CHAPTER 24 SOCIAL MOVEMENTS AND THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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> For government to be defeated at the Constitutional Court by some shack dwellers; that is not a small thing![1]
>
> Government is afraid of the Constitutional Court.[2]
>
> It would be very dangerous to put our faith in legal processes. Courts are seldom neutral and often tend to serve the interests of the ruling class. That is the reason we have delayed taking this matter to the Constitutional Court. For more than a year we have relied on our own mass strength and we still do. In the coming period we will utilise the so-called democratic space provided by the new Constitution as well as working class resistance. Key strategies include intensifying mobilisation, building consciousness and continuing with mass struggle in the form of marches and rallies. This struggle will be won in the street! [3]

1 Background

The South African Constitutional Court is often held up by constitutional scholars as an exemplar of how a post-colonial/post-conflict judicial institution can dextrously steer the process of social transformation, inculcate a culture of human rights and the rule of law while retaining political legitimacy.[4] At the same time, social movement scholars often look up to post-apartheid social movement activists for inspiration of how poor and

1 *Abahlali* leader, Focus Group Discussion 14 August 2010, Durban.

2 TAC leader cited in S Friedman & S Mottiar 'A moral to the tale: Treatment Action Campaign and the politics of HIV/AIDS' A case study for the UKZN project entitled: Globilisation, marginalisation, and new social movements in post-apartheid South Africa (2004) available at http://ccs.ukzn.ac.za/files/friedman%20mottier%20tac%20research%20report%20short.pdf (accessed 23 December 2013).

3 Merafong Demarcation Forum Leader in N Kolisile 'The crying of Khutsong' *Amandla Publishers* 1 October 2008 available at http://www.amandlapublishers.co.za/content/view/71/32/ (accessed 2 November 2008).

4 P de Vos 'The constitutional, innovative face of South African law' *The Guardian* 25 November 2011 available at http://www.guardian.co.uk/commentisfree/libertycentral/2011/nov/25/ constitutional-south-african-law (accessed 29 October 2012); T Roux

marginalised actors can mobilise extra-institutionally in pursuit of counter-hegemonic goals.[5] This chapter explores social movements' perceptions of the Constitutional Court.

It could be argued that in the final analysis, the Court decides which political and social demands are reasonable and which are not. Put differently, it can be argued that, in its ruling, the Court decides which political struggles are legitimate and which are not. On the other hand, social movements, by their nature, exist to struggle for demands and visions that are not part of the hegemonic political discourse. Through brief case studies of three very different social movements, this chapter demonstrates that movement perception of the Court, and the impact of the Court's decisions on a social movement's collective action frame, strategies and trajectory depends on the movement's legal consciousness, attitude to state institutions, its positionality in 'civil society', and the overall political opportunities and threats a movement faces.

By social movements, I mean collectives of marginalised actors who develop a collective identity; who put forward change-oriented goals; who possess some degree of organisation; and who engage in sustained, albeit episodic, extra-institutional collective action.[6] From this description it is clear that social movements are, firstly, distinguishable from non-governmental organisations (NGOs), NGO coalitions, and interest groups by the fact that the action repertoires of social movements are generally skewed in a non-institutional direction and their goals are often more far-reaching than those of the above-mentioned groups.

Secondly, social movement activity is distinguishable from the kinds of 'spontaneous' community protests that have engulfed South Africa from the middle of the 2000s. The scale and magnitude of these 'unorganised' protests – what Alexander calls the 'rebellion of the poor'[7] – are profound indeed. Police estimate that approximately more than 10 000 protests take place every year – one of the highest rates of protests in the world.[8] Unlike movement mobilisation activities, these latter protests are *usually* not based on underlying social networks; they lack some degree of organisation; they fail to develop a collective identity; and they thus do not develop the capacity

4 'Principle and Pragmatism on the South African Constitutional Court' (2009) 7 *International Journal of Constitutional Law* 106; H Richardson III 'Patrolling the resource transfer frontier: Economic rights and the South African Constitutional Court's contribution to international justice' (2007) 9 *African Studies Quarterly* 81.

5 NC Gibson *Fanonian practices in South Africa: From Steve Biko to Abahlali baseMjondolo* (2011); E Zuern *Politics of necessity: Community organising in South Africa* (2011).

6 See also D Snow *et al* 'Mapping the terrain' in D Snow *et al* (eds) *The Blackwell companion to social movements* (Blackwell 2004) 3-16.

7 P Alexander 'Rebellion of the poor: South Africa's service delivery protests – A preliminary analysis' (2010) 37 *Review of African Political Economy* 25.

8 P Alexander 'Protests and police statistics: Some commentary' *Amandla Publishers* 28 March 2012 available at http://www.amandlapublishers.co.za/general-downloads/protests-and-police-statistics (accessed 29 October 2012).

to maintain sustained challenges against the state and others.[9] Moreover, 'established' movements are usually not involved in the instigation and co-ordination of these 'spontaneous' protests.[10] This chapter confines itself to more 'established' social movements.

2 Post-apartheid exclusion and marginalisation

South Africa has a 'vibrant' civil society sector which campaigns robustly for various causes.[11] This sector routinely engages courts in pursuit of their campaigns. This chapter focuses on organisations of the poor and marginalised; organisations that are found at the margins of the sphere of civil society or, as is often the case, are excluded from 'civil society'. In this regard, there is a growing body of research that shows that, unlike their middle-class counterparts, poor residents and their movements are routinely subjected to a mixture of repression and patronage. Neocosmos observes that poor township residents exist in a political domain where 'rules are bent, political relations are often informal (if not downright illegal) and where the majority are only tenuously "rights-bearing citizens"'.[12] Similarly, drawing from his research on local politics in Durban, Pithouse also notes this split and concludes that this distinction has led to a dual political system, with a system of liberal democracy for the middle class and a politics of patronage and repression for the poor.[13] The co-existence of local illiberalism/despotism and liberal constitutionalism is not unique to South Africa and has been documented in other post-colonial contexts.[14] This chapter is interested in finding out how and why these movements of the poor have engaged with Constitutional Court, the guardian of the post-colonial constitutionalism.

The two main aspects of the political context that mostly shape the struggles of post-apartheid social movements are the hardships entrenched by austere macro-economic policies and the truncated nature of local

9 For examples of these struggles, see J Karamoko 'Community protests in South Africa: Trends, analysis, and explanations – Continuation report' (2011) available at http://ldphs.org.za/publications/publications-by-theme/local-government-in-south-africa/community-protests/Community_Protests_SA.pdf/view (accessed 20 October 2012); Luke Sinwell *et al* 'Service delivery protests: Findings from quick response research in four "hot-spots" – Piet Retief, Balfour, Thokoza and Diepsloot' Centre for Sociological Research, University of Johannesburg (1 September 2009).

