

# The Enforcement of Socio-Economic Rights against Local Governments in South Africa

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## 1. Introduction

Poverty and underdevelopment are South Africa’s greatest challenges. These are inextricably linked to uneven access to adequate public services. By all accounts, South Africa has made impressive progress in extending access to basic services to marginalised communities (see Table 1 below). However, the main challenge remains the severe inequality in access to basic services across different demographic segments of the population of 52 million inhabitants.<sup>1</sup>

A significant part of South Africa’s population reside in informal settlements, often with little or no access to adequate public services such as piped water, electricity, sanitation, street lightning and others.

**Table 1: Key Statistics<sup>2</sup>**

Type of service	Percentage of national population with access
Access to piped water	89.9%
Access to improved sanitation	77.9%
Access to mains electricity	85.4%
Use solid fuels for cooking	10.9%
Dwelling owned	66.4%
Living in formal dwellings	77.7%
Municipal refuse removal	66.0%

<sup>1</sup> R C Nnadozie, 'Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis' (2013) 16 *The African Statistical Journal* 98.

<sup>2</sup> Statistics South Africa, *Household Service Delivery Statistics* (2015) [http://www.statssa.gov.za/?page\\_id=739&id=2](http://www.statssa.gov.za/?page_id=739&id=2) (accessed 13 October 2015).

At the same time, the South African Constitution contains socio-economic rights. They relate to housing, education, shelter, food, water, health care and a safe and healthy environment.<sup>3</sup> These rights are justiciable, in the sense that they can be invoked in court and the court may fashion a remedy in response to a finding that the right has been violated. Indeed they are being used successfully by communities and civil society groupings to litigate against organs of state.

The socio-economic rights in the Bill of Rights are often phrased as rights for which the state must take reasonable measures, within its available resources to achieve the progressive realisation of this right. However, 'the state' in the South African context is constituted as national, provincial and local spheres of government. Each of these spheres has constitutionally guaranteed functions and powers, which, for ease of comparison with Kenya can indeed be termed a form of devolution.<sup>4</sup> This combination of legally enforceable socio-economic rights and constitutionally entrenched devolution creates an important and rather unique dynamic in the Constitution. This is because the realisation of socio-economic rights often has significant budgetary consequences for organs of state throughout the various levels or spheres of government. The combination of legally enforceable socio-economic rights and constitutionally entrenched devolution is something that the constitutions of Kenya and South Africa have in common. A brief perusal of South Africa's experience and the jurisprudence of its Constitutional Court surrounding the intersection of socio-economic rights and the constitutional division of powers may thus be of use to the Kenyan judiciary.

In this chapter, it will be argued that the jurisprudence of the South African Constitutional Court has affected the intersection between socio-economic rights and the constitutional division of functions and powers. This has occurred in particular with regard to the functions and powers of local government. The impact of enforcement of socio-economic rights on the functions and powers of local government has been threefold. First, it can be argued that South Africa has seen 'devolution through rights', whereby the Constitutional Court seems to have decentralised functions to subnational governments through the enforcement of the Bill of Rights. Secondly, it will be argued that the Court has formulated, on the basis of the division of powers and functions, a new right that can be invoked against subnational governments. A new 'right to receive basic (local) services' seems to have emerged in the Constitutional Court's jurisprudence. Thirdly, the Constitutional Court has formulated standards for the exercise of powers

<sup>3</sup> Constitution of the Republic of South Africa 1996 ss 24, 26, 27, 28 and 29.

<sup>4</sup> As above 40(1).

by municipalities and based these standards on the Bill of Rights and the socio-economic rights in particular. Before elaborating on the above three trends, the chapter provides a short outline of the constitutional framework for provincial and local government, which should assist in the subsequent analysis of the Constitutional Court's jurisprudence.

## 2. Constitutional Framework for Provincial and Local Government

South Africa's nine provinces, where legislative powers are exercised by directly elected provincial legislatures and executive powers by an indirectly elected Premier, are responsible for the functional areas, listed in Schedules 4 and 5 of the Constitution.<sup>5</sup> Matters not listed in any of the two Schedules are the responsibility of the national government.<sup>6</sup>

With regard to the functional areas listed in Schedule 4, national and provincial governments have concurrent legislative and executive authority: both national and the provincial governments have the same (legislative and executive) powers over the same territory.<sup>7</sup> Conflicts between national and provincial laws on the same matter are ultimately resolved by the Constitutional Court.<sup>8</sup> With regard to the functional areas listed in Schedule 5 provincial powers are exclusive.<sup>9</sup> National government is barred from exercising any legislative or executive powers in any of the functional areas in Schedule 5, unless exceptional circumstances merit national legislative intervention.<sup>10</sup>

Local government in South Africa is constitutionally recognised and its powers constitutionally protected.<sup>11</sup> Local government consists of municipalities, headed by directly elected municipal councils.<sup>12</sup> They are charged by the Constitution with critical service delivery responsibilities, such as the delivery of water, electricity, sanitation, municipal roads, street lightning etc. Municipalities derive their legislative and executive authority with respect to these services directly from the Constitution which contains a list of local government matters.<sup>13</sup>

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5 As above s 104(1)(b)(i) and (ii).

6 As above ss 44(1)(a)(ii).

7 As above ss 44(1)(a)(ii) and 104(1)(b)(i).

8 As above s 146.

9 As above s104(1)(b)(ii).

10 As above s104(1)(b) and 42(2).

11 As above Chapter 7ss 151 and 156.

12 As above s 157.

13 As above s 156(1), read with shcs 4, Part B, and5, Part B.

As mentioned above, Schedules 4 and 5 contain concurrent national and provincial and exclusive provincial powers respectively. However, they also contain the above mentioned local government powers, which are nestled away in Part B of Schedule 4 and Part B of Schedule 5. In the case of Schedule 4B matters, national and provincial governments may only regulate these functional areas to “see to the effective performance by municipalities of their functions” or to provide for the monitoring of or support to municipalities.<sup>14</sup> In the case of Schedule 5B matters, it is only the provincial government that may regulate. Implicit in South Africa’s system of local government is a high degree of self-sustainability with municipalities expected to raise a considerable portion of their revenue from property taxes and service fees, revenue generating powers that are constitutionally guaranteed.<sup>15</sup> As a result, local government budgets are indeed -to a significant degree -self-funded. For example, 73 percent of the 2014-2015 local government budgets was funded out of own revenue.<sup>16</sup> It must be said, however, that local government’s ability to raise revenue varies significantly between urban and rural local governments with many rural local governments relying to a very significant degree on national government funding. Additional funding is provided by the national government, in the form of an unconditional grant which is called the equitable share,<sup>17</sup> using terminology and on the basis of equalisation principles that are very similar to the relevant provisions in the Kenyan Constitution. Furthermore, local governments receive a myriad of conditional grants that are earmarked for specific purposes.

The Constitution thus divides powers and functions between national, provincial and local government by listing concurrent national and provincial powers in Schedule 4 and exclusive provincial powers in Schedule 5 of the Constitution. The latter part of each schedule then contains the areas over which local government has constitutional authority. Local government’s constitutionally allocated powers revolve around matters such as the provision of electricity, fire fighting, municipal health services, storm water management, municipal roads, refuse removal, water and sanitation. Changes to this division of powers and functions between the three spheres of government can be made, though. The Constitution provides for the instrument of assignment, in terms of which the national or provincial governments may transfer responsibility for a function to another sphere of government.<sup>18</sup>

<sup>14</sup> As above ss 155(6),- 155(7).

<sup>15</sup> As above 229.

<sup>16</sup> National Treasury, *Budget Review 2014(2015)* 100.

<sup>17</sup> Constitution of the Republic of South Africa 1996ss 214 and 229.

<sup>18</sup> Sections 44(1)(iii), 99, 104 and 126 of the Constitution provide for the assignment of national or provincial functions to local government or to specific municipalities.

With respect to the assignment of functions to local government, there are statutory provisions that seek to ensure that adequate resources accompany the assignment.<sup>19</sup> This is to avoid that local governments are saddled with additional functions without resources to carry them out. In practice, municipalities perform a range of functions ‘outside’ their constitutional mandate on the basis of formal and informal mechanisms such as agency arrangements and sector-specific instruments.