10 Khanya College *Annual Report 2010* (2011) available at http://khanyacollege.org.za/sites/default/files/kc-annual-report10.pdf (accessed 30 October 2012) 15-16.

11 The Department of Social Development (2011) indicates that as of March 2011, there were 76 175 *registered* non-profit organisations (NPOs). Most of the NPOs are in the social services sector (34%), followed by community development and housing (21%), then religion (12%) and education and research (11%).

12 M Neocosmos 'Transition, human rights and violence: Rethinking a liberal political relationship in the African neo-colony' (2011) 3 *Interface: A Journal For and About Social Movements* 359 374.

13 R Pithouse 'Shifting the ground of reason' in J Heather & P Vale (eds) *Re-imagining the social in South Africa: Critique, theory and post-apartheid society* (2009) 141 146.

14 P Chatterjee *The politics of the governed: Reflections on popular politics in most of the world (Leonard Hastings Schoff lectures)* (Columbia University Press 2004); B de Sousa Santos *Towards a new legal common sense: Law, globalisation and emancipation* (2002).

democracy. The state's embrace of a largely neoliberal macro-economic policy – formalised in 1996 with the adoption of the Growth, Economic and Redistribution programme (GEAR) – led to steady cutbacks in central government allocations to local authorities, leaving municipalities with little choice but to introduce cost-recovery and cost-cutting measures. In the months following the adoption of GEAR, millions of residents suffered evictions and water and electricity disconnections.[15] The state's neoliberal policy also worsened the economic situation inherited from apartheid. For example, the racialised nature of poverty has hardly shifted since 1994. The 2011 census report shows that white households earned six times more than their black counterparts – which have more individuals per household.[16] The effects of punitive economic policies thus constitute the first aspect of the political context that shapes the struggles of these movements.

The second aspect of the political context that triggers contemporary social movement activism is the lack of genuine democracy at the local government level. Since 1993, the sphere of local government has been restructured to reflect its new role as the engine of redistribution and development, and the main locus of participatory democracy. In order to enhance participatory governance at local government level, provision is made for the establishment of ward committees in metropolitan and local councils. The main functions of ward committees are to act as the interface between the community and municipality, to provide advice to the councillor, and to make any recommendation on any aspect of their ward. In this way, ward committees are meant to be the central vehicles for community participation in decisions regarding the developmental priorities of the ward. In particular, municipalities are under an obligation to cultivate a 'culture of municipal governance that complements formal representative government with participatory governance' and to involve community members in the development of Integrated Development Plans (IDPs), annual budgets and other strategic decisions of the municipality.[17]

The way the system of local government works in practice constitutes, instead, a significant political constraint for social movements and other marginalised groups. Firstly, ward committees are failing to play their role as non-partisan vehicles for community participation, largely due to the fact that political parties dominate and influence the process of nomination and election of committee members.[18] The result is that, instead of representing a diversity of interests, committee members are often drawn from the same

15 See eg DA McDonald and J Pape (eds) *Cost recovery and the crisis of service delivery in South Africa* (2002).

16 P de Wet 'Census 2011: 50 years for blacks to catch up' *Mail and Guardian Online* 30 October 2012 available at http://mg.co.za/article/2012-10-30-census-2011-50-years-for-blacks-to-catch-up (accessed 28 October 2012).

17 Sec 16(1) of the Local Government: Municipal Systems Act 32 of 2000.

18 T Smith & J de Visser *Are ward committees working? Insights from six case studies* (2009); L Piper & R Deacon 'Party politics, elite accountability and public participation: Ward committee politics in the Msunduzi Municipality' (2008) 66 *Transformation: Critical perspectives on Southern Africa* 61.

party as the ward chairperson.[19] Various studies have thus found that the agendas of ward committees are 'colonised' and 'hijacked' by political parties and intra-party factions.[20]

Secondly, municipalities are not meaningfully engaging local communities when drafting medium and long-term development plans, annual budgets and other priorities of municipalities. In most cases, community 'consultation' takes place at advanced stages of policy formulation, only for purposes of obtaining political buy-in and adhering to legislative requirements rather than at the beginning of the process.[21] Available research shows that state and non-state elites are the most influential actors in the formulation of developmental plans and budgets for municipalities.[22]

Post-apartheid social movements therefore operate in a political context marked by severe political constraints in the form of unresponsive and inaccessible government structures and prevailing strategies of exclusion and marginalisation. Poor people's movements and organisations respond to these political threats and constraints by employing learned action repertoires from the anti-apartheid struggle. These tactical repertoires include erecting barricades to prevent evictions and cut-offs; reconnecting disconnected water and electricity supplies; occupying unused private and public land; and campaigning for election boycotts.

2.1 Activists' legal consciousness

Elites respond to struggles of these movements through a mixture of vilification, counter-movements, co-optation, criminalisation and repression. It is important to emphasise that legal strategies are the principal strategies the state employs to make collective action more arduous. Firstly, there is evidence that the Regulations of Gatherings Act of 1993 (RAG) – the legislation that regulates marches and picketing – is often abused to prohibit protest marches and other forms of gatherings.[23] Secondly, state authorities

19 I Buccus *et al* 'Public participation and local governance' Research report prepared by the Centre for Public Participation in association with the Human Sciences Research Council and the University of KwaZulu-Natal (May 2007).

20 J Hicks & I Buccus 'Crafting new democratic spaces: Participatory policy-making in KwaZulu-Natal, South Africa' (2008) 65 *Transformation: Critical perspectives on Southern Africa* 94; M Low *et al* 'Dilemmas of representation in post-apartheid Durban' (2007) 18 *Urban Forum* 247.

21 SE Mohamed 'From ideas to practice: The involvement of informal settlement communities in policy-making at city level in South Africa' (2006) 37 *South African Review of Sociology* 35.