The Constitution of Kenya uses similar concepts to arrange the functions and powers of the national government and the counties. Constitutional mechanisms such as concurrency, exclusivity, assignment and equitable division of revenue also feature in the Constitution of Kenya. This enhances the scope for a useful comparison between the two countries.

### 3. Devolution Through Rights

The first manifestation of the impact of the enforcement of socio-economic rights on the division of functions and powers relates to what can be termed ‘devolution through rights’. The background to this is the following question: given that the socio-economic rights in the South African Constitution are phrased as rights that can be enforced against “the state”, does this mean that they thus be claimed from any sphere of government that makes up “the state”? To underscore the suggestion that this question may be relevant for the Kenyan context, a quick excursion to the Kenyan Constitution may be useful. Article 53(1) of the Constitution of Kenya provides that “[e]very child has the right to ... shelter”. It does not specify whether it is the national government or the counties that bear the duty to ensure the realisation of this right. At the same time, there are provisions elsewhere in the Constitution, particularly in Schedule IV that set out an intricate division of powers between the central government and counties with respect to housing and shelter. For example, Schedule IV provides that the national government is responsible for “housing policy” and that the counties are responsible for “country planning and development, including ... housing”. The question could thus be: can this right to shelter be claimed from the county, from the national government or from both?

In South Africa, the first time the issue arose as to which sphere of government is responsible for the realisation of the right of access to housing was in the context of the landmark *Grootboom* matter before the Constitutional Court.<sup>20</sup> The judgment is one of the Court’s most well-known judgments

<sup>19</sup> Local Government: Municipal Systems Act 32 of 2000 s 9-10A.

<sup>20</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

and its content and impact have been well traversed in literature around the world.<sup>21</sup> It will thus not be comprehensively presented here except for the elements, essential to understand its significance for the topic of this paper. In essence the matter revolved around a community that had been rendered homeless as a result of eviction from land that had been earmarked for development. They sued government to assert that their right of access to housing had been violated. The Constitutional Court agreed and, in applying a test of reasonableness, held that government's housing programme was not reasonable. The key reason for this was that the housing programme focused exclusively on medium and long term progress in the delivery of low cost housing and didn't cater for the destitute who found themselves in deplorable circumstances.<sup>22</sup> All three spheres of government were cited in the application and the Court spent a considerable amount of time engaging counsel on the question as to who was responsible for delivering which component of the right to housing. In the judgment, the Court opted to leave the matter to the three spheres of government to work out with reference to the principles of cooperative governance that are embedded in the Constitution:

What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. ... The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. ... Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution.<sup>23</sup>

While this resolved the matter in the context of *Grootboom*, the question as to who is responsible for the realisation of the right to housing, kept rearing its

<sup>21</sup> See for example G Van Bueren, 'Housing' in M H Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* (2014) 21,2; C Mbazira, 'Grootboom: a paradigm of individual remedies versus reasonable programmes' (2011) 26(1) *Southern African Public Law* 60-80.

<sup>22</sup> As above, Van Bueren above n 21.

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) paras 39-40.

head. This is so particularly because many municipalities are deeply involved in the delivery of low cost housing. Not only do they naturally provide a basket of services related to housing (such as water, sanitation, storm water drainage, roads, local public transport and town planning), they often carry out housing projects on behalf of provincial governments. In addition, legislation such as the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE),<sup>24</sup> the key function of which it is to ensure that no eviction takes place without a court order made after considering all the circumstances,<sup>25</sup> draws municipalities into legal battles over evictions.<sup>26</sup> In terms of PIE and the jurisprudence that has given effect to it, municipalities have become involved in -

- providing alternate/emergency housing for occupiers who would be rendered homeless by an eviction order;<sup>27</sup>
- mediating in eviction proceedings;<sup>28</sup> and
- placing information before the courts relating to the circumstances of vulnerable unlawful occupiers in eviction cases.