22 R Ballard *et al* 'Conclusion: Making sense of post-apartheid South Africa's voices of protest' in R Ballard *et al* (eds) *Voices of protest: Social movements in post-apartheid South Africa* (2006) 397-417.

often deploy the whole array of the criminal justice system to counter local movement struggles.[24]

The legal consciousness of local activists is thus structured by these negative encounters with the law.[25] Thus, social movement activists are sceptical about the use of the law for a progressive agenda. The following statements by movement activists point to this pervasive sentiment:

> Rights are for everyone on paper. In reality they are only there for the rich.[26]
>
> We need to understand that the law works for the capitalist class and it is not always accessible to the working class and the poor.[27]

Activists' animosity towards the law is intensified by the fact that in many cases, government officials and police officers react with hostility when poor people invoke the law. The following account by a Motala Heights resident captures succinctly the challenges poor township activist groups face when confronted by state authorities' intent on acting illegally:

> When the evictions happened … the South African law and the Constitution didn't work for us. They were pointing guns at us, threatening us, meantime we were fighting for our rights [as guaranteed by the law]. One comrade came asking them 'What about section 26?' but they didn't say anything … When our chairperson came to ask, 'By what right and by what law can you do this?' teargas just got thrown in his face.[28]

The idea that the law only 'works' for the rich, and is repressive towards the poor goes together with a pervasive perception amongst many activists that

23 M Dawson 'Resistance and repression: Policing protest in post-apartheid South Africa' in J Handmaker & R Berkhout (eds) *Mobilising social justice in South Africa: Perspectives from researchers and practitioners* (2010) 101-136; M Memeza 'A Critical Review of the Implementation of the Regulation of Gatherings Act 205 of 1993 – A Local Government and Civil Society Perspective' (2006) available at http://www.fxi.org.za/PDFs/Legal%20Unit/RGAReport-Mzi.pdf (accessed 1 October 2011).

24 D McKinley & A Veriava *Arresting dissent: State repression and post-apartheid social movements* (Centre for the Study of Violence and Reconciliation 2005).

25 The legal consciousness of movements is also structured by the fact that most poor people have low levels of awareness of pertinent rights, a fact confirmed by many national surveys. A 1998 survey by the Community Action for Social Agency (CASE) found that only 30% of the population was aware of the existence of the Bill of Rights (Mubangizi 2005;41). More pertinently, knowledge of human rights was generally very poor amongst 'coloured' people (30% affirmative response) and Africans (24% affirmative response). A follow-up survey in 2000 found that the situation had improved; still an alarming 36% of respondents answered that they were not aware of the existence of the Bill of Rights and 20% reported that they had heard about the Bill of Rights but were not sure what its purpose was (Mubangizi 2005;42). These results were confirmed in 2003 by a National Research Foundation-sponsored survey which reported that 33,2% of the population did not know about the Bill of Rights.

26 B Mdlalose 'Marikana shows that we are living in a democratic prison' *Abahlali* 22 September 2012 available at http://abahlali.org/node/9061 (accessed 29 October 2012).

27 S Segodi, Anti-Privatisation Forum Legal Team Co-ordinator 'Legal representation and the struggle of the APF' *Struggle Continues* Newsletter 1 April 2007.

28 R Pithouse & M Butler 'Lessons from eThekwini: Pariahs hold their ground against a state that is both criminal and democratic' *Abahlali* 11 April 2007 1 available at http://abahlali.org/filesAFRAreport.final_doc. (accessed 30 August 2012).

courts are 'institutions of bourgeois rule'. Thus, Trevor Ngwane of the Soweto Electricity Crisis Committee worries that court victories might serve to co-opt movements into the hegemonic political and economic system:

> We must not allow the court victory to shift our struggle away from mass action. We must continue to destroy the meter and not fall into bourgeois legalism. We must celebrate the court victory but not allow the celebration to hide our mistakes and weaknesses. The struggle for socialism must continue.[29]

Apart from the feeling by some activists that court victories only offer temporary victory and do not challenge the political and economic neoliberal juggernaut, some activists point out that court processes are expensive and might shift badly-needed resources away from poor peoples' movements.[30] One Cape Town activist put it as follows: 'If there is relief, it comes at a very high financial cost. Lawyers and advocates exploit the problems of the poor for their own financial gain. Court actions favour the legal profession.'[31]

Part of the reason for this antipathy towards the law, courts and constitutionalism has to do with the fact that, despite the certainty that the South African Constitution sets out a vision of 'transformative constitutionalism', access to the courts still remains a pipedream for most South Africans. Whilst constitutionally-mandated legal assistance is offered to indigent accused persons, no such assistance is available for poor people seeking to vindicate their fundamental rights. Poor people's access to courts is mediated via middle-class NGOs and university-based law clinics.[32]

Focusing directly on the Constitutional Court, we find that the Court has failed in its duty to facilitate 'constitutional dialogue' owing to the fact that the Court chooses to communicate with the public (and other branches of government) via lengthy, complex legal decisions published on its website

29 T Ngwane 'The water case victory: Lessons to strengthen our struggle' (2008) (on file with the author) (unpaginated). For excellent discussions regarding the co-optive power of the law, and how the law can serve to reify ongoing domination, transmute radical desires, lower expectations and induce passivity, see W Brown & J Halley 'Introduction' in W Brown & J Halley *Left legalism/Left critique* (2002) 1-37; P Gabel & D Kennedy 'Roll over Beethoven' (1984) 36 *Standard Law Review Law* 1.

30 On how legal tactics can be detrimental to movement building because they deflect resources and attention from protest action, often leading to the dominance of poor people's organisations by lawyers and other elites, see D NeJaime 'Convincing elites, controlling elites' (2011) 54 *Studies in Law, Politics and Society* 175; L Jones 'The haves come out ahead: How cause lawyers frame the legal system for movements' in A Sarat & SA Scheingold (eds) *Cause lawyers and social movements* (2006) 182-196. For a prototypical argument about how courts are institutionally incapable of ushering in fundamental transformation and as such court victories may offer merely 'hollow hope', see G Rosenberg *The hollow hope: Can courts bring about social change* (1991).

31 Roy, a Cape Town-based activist cited in I Steyn 'Socioeconomic rights in post-apartheid South Africa: How do they articulate to poor people's material expectations of democracy?' Democracy Development Programme Report (2010) 31.

32 Law societies currently require their members to commit a minimum of only 24 hours per year for *pro bono* work.

only in English, and it lacks a systematic out-reach programme.[33] Furthermore, although the rules of standing are wide enough to enable movement to bring cases on behalf of their constituencies, the Court has interpreted its rules conservatively to restrict direct access.[34] All of these factors account for poor people's perception of the Constitutional Court – like other government institutions – as inaccessible and elitist.

Nonetheless, assisted by public interest litigation organisations, some movements have engaged with the Court, tactically, to extract concessions from the state. In this paper I shall look at some of the factors that led the Treatment Action Campaign, the Merafong Demarcation Forum and *Abahlali baseMjondolo* to take their struggles to the Constitutional Court.[35] This paper does not seek to undertake an in-depth analysis of the final judgment of the Court in each matter, as this is done in other papers in this series. Rather, my aim here is to tease the road from the street to the Court. I finish the paper by making some tentative remarks about what we can learn about the relationship between post-apartheid social movements and the Constitutional Court. The aim of this paper is to make a contribution to studies of the way poor peoples' movements engage with apex courts in transitional or post-conflict societies especially ones marked by Euro-modernist constitutionalism and in contexts where liberalism and illiberalism exist side by side.

3 Treatment Action Campaign

> The anxiety of the applicants to have the government move as expeditiously as possible in taking measures to reduce the transmission of HIV from mother to child is understandable … In our country the issue of HIV/AIDS has some time been fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case.[36]

In July 2002 the Treatment Action Campaign (TAC) successfully challenged the government's policy of limiting the prevention of mother-to-child HIV/

33 See T Madlingozi 'The Constitutional Court, court watchers and the commons: A reply to professor Michelman on constitutional dialogue, "interpretive charity" and the citizenry as *Sangomas*' (2008) 1 *Constitutional Court Review* 63.

34 J Dugard 'Courts and structural poverty in South Africa: To what extent has the Constitutional Court expanded access and remedies for poor people?' in DB Maldonodo *Constitutionalism in the global south: Activist tribunals in India, South Africa and Colombia* (Cambridge University Press 2008); L Berat 'Constitutional Court of South Africa and the jurisdictional question: In the interest of justice?' (2005) 3 *International Journal of Constitutional Law* 39.

35 Elsewhere I engage in an in-depth analysis of the impact of legal mobilisation on post-apartheid social movements. See T Madlingozi 'Post-apartheid social movements and legal mobilisation' in M Langford *et al Socio-economic rights in South Africa: Symbol or substance?* (2013) 92-130.

36 *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (*TAC*) paras 130 & 20.

AIDS treatment (PMTCT) to a few research and training sites.[37] The Constitutional Court ordered the government to administer the PMTCT drug in all public health facilities whenever it is medically indicated. Many analysts consider this triumph as exemplary of how social movements can creatively utilise political mobilisation and court-based strategies to advance their causes.[38] Through its affirmative response to the TAC's demand for treatment for HIV-positive pregnant mothers, the Court legitimated and cemented the moral victory that this movement had already won in the public imagination.[39] Any reflection on the interface between South African social movements and the Constitutional Court has to start with the TAC's 2002 victory at the Constitutional Court.[40]

The TAC's success before the Constitutional Court was no small victory. The government's response to the scourge of HIV/AIDS was characterised by a lack of co-operation with – and sometimes open hostility towards – civil society organisations and by attempts to silence those organisations critical of its position.[41] Given the magnitude of the AIDS epidemic in Africa and South Africa in particular, government attitude and policy were literally costing thousands of lives. To put the magnitude of the problem into context: By the early 2000s, the South African government itself admitted that the scourge of HIV/AIDS was already 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our democracy'.[42]

37 As above.

38 See M Heywood 'South Africa's Treatment Action Campaign: Combining law and social mobilization to realize the right to health' (2009) 1 *Journal of Human Rights Practice* 14; M Heywood *South Africa's Treatment Action Campaign (TAC): An example of a successful human rights campaign for health* (2008) available at http://www.tac.org.za/ (accessed 23 December 2013); PS Jones '"A test of governance": Rights-based struggles and the politics of HIV/AIDS policy in South Africa' (2005) 24 *Political Geography* 419; and Freidman & Mottiar (n 2 above).

39 On the TAC's moral victory, see S Robins *From revolution to rights in South Africa* (University of KwaZulu-Natal Press 2008), Friedman & Mottiar (n 2 above).

40 The TAC was only the second social movement to approach the Constitutional Court for a remedy. The pioneer organisation in this regard is the National Coalition for Gay and Lesbian Equality (NCGLE). See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/z7nC9V8Ush/MAIN/0/57/518/0/S-CCT10-99 (accessed 29 October 2002); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/hzgtFe3pst/MAIN/140220008/9#top (accessed 29 October 2012). Zackie Achmat, the TAC's first national director, had previously been director of the NCGLE. On how the NCGLE's strategy of focusing on institutional gains and formal equality hindered the possibility of building a strong social movement and growing gay activism beyond its base of white, male, middle-class membership, see N Oswin 'Producing homonormativity in neoliberal South Africa: Recognition, redistribution, and the equality project' (2007) 32 *Signs* 649; J Cock 'Engendering gay and lesbian rights: The equality clause in the South African Constitution' (2003) 26 *Women's Studies International Forum* 35. For a good exposition on how, despite formal and institutional gains, poor, black, township-based lesbians continue to suffer from homophobia and even targeted 'corrective rape', see N Mkhize *et al The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans* (2010).

41 Jones (n 38 above) 429.

42 *TAC* case (n 36 above) para 1.

One of the most vulnerable groups affected by the scourge of HIV/AIDS is unborn babies of pregnant mothers living with HIV/AIDS. In the early 2000s, the government estimated that since 1998, 70 000 children had been infected by their mothers at and around birth.[43] It for this reason that as early as 1997, several NGOs began a sustained campaign to lobby the government to adopt a comprehensive policy and programme for the prevention of mother-to-child HIV/AIDS treatment (PMTCT) as articulated in the government's own National AIDS Plan. This campaign received impetus with the formation of TAC in 1998.

Mark Heywood, one of the key leaders of the TAC, reports that initially the government was sympathetic to calls for a policy and plan on PMTCT and in April 1999 released a joint statement with TAC stating that the major barrier to a PMTCT programme was the prohibited cost of the required anti-retroviral drug, Zidovudine (AZT).[44] In May 1999, Thabo Mbeki was installed as the second democratic President of South Africa. Many commentators point to this moment as the moment when government, albeit unofficially, changed its position on HIV/AIDS and the required approach to tackle it and began siding with the 'AIDS denialists'. In 2000, when it became clear that the government was just adopting delaying tactics that appeared politically motivated, TAC threatened to embark on litigation.

After a serious of well-publicised civil disobedience campaigns which enabled the TAC to mobilise grassroots support and consolidate its partnerships with international donors and organisations,[45] in August 2001, the TAC decided that 'both morally and politically it had no other options than to launch a case against the government'.[46] The government opposed the case on the grounds that the efficacy and safety of Nevirapine had not been fully proven and that its widespread use risked a public health catastrophe.[47] In December 2001, the Pretoria High Court found in favour of the TAC and found that the government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting HIV to their babies at birth.[48] The Minister of Health and other respondents responded to this ruling by launching an appeal. At the first hearing, the TAC and its partners organised a march of over 5 000 people.