The municipality is thus part of the search for alternative accommodation when an application for an eviction order reaches the court. In terms of the law and as a result of practice, municipalities not only engage daily with issues related to the delivery of social housing but also with the question as to how to ameliorate the plight of those rendered homeless by evictions. With reference to the fact that ‘housing’ is listed in the Constitution as a function of national and provincial governments concurrently, municipalities have often argued that this constitutes an “unfunded mandate”; that is a transfer of functions to local government without making adequate funding arrangements.

In 2011, more than a decade after the *Grootboom* decision, which had left it to the three spheres of government to resolve this issue amongst them, the question came to the Constitutional Court very directly. This time, the setting was the City of Johannesburg where a community had been evicted by a private company from private land. In the *Blue Moonlight* matter the destitute community approached the City of Johannesburg for temporary emergency accommodation.<sup>29</sup> The City refused to accept responsibility. It claimed that it would be untenable for the City to be held responsible for the consequences of

24 Republic of South Africa, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 (“PIE”).

25 Constitution of the Republic of South Africa 1996 s26(3).

26 Republic of South Africa, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 section 4(2).

27 See section 4(7) of PIE in terms of which the Court seized with the eviction matter must consider whether the municipality can make land available for relocation.

28 Republic of South Africa, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 7(1).

29 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC); See also Van Bueren, above n 21, 21.8.

each private eviction as it had not budgeted for the type of assistance that was required. Essentially, it wanted the Court to pronounce that it was the national and provincial government that should be ordered to provide emergency housing, not the City. Key to the City's argument was the location of 'housing' in Schedule 4A of the Constitution thus rendering it a function over which national and provincial governments exercise powers concurrently.<sup>30</sup> The Constitutional Court disagreed with this argument. It held that the City was indeed responsible and that it ought to find alternative accommodation. The City could not evade its responsibility for the realisation of the right of access to housing on the basis of the argument that housing is not part of its original constitutional mandate. It based its judgment on a combined reading of the right of access to housing and the housing legislation which sets out functions for local government with respect to emergency accommodation.

... the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like [this].<sup>31</sup>

The Court thus made it clear that municipalities are constitutionally responsible for at least certain components of the housing function. It can be argued that this is a form of devolution of function to local government, not by means of the instrument of assignment as set out in sections 44(1)(iii), 99, 104 and 126 of the Constitution but through the operation of the Bill of Rights, enforced by the Constitutional Court. The municipality's responsibility is based on its responsibility to protect the vulnerable and the destitute and it is duty bound to obtain funds from national and provincial governments to exercise this function or budget own revenue for it.

#### 4. A New 'Right to Basic Municipal Services'

The second jurisprudential trend that has affected the division of powers has been the formulation of what can be termed a new 'right to basic municipal services' by the Constitutional Court. 'Basic municipal services' could be defined as those services which are "necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public

<sup>30</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) at para 50.

<sup>31</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) para 67.

health or safety or the environment” as is the definition in local government legislation.<sup>32</sup> The Bill of Rights contains rights to housing, shelter, food, water, health care and a safe and healthy environment. It goes without saying that the content of ‘basic municipal services’ is not identical to the socio-economic rights in the Bill of Rights. In many respects it encompasses more than that. For example, even if one would be prepared to argue that there is no right of access to electricity in the Bill of Rights,<sup>33</sup> it can certainly not be argued that electricity is not a basic municipal service.

What can be discerned in the jurisprudence of the Constitutional Court pertaining to local government services is that the Court sees the delivery of basic municipal services as an enforceable duty on the part of municipalities. For example, in the *Mkontwana* judgment, dealing with the instruments for local governments to secure revenue, the Court remarked that “municipalities are obliged to provide water and electricity to residents in their area *as a matter of public duty*”.<sup>34</sup> In the *Joseph* judgment,<sup>35</sup> the argument is even clearer. In this case the municipality had disconnected electricity to a block of flats in response to non-payment by the owner. The result was that the tenants, who had paid for electricity to the owner, were being deprived of electricity.<sup>36</sup> The Constitutional Court resolved the matter with reference to the obligation on local government to provide basic services. The Court explained the origins of this obligation: “The *obligation borne by local government to provide basic municipal services* is sourced in both the Constitution and legislation”.<sup>37</sup> This obligation is not in the Bill of Rights but sourced from section 152 and 153 of the Constitution where the developmental duties of local government are set out. These provisions are part of the institutional arrangements the Constitution makes with regard to local government.