By the time the case landed in the Constitutional Court, the Court observed that the dispute had been characterised by 'a regrettable degree of

43 *TAC* case (n 36 above) para 19.
44 M Heywood 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Campaign case against the Minister of Health' (2003) 19 *South African Journal on Human Rights* 278 281.
45 Treatment Action Campaign *Fighting for our Lives: The History of the Treatment Action Campaign 1998-2010* (Treatment Action Campaign 2010) 44.
46 As above. The TAC was assisted by the Legal Resources Centre, a public interest litigation organisation, with funding from Legal Aid South Africa's Impact Litigation Unit.
47 Heywood (n 44 above) 296.
48 *Treatment Action Campaign v Minister of Health* 2002 (4) BCLR 356 (T).

animosity and disparagement'.[49] The Court subsequently ordered the government to, 'without delay', provide the anti-retroviral Nevirapine where it was medically indicated. Such were emotions around this case that, according to Mark Heywood of the TAC, one of the Constitutional Court judges cried after the handing down of this judgment.[50]

TAC activists felt that their struggle had been vindicated by the Constitutional Court and asserted that the case demonstrated that 'skilful litigation can take advantage of constitutional promises' and that 'the outcome of the case … should confirm to those who still suffer marginalisation and deprivation that the Constitution can materially impact on and better their lives'.[51] The subsequent decision by the South African Cabinet to approve a bold national treatment plan – beyond the PMTCT – aimed at rolling out anti-retroviral drugs to all HIV/AIDS patients, confirmed in the minds of TAC activists that there was value in investing a large amount of resources in this Constitutional Court battle. TAC activists have a lot of trust in the Court, invoking in arguments with adversaries or to threaten the state. As one TAC activist put it, 'government is afraid of the Constitutional Court'.[52]

4 Merafong Demarcation Forum

> On the 20th September 2007 the Merafong Demarcation Forum will be taking the government to [the Constitutional] court in the bid to reverse the unjust and draconian law called the Twelfth Amendment Act which resulted in Merafong [been] dumped into the North West province unlawfully despite the fact that the overwhelming majority of the residents of Merafong still want to fall under Gauteng ... We want to send a clear message to the government that we are still opposed to incorporation into the North West and we will continue to resist by any means necessary until the government listens to the people.[53]
>
> The people of Merafong rightly brought their dispute to this Court … [but] this Court is not and cannot be a site for political struggle.[54]

On 20 September 2007 members of the Merafong Demarcation Forum (MDF) took their campaign to seek an order declaring that a constitutional amendment that sought to abolish cross-border municipalities was unconstitutional because law makers failed to heed the community's wish that Merafong City Local Municipality (Merafong) should be incorporated into Gauteng province, and not the North West province. This petition came after two years of often violent resistance by this movement. On the day of

49 *TAC* case (n 36 above) para 20.
50 Heywood (n 38 above) 32.
51 Heywood (n 44 above) 279.
52 TAC leader cited in Friedman & Mottiar (n 2 above).
53 Merafong Demarcation Forum *Final Push for Peoples' Victory!!* Petition Signature Request Leaflet 2007 (on file with author).
54 *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) paras 308 & 306, available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 (accessed 29 October 2009).

the first hearing, more than a 1 000 protesters gathered outside the court room singing liberation songs and 'toyi-toying'. During the course of the day, things turned nasty when protestors started burning tyres just outside the Constitutional Court building, brandishing dangerous weapons and pelting police officers with stones.[55] Never before nor since has the Constitutional Court witnessed such a protest at its doorsteps. Uniquely too, although the Court subsequently rejected the MDF's petition, the movement continued its mass resistance until the state was forced to reverse its decision. Unlike the TAC, a professionalised/NGO-ised organisation, the MDF's violent demonstration at the Court and its subsequent refusal to be deradilised by the Court's negative judgement, is a good example of how differently situated movements engage with the Court. A brief overview of the history of this case follows.

Merafong was established in 2000 as a cross-border municipality that straddled the provinces of Gauteng and the North West with 74 per cent of the population situated in Gauteng and the remaining 26 per cent in the North West. Numerous difficulties arose in the administration of cross-border municipalities. These included poor service delivery and the fact that residents were often left frustrated not knowing which provincial authority to turn to.[56] The government thus enacted the Constitution Twelfth Amendment Act of 2005 (Twelfth Amendment) in order to abolish cross-boundary municipalities.

Pursuant to this constitutional amendment, in August 2005 the Municipal Demarcation Board published proposals to redraw the boundary of Merafong. The Board recommended that the whole of Merafong should be incorporated into the North West. As the Constitutional Court observed, this proposal was met with 'widespread and spontaneous mass protests' in Khutsong, one of the townships in Merafong.[57] According to media reports:

> On 2 November they organised a stay-away. Armed with petrol bombs and stones, they took on the police, who shot them … with rubber bullets …The next day, local municipal offices were set alight, telephone booths were dismantled and the main intersections of the townships were barricaded … In all, 6 000 people were involved in the protest.[58]

The residents of Khutsong did not question the rationality of doing away with cross-border municipalities. What angered the residents of Merafong was the specific decision to re-demarcate all of Merafong into North West and not in

55 See 'Khutsong battle reaches the Constitutional Court' *Mail & Guardian* 20 September 2013 available at http://mg.co.za/article/2007-09-20-khutsong-battle-reaches-constitutional-court (accessed 29 October 2009).

56 A Christmas & D Singiza 'Taking participation to the streets and courts: The *Merafong* judgment' (2008) 10 *Local Government Bulletin* 26.

57 *Merafong* para 135.

58 RJ Thomson 'Identity Politics in South Africa: Lessons from the People' (2006) 14 available at http://ccs.ukzn.ac.za/files/identity%20politics%20revised%20rjt%202006%2003%2014.pdf (accessed 23 December 2013).

Gauteng as they had preferred.[59] They felt that the two provincial governments had acted undemocratically by ignoring their clearly-expressed wish. The MDF was thus set up to campaign 'for democracy to prevail in Merafong'.[60] This strong movement was made up of political organisations, taxi associations, woman and student groups, trade unions, churches and business organisations.

The Municipal Demarcation Board then decided to withdraw its recommendation, pointing out that it agreed with some of the motivations provided by the community as to why the whole of Merafong should be incorporated into Gauteng and not the North West. Despite this, the next day the Minister of Local and Provincial Affairs ('the Minister') stated his preference for the whole of Merafong to be incorporated into the North West. A meeting with the Minister failed to reach any consensus as each side stuck to its guns. By the time the community submitted a collective memorandum to the Minister – pursuant to the Minister's invitation – the legislative process had, however, already started. One house of Parliament, the National Assembly, had already approved a Bill to incorporate Merafong into North West. This Bill had been sent immediately to the second house of Parliament, the National Council of Provinces (NCOP). The Minister had then set very tight time frames for the affected provinces – Gauteng and North West – to submit their views to the NCOP.