The *Joseph* judgment makes it clear that, in formulating the duty to provide basic municipal services, the Court does not conceive of a state obligation that cannot be invoked in court. It clearly recognises the concomitant right to claim the fulfilment of that obligation. This obligation and therefore the right to claim the fulfilment is aimed specifically at local government because no other sphere of government delivers ‘basic municipal services’. It is not

32 Local Government: Municipal Systems Act 32 of 2000 s 1 “basic municipal services” of the Local Government.

33 Even though it can be argued convincingly that access to basic electricity is indispensable to the realisation of other important human rights including the right to dignity of the person, the right to health, and the right to water.

34 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 38 and 52 (emph. added).

35 *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

36 N Steytler & J De Visser *Local Government Law of South Africa* 9-7; M Bishop & J Brickhill, ‘Constitutional law’ in (2010) *Annual Survey of South African Law* 199-202.

37 *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 34 (emph. added).

directly based on a specific provision of the Bill of Rights but on (1) local government's developmental mandate in the Constitution, (2) statutes that give further content to that and (3) indirectly on the rights of access to housing, food and water. This must then mean that a municipality can be sued for not providing 'basic municipal services', even though the right is not explicitly listed as a right in the Constitution.

## 5. Rights Based Service Delivery Standards

The third manifestation of the courts influencing the division of powers and functions relates to the formulation of standards for service delivery that are directly based on the content of socio-economic rights. As was explained earlier, the Constitution delineates a regulatory role for national and provincial governments in relation to local government. National and provincial governments may regulate local government's constitutional functions "see to the effective performance by municipalities of their functions" or to provide for the monitoring of or support to municipalities.

What has emerged in the jurisprudence is that the courts formulate principles and standards that essentially also regulate how municipalities ought to deliver services. However, these principles and standards are formulated on the basis of the imperatives of the Bill of Rights. When a court issues rights-based service delivery standards it does not add functions to a subnational government's portfolio of constitutional functions and neither does it add substantive rights to the rights contained in the Bill of Rights. Instead, it formulates standards that are not necessarily contained in statutory law but become judge-made standards, directly based on the Bill of Rights.

There are many instances of the courts issuing broad, rights based standards for municipalities to follow when delivering services but two are mentioned in particular. The first is the Constitutional Court's judgment in *Mazibuko*.<sup>38</sup> The case dealt with the introduction, by the City of Johannesburg, of pre-paid water meters in Phiri, an area in Soweto. Pre-paid water meters may be attractive for the local authority from a cost recovery point of view but their very nature means that those who cannot pay for water are left without access to the most basic of human needs. In implementing the system, the City of Johannesburg had ensured that, despite the pre-paid system, each household would have access to 6000 litres per month free of charge.<sup>39</sup> This was broadly in line with the above mentioned national policy and the City's own policy.

<sup>38</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

<sup>39</sup> As above para 167.

The residents of Phiri approached the Constitutional Court and claimed that the City's decision and implementation of the pre-paid water system was unconstitutional for violating the rights of access to water. The Constitutional Court disagreed and held that the City's free basic water policy and the implementation of the pre-paid water metering system did not violate the right of access to water.<sup>40</sup> For the purposes of this chapter, the focus is on how the Court formulated standards for service delivery. For example, the Court had to review the adequacy of the free allocation 6000 litres per household per month. The Court acknowledged that this would be insufficient for large households, but, based on average household sizes, considered it sufficient to pass constitutional muster.<sup>41</sup> However, the Court also issued a stern warning to the City of Johannesburg (and thereby to all municipalities) that the policy on free basic water may not remain static. Socio-economic rights are to be realised "progressively" and the City was therefore duty bound to continuously review its free basic water allocation.

Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.<sup>42</sup>

The second example of judge-made service delivery standards relates to the Constitutional Court's jurisprudence surrounding 'meaningful engagement'. Essentially, the principle of 'meaningful engagement' requires organs of state to engage meaningfully with citizens when decisions are made that impact on their enjoyment of rights. It is thus a judge-made standard, not explicitly listed as such in the specific legislation on that particular service but formulated and applied by the courts on the basis of the Bill of Rights. It was developed by the Constitutional Court in cases involving evictions, particularly large scale evictions where communities are 'temporarily' relocated in order to facilitate new housing projects. In order for those eviction arrangements to pass constitutional muster, there should have been 'meaningful engagement' with the affected communities. One of the key judgments on 'meaningful engagement' is *Olivia Road*,<sup>43</sup> in which residents of two buildings in the City of Johannesburg challenged a decision by the City to evict them on

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<sup>40</sup> As above para 166-169.

<sup>41</sup> As above para 86-89.

<sup>42</sup> As above para 162.

<sup>43</sup> *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).

the grounds that the buildings they occupied were unsafe. Two days after hearing arguments in the case, the Constitutional Court issued an interim order, crafted in general terms, forcing the parties to engage meaningfully and report back to the Court. The Court instructed the parties to put the following at the centre of their discussions: “to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable”.<sup>44</sup> The parties conducted the engagement and reached a settlement, which was confirmed by the Court. The agreement contained interim measures to secure the safety of the building at the City’s expense<sup>45</sup> and to provide the occupiers with alternative accommodation in the inner City of Johannesburg. In elaborating on the engagement process, the Court stated that it must be tailored to the particular circumstances of each situation: “[T]he larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement”.<sup>46</sup> Furthermore, the process must be transparent: “[T]he provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential”.<sup>47</sup>

Meaningful engagement has become a standard that finds application in contexts, other than evictions. Essentially, it applies whenever an organ of state takes a decision with regard to service delivery and that decision directly impacts on the enjoyment of rights of certain specific communities, either positively or negatively. The case of *Beja* is an example of the application of this principle.<sup>48</sup> The case revolved around the City of Cape Town’s decision to build toilets for an informal settlement community in Makhaza, which is part of Khayelitsha, a township on the outskirts of Cape Town. Ordinarily such a decision by the City would be welcomed was it not that the toilets were built without walls, leaving the community members with an undignified and dangerous situation. Members of the community took the City and the provincial government to court, arguing that their constitutional rights were violated with this decision and the implementation thereof. The City, in defending the curious practice of building toilets without walls, argued that it was based on what could be termed a ‘self-help’ deal. The affected community had apparently agreed to build the enclosures, so the City’s argument went, if the City would provide the actual toilets.<sup>49</sup>

<sup>44</sup> As above para 5.

<sup>45</sup> It dealt with issues such as the installation of toilets, potable water, waste disposal services, fire extinguishers and a once-off operation to clean and sanitise the properties.

<sup>46</sup> *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 19.

<sup>47</sup> As above para 21.

<sup>48</sup> *Beja and Others v Premier of the Western Cape and Others*[2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC).

<sup>49</sup> As above para 77.

This is when the High Court applied the principle of ‘meaningful engagement’: had the City meaningfully engaged with the affected members of the community before accepting or recording that an ‘agreement’ with them existed? Upon scrutinising the history of the conclusion of the ‘agreement’ between the City and the affected community, it appeared that it was based on a small number of poorly attended and poorly recorded community meetings. The City could not prove that very serious considerations such as the need to prioritise the rights to dignity, safety and privacy were actually taken into consideration. In addition, there was no sign of specific attention being paid to the most vulnerable members of the community, such as the elderly, in designing this service delivery mechanism. On the basis of these and other considerations, the Court concluded that the City had failed in its duty to meaningfully engage the members of the community who stood to be affected by its decision.<sup>50</sup>

The above three judgments are examples of the courts formulating and applying standards for service delivery based on the Bill of Rights. In the *Mazibuko* judgment, the Constitutional Court formulated a standard for service delivery based on the principle of ‘progressive realisation’ of socio-economic rights: a city’s policy on the allocation of free basic water may not be static but must be reviewed continually. In the *Olivia Road* judgment, the Court instructed the parties to an impending eviction to meaningfully engage around the plight of those were to be evicted as well as the objectives the government wished to pursue with the eviction. In the *Beja* judgment, the High Court tested an agreement between the municipality and a community against the standard of ‘meaningful engagement’ and concluded it did not pass muster. In doing so the Court insisted on service delivery mechanisms that are genuinely participatory.