In November 2005, a constitutionally-mandated joint public hearing involving the Gauteng and North West provincial legislatures was held. This well-attended meeting received a number of written and oral submissions. In its negotiating mandate to the NCOP, the Gauteng legislature highlighted the overwhelming public opposition to the incorporation. It also put on record that it agreed with the incorporation of the whole of Merafong into Gauteng. The provincial legislature thus recommended that the Twelfth Amendment Bill should be amended to provide for that position. Despite this mandate, and the fact that the Gauteng provincial representative had earlier, in the words of one Constitutional Court judge, presented it to the NCOP 'faithfully and with effusive conviction',[61] on 5 December 2005 the Gauteng legislature changed its decision and decided that its representative should vote in

59 Thomson (n 58 above) 15 summarises the MDF position as follows: 'First, Khutsong is closer to the capital of Gauteng than to that of the North West. Secondly, more of Khutsong's workers commute to other parts of Gauteng than to the North West. Thirdly, the people who built Gauteng through their labour on the mines should be recognised as part of the province. Fourthly, the people are attached to Gauteng; it is their province. Finally, Gauteng is "by far the most developed province". Excluding the people from the province would be a "slap in the face".'

60 *Merafong Demarcation Forum v President of the Republic of South Africa* Founding Affidavit, para 2.1 available at http://www.constitutionalcourt.org.za/Archimages/10585.PDF (accessed 30 October 2012).

61 *Merafong* (n 54 above) para 154.

support of the Bill in the NCOP.[62] On 14 December 2005, the Bill was agreed to by the NCOP, with all provinces in favour of it.

That night the epicentre of the MDF's struggle, Khutsong – literally translated as the 'place of peace' – erupted into one of the most uncontrollable places in post-apartheid South Africa.[63] The people were angered by the fact that the provincial legislature appeared to take their views into account and to agree with them, only to change its mind later without any consultation and discussion. From December 2005 until the end of 2007, the township had been rendered 'ungovernable'. In scenes very much reminiscent of the 1980s township revolts against the apartheid regime, television cameras captured daily images of young people blockading the streets with burning tyres and stones, preparing 'molotov cocktails', and torching shops, libraries, schools, government buildings and local councillors' homes. Between December 2005 and April 2006, violent protests caused damage to private and public property estimated at US $10 million.[64] The community's deep level of discontent is further reflected by a successful boycott of the municipal elections in March 2006. Of almost 30 000 registered voters, only 232 cast their ballots.

It took a very long time before the people of Khutsong decided to take their struggle to the Constitutional Court. It was not an easy decision. According to the Chairperson of the MDF, they had won every battle against the government in the street:

> Merafong community has taken a decision that says they want to remain in Gauteng Province. We made submissions to the government on 25 November 2005 and 90 per cent plus of the community are in favour of this view. This followed several other submissions made and protests to voice out the will of the people of Merafong. We have won all fights at all fronts, however, the referees, the government, have ensured that no victory comes our way, despite the fact that we have outplayed them in the field. As opposed to what we all know and expect, the chambers of our parliaments have been used to undermine the genuine and legitimate will of the people of Merafong. The last few months of 2005 have [and] will live as a sad memory of our democratic dispensation. We have since opened the [bank] account to challenge this unfairness to the constitutional court …[65]

62 For more on the functions and powers of provincial legislatures, see T Madlingozi & S Woolman 'Provincial legislative authority' in S Woolman *et al* (eds) *Constitutional law of South Africa* 2nd edition (2005) ch 19.

63 The media recorded the events of that night as follows: 'Police vehicles were met with "a hail of stones and bullets". They reacted with rubber bullets. Five police offices were injured. Eight police vehicles were damaged. Schools were vandalised. [T]he houses of the major, a soldier and several municipal councillors were set alight, as well as the library, a church and the community hall. 71 people were arrested.' Thomson (n 58 above) 16.

64 See Centre for Development and Enterprise 'Voices of Anger: Protest and conflict in two municipalities' *CDE Focus* (April 2007) 10.

65 D Baqwana 'Fund-Raising Letter' January 2006, available at http://amandlandawonye.wikispaces.com/Merafong+Demarcation+Fund (accessed 30 October 2012).

Lawyers for Human Rights, a public interest litigation organisation, agreed to represent the MDF. The MDF obtained direct access to the Court because only the Constitutional Court may decide the constitutionality of an amendment to the Constitution.[66] In the main, the MDF asked the Court to declare that the Gauteng Provincial Legislature had failed to comply with the constitutional duty to facilitate public involvement in processes leading to the approval of the Twelfth Amendment by the NCOP. On 13 June 2008 the Court handed down its decision. The Court stated that under the new constitutional dispensation, participatory democracy and representative democracy are mutually supportive. However, the Court also made the point that the obligation to facilitate public involvement is open to innovation and legislatures have a discretion as to how to fulfil that obligation.

In this case, the majority of the Court found that the legislature had afforded the public the opportunity to be heard and considered the views of the public in great detail. Most importantly, the Court held that the fact that the process of public involvement is mandatory does mean that the legislature must follow the views of the community: 'But being involved does not mean that one's views must necessarily prevail.'[67] The Court held that the legislature's failure to return to the public to inform it that it had subsequently altered its negotiating mandate and decided to vote in favour of the Bill was 'possibly disrespectful'; but that failure did not rise to the level of unreasonableness which could result in the invalidity of the Twelfth Amendment. In the words of the majority decision, '[p]ossible discourteous conduct does not equal unconstitutional conduct which has to result in the invalidity of the legislation'.[68] The Court therefore dismissed the application.

This dismissal only served to embolden the movement and its conviction that all arms of state are elitist, unresponsive and anti-poor. One of the affiliates of the MDF responded that even though it had not yet studied the Court's decision, it was its 'contention that matters related to forceful and illegitimate demarcations cannot be mitigated or resolved through the organs of class rule - the courts'.[69] During the following months, Khutsong continued to resemble a battlefield with residents engaging in often violent protests, work stay-aways and school boycotts. This extra-institutional, mass resistance prevailed. The ruling party subsequently decided that the whole of the Merafong municipality would be incorporated back into Gauteng province.[70] The whole of Merafong has now been incorporated into the Gauteng province, in a move that the new Minister of Provincial and Local Government proclaimed is aimed at 'putting the final nail into the coffin that

66 Sec 167(4)(d) of the Constitution.
67 *Merafong* (n 54 above) para 50.
68 *Merafong* (n 54 above) para 60.
69 See 'YCL [Young Communist League] Statement on Khutsong's Ruling by the ConCourt' 13 June 2008 available at http://groups.google.com/group/yclsa-press/browse_thread/thread/67c0616a73a6f791 (accessed 20 June 2008).
70 The decision was also strongly influenced by the fact that the 2008 general elections were around the corner.

buries unhappiness [and] protests from the people of Merafong and Khutsong in particular'.[71]

Thus, while the Court was not particurlaly moved by the plight of these indignant residents, this social movement did not allow itself to be demobilised by the apex court's order or for the Court to be the final arbiter of the legitimacy of its struggle. To be sure, even before the Court handed down its decision, the MDF was not convinced that the Constitutional Court could not assist it in its struggle. Thus, even before the Court could make its ruling, one of the leaders of the MDF declared as follows:

> It would be very dangerous to put our faith in legal processes. Courts are seldom neutral and often tend to serve the interests of the ruling class. That is the reason we have delayed taking this matter to the Constitutional Court. For more than a year we have relied on our own mass strength and we still do. In the coming period we will utilise the so-called democratic space provided by the new Constitution as well as working class resistance. Key strategies include intensifying mobilisation, building consciousness and continuing with mass struggle in the form of marches and rallies. This struggle will be won in the street! [72]

5 Abahlali baseMjondolo

> Abahlali baseMjondolo will once again climb another high mountain for the first time when our struggle for safety, dignity, and equality of the poor ascends to the Constitutional Court of the Republic of South Africa. In 2005 when we formed our movement, we commitment ourselves to do whatever it takes to protect the rights, lives and future of the shack dwellers and the poor in South Africa.[73]

On 13 May 2009, members of Abahlali baseMjondolo ('those who live in shack-settlements') got onto a bus in Kennedy Road Informal Settlement (Kennedy Road) in Durban, KwaZulu-Natal and made a 12-hour trip to the Constitutional Court building in Braamfontein, Gauteng. They went to observe the first hearing of their appeal against a High Court ruling that found the (self-explanatory) KwaZulu-Natal Elimination and Prevention of the Re-emergence of Slums Act in line with the Constitution. When they got to the Court, hundreds of Abahlali members, together with others from the Poor Peoples' Alliance, observed proceedings from a packed public gallery, while others sat outside watching the proceedings on large television screens.[74]

71 See 'NCOP passes Merafong Bill' *Parliament* 19 March 2009 available at http://www.parliament.gov.za/live/content.php?Item_ID=849 (accessed 10 August 2009).

72 Kolisile (n 3 above).

73 'Abahlali baseMjondolo will challenge the KZN Slums Act in the Constitutional Court on 14 May 2009' *Abahlali* 6 May 2009 available at http://abahlali.org/node/5120 (accessed 30 October 2012).

74 N Tolsi 'Shack dwellers' victory bus' *Mail & Guardian Online* 24 May 2009 available at http://www.mg.co.za/article/2009-05-24-shack-dwellers-victory-bus (accessed 30 October 2012).

After the hearing, they sang anti-apartheid liberation songs and religious hymns. One Abahlali member expressed a common sentiment:

> This was a beautiful day for me, because in 2007 I was shot six times with rubber bullets during a march and put in jail by the police. Listening to these judges today made me feel like I was part of this democracy again.[75]

The Constitutional Court dispute between Abahlali and the provincial government was just another episode in a series of very acrimonious encounters between the two parties. Since its formation in 2005, Abahlali had resisted attempts by local officials to treat shack dwellers as 'people who don't count'.[76] Abahlali's campaign for land, housing, basic services and dignity of poor people was instead criminalised. To put the scale of this criminalisation into context, Abahlali alleges that between 2005 and early 2007, more than 160 of its members were arrested on trumped-up charges.[77] State officials have also banned several protest marches by the movement. Furthermore, local elites have caused Abahlali leaders to lose their jobs, to be attacked and to be tortured by the police.[78] It is no wonder, then, that the opportunity to appear before the Constitutional Court and declare to the whole world that they count and that their homes are not 'slums' fit for 'eradication' was so meaningful to this movement. What transpired before and after Abahlali's Constitutional Court challenge, however, demonstrates that victories obtained from this august institution can have both positive and negative symbolic impacts for movements positioned outside the sphere of civil society and constitutional liberalism.

Richard Pithouse reports that when the ANC was unbanned in 1990, it encouraged people to embark on land invasions and appeared to sympathise with the plight of shack dwellers.[79] However, this position changed in 2001 when local authorities in Durban – later working under the auspices of United Nations Habitant Cities Without Slums project – earmarked the city for a pilot project named the Slums Clearance Project.[80] Under this project, about 70 settlements were earmarked for 'slum clearance' and 'relocation' to new townships. Kennedy Road was identified as one of the beneficiary settlements. When it turned out that residents of Kennedy Road were instead

75 As above.

76 S Zikode 'The struggle to affirm the dignity of the poor in a society in which we don't count' *Abahlali* 7 August 2012 http://abahlali.org/node/9006 (accessed 30 October 2012). For more on the history of *Abahlali* and its achievements, see Madlingozi (n 35 above).

77 S Lynch & Z Nsibande 'The police and Abahlali baseMjondolo' (2006) available at http://libcom.org/tags/south-africa?page=11 (accessed 20 October 2011).

78 K Chance 'The work of violence: A timeline of armed attacks at Kennedy Road' (2010) 83 *School of Development Studies Research Report*.

79 R Pithouse '"Our struggle is thought, on the ground, running" The University of Abahlali baseMjondolo' (2006) 1 Centre for Civil Society Research Report 40 available at http://www.ukzn.ac.za/ccs/files/RREPORT_VOL106_PITHOUSE.pdf (accessed ?) 15. Also see Centre on Housing Rights and Evictions (COHRE) *Business as usual? Housing rights and 'slum eradication' in Durban, South Africa* (2008) 41 available at http://www.cohre.org/store/attachments/081007%20Business%20as%20Usual_final.print.pdf (accessed 29 October 2012).

80 Pithouse (n 79 above) 15.

going to be evicted so that the land could be used for commercial development, the residents protested. The origins of Abahlali are usually traced to this 19 March 2005 uprising when about 750 people blockaded a major road with burning tyres and mattresses and had a stand-off with the police for more than four hours.

The Slums Clearance Project signalled a shift on the part of the government from a rights-based approach with respect to the situation of the urban poor to militarised language based on the 'eradication of slums'.[81] Those who oppose the Slums Act saw it as a concretisation of this approach.