## 6. Conclusion

The above three trends in the jurisprudence indicate that there is a dynamic relationship, mediated by the courts, between the constitutional division of powers between the three spheres of government and the Bill of Rights. At times, the courts seem to have expanded the list of responsibilities of local government. In other cases the courts extrapolated new rights from provisions dealing with the division of powers and arguably expanded the Bill of Rights. Lastly, the courts have formulated and applied rights-based service delivery standards.

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<sup>50</sup> As above paras 77-106.

So are the courts going too far? Are they overstepping their role and interfering in processes that are best left to the legislature and the executive? For example, is the Constitutional Court interfering in the delicate process of intergovernmental fiscal relations by making municipalities responsible for aspects of the housing function (namely emergency housing)? For example, Van Bueren criticises the *Blue Moonlight*:

This judgment is surprising because of its lack of attention to the polycentric implications of the order, namely that evictions by private landowners could hold significant implications for the City's housing budget in general and its ability to provide permanent housing in particular. Furthermore, there was an absence of any consideration of the manner in which this judgment transfers the social costs of the private landowner acquiring dilapidated buildings from the former to the City.

Indeed, one may point at the fact that courts generally do not have the instruments, nor the expertise to engage with the myriad of complexities surrounding intergovernmental funding arrangements, let alone craft a detailed intergovernmental funding arrangement to deal with the financial consequences of its decision.

However, it is argued that such an argument, while perhaps attractive from the point of view of the need for predictable and properly researched and negotiated intergovernmental fiscal arrangements, ignores that these outcomes are the inevitable result of a transformative Constitution with a Bill of Rights at its heart. The Constitutional Court has consistently ruled that the various sections and parts of the Constitution must be read harmoniously whenever possible. This also applies when the one provision is part of the Bill of Rights and the other provision is part of the Constitution's institutional arrangements. It cannot be that institutional arrangements trump provisions of the Bill of Rights or that institutional arrangements play no role in the interpretation of the Bill of Rights.

This does not mean, however, that complaints such as local government's objection that the emergency housing mandate is an unfunded mandate should not be taken seriously. As explained in the introduction to this chapter, municipalities have limited own revenue and receive grant funding premised on a certain portfolio of constitutional functions. Additional responsibilities must be properly costed and funded.

The objections around the unfunded mandate may not, however, result in a diminution of constitutional rights. When organs of state seek to

evade responsibility for the realisation of those economic and social rights where they are clearly invested and do so on the basis of arguments around competencies and intergovernmental relations, there is a real threat that the rights start losing meaning. It is suggested that the objection must be responded to differently. The Constitutional Court has made it clear that the provision of emergency housing to those rendered homeless as a result of evictions or other similarly exceptional circumstances is a constitutional responsibility of local government. Furthermore it has formulated a right to basic municipal services and formulated rights-based service delivery standards. The stakeholders to the intergovernmental fiscal system, comprising of various organs of state in different spheres of government, the National Treasury and the Financial and Fiscal Commission, must now bring its very considerable research and negotiation capabilities to bear to investigate whether changes to the intergovernmental fiscal system are needed to achieve greater alignment between the intergovernmental fiscal system and the constitutional responsibilities.

The Constitution of Kenya contains economic and social rights that are phrased so as to make them justiciable: they are not mere instructions to the state to pursue them as objectives. Key provisions are in Article 43, which contains various rights pertaining to health care, housing, sanitation, food, water, social security and education. The rights of children and persons with disabilities (Articles 53 and 54) also contain elements that constitute economic and social rights. There is no doubt that the enforcement of these rights by the Kenyan courts is going to affect the devolution of functions and powers. There is also no doubt that the Kenyan courts will develop their own jurisprudential principles to manage the complicated intersection, tailored to the specificities of the Kenyan context. However, it is hoped that the above excursion into some of the approaches developed by the South African Constitutional Court, based on a Constitution that bears remarkable similarities to the Kenyan Constitution, may add a useful dimension to their deliberations.