COHRE records that when the KwaZulu-Natal Elimination and Prevention of Re-Emergency of Slums Bill (Slums Bill) was officially tabled, it was opposed by academics, lawyers, NGOs and shack dwellers' organisations.[82] This opposition took the form of protest marches as well as official submissions to the provincial legislature. From March 2007 when Abahlali became aware of the Slums Bill, it vehemently opposed the Slums Bill, stating that it is an attempt to 'mount a legal attack on the poor'.[83]

Abahlali vowed to fight this Bill everywhere: 'We will fight in the courts. We will fight this Bill in the streets. We will fight this Bill in the way we live our ordinary lives every day.'[84] Indeed, Abahlali took part in every forum available to voice their opposition against the Bill.[85] In the meantime, Abahlali held regular meetings with their members to familiarise them with the contents and import of the Bill. They also elected a Slums Bill Elimination Task Team 'to take the resistance forward'.[86] The movement also decided to engage with policy and legal experts to help them take the case to the courts if the Bill became law.[87] Despite 'extraordinary criticism' of the Slums Bill by a range of stakeholders, the Bill became law in June 2007. [88]

In February 2008, Abahlali decided to launch a constitutional challenge against the Act at the Durban High Court. Abahlali explained why they were going to court:

81 COHRE (n 79 above) 61.
82 COHRE (n 79 above) 66.
83 'Operation Murambatsvina comes to KZN: The notorious Elimination and Prevention of Re-Emergence of Slums Bill' *Abahlali* Press Statement 21 June 2007 available at htpp://www.abahlali.org/node/1629 (accessed 29 October 2012).
84 As above.
85 See 'No house, no land, no Bill!' *Abahlali* 11 May 2007 available at http://www.abahlali.org/node/1292 (accessed 2 June 2009) and Z Mkhize 'A review of the KZN Slums Bill public hearing process (A closer look at the Slums Clearance Bill public hearing process)' available at http://www.cpp.org.za/main.php?include=docs/space.html&menu=_menu/main.html&title=Publications (accessed 2 June 2009).
86 See 'Meeting to discuss legal and political strategies to oppose the Slums Bill – Friday July, 9:00 am Kennedy Road' *Abahlali* 12 July 2007 available at http://www.abahlali.org/node/1700 (accessed 2 June 2009).
87 See 'Minutes of the Abahlali baseMjondolo Meeting to Discuss Legal and Political Strategies to Oppose the Slums Bill' *Abahlali* 19 July 2007 available at http://www.abahlali.org/node/1718 (accessed 2 June 2009).
88 COHRE (n 79 above) 67.

- On 28 September 2007 we marched against the Slums Act in our thousands. We were beaten and 14 of us were arrested.
- On 21 June 2007 we sent a delegation to the provincial parliament to oppose the Slums Act there. We were denied the right to speak.
- On 4 May 2007 hundreds of us crowded into the Kennedy Road Hall to tell the government that we are absolutely opposed to the Slums Act. We were ignored.
- We are going to court because we know that in court we will not be beaten, arrested, denied the right to speak or ignored.[89]

The Centre for Applied Legal Studies, University of the Witwatersrand, represented Abahlali. In particular, the applicants argued that section 16 of the Act, read together with other provisions of the Act, conflicted with the constitutional right to access to adequate housing because it did not constitute a reasonable measure to progressively realise this right within the meaning of section 26(2) of the Constitution. Further, they argued that section 16 was unconstitutional because it rendered the constitutional requirement of meaningful engagement futile. Section 16 compelled the owner of land or a building which is occupied by unlawful occupiers to institute an eviction procedure against such occupiers. If they fail to do so, a municipality is obligated to institute eviction proceedings itself.

On 27 January 2009, the High Court dismissed Abahlali's application, commenting that the province should be applauded for 'attempting to deal with the problem of slums and slum conditions'. On appeal, the Constitutional Court decided to uphold the Act but to nullify section 16.[90] Abahlali could claim victory because this section was the most contentious. Given the many years of harassment, marginalisation and criminalisation, the Constitutional Court had huge symbolic significance for Abahlali because it essentially halted apartheid era-style mass evictions. At the symbolic level, the movement, often suppressed and repressed by state institutions, put a lot of value in the Court's affirmative decision. The president of Abahlali, Zikode, summarised the significance of the Court's ruling in the following words:

> The Constitutional Court ruling in favour of *Abahlali* means that a people's democracy will not be undermined at every turn … The Constitutional Court ruling also means that while party politics is trying to bring our democracy to the brink of catastrophe, the Court recognises our humanity and that the poor have the same right as everyone else to shape the future of the country.[91]

89 'Abahlali baseMjondolo take the provincial government to court over the notorious Slums Act' *Abahlali* Press Statement 13 February 2008 available at http://www.abahlali.org/node/3335 (accessed 2 June 2009).

90 *Abahlali base Mjondolo v Premier of KwaZulu-Natal Province* 2010 (2) BCLR 99 (CC) available at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5/0 (accessed 30 October 2012).

91 S Zikode 'Democracy is on the brink of catastrophe' 2009 http://www.ru.ac.za/latestnews/2009/name,36269,en.html (accessed 1 August 2011).

On the other hand, this high-profile Constitutional Court case led to a serious local backlash against the movement. A few days before the judgment was to be handed down, a local militia, allegedly aligned to the ruling party, subjected Abahlali to a vicious attack. Abahlali believes that the main motivation behind that attack was a publicly-expressed resentment by local elites over the movement's decision to take the government to court.[92] By the time the attacks came to an end, the Kennedy Road informal settlement resembled a war zone: Three people were dead, dozens of people were injured, over 1 000 people were displaced, shacks belonging to Abahlali organisers were burnt down, and the Abahlali headquarters were occupied by the militia. All of this, it is alleged, took place under police watch and complicity.[93] The following day, police arrested 12 members of the KRDC. None of the attackers was arrested. Those arrested spent many months in police custody before being released on bail.

6 Conclusion

> South Africa has the most beautiful Constitution amongst all countries. Its beauty is well documented and respected. But we are living in a democratic prison … It is clear that we do not have the rights and freedoms that are written in the Constitution in reality. Let's not fool ourselves and say we are in a democratic country while we are in a democratic prison.
>
> Bandile Mdlalose, General Secretary of *Abahlali baseMjondolo*[94]

This chapter investigated social movements' perceptions of the Constitutional Court. Although disputes involving large groups of people have landed in the South African Constitutional Court,[95] I have confined my discussion to those groups of people who have gone to the Court under the banner of a social movement – as defined above. Given the fact that all aspects of South African society are saturated with legalism, myth of neutrality in adjudication and constitutional fetish, it is inevitable that social movement struggles will land at the Constitutional Court. Social movement activists' perception of the Court is mediated by a number of things. First, it depends on movement character and its relationship to the state. This chapter demonstrated that more counter-hegemonic movements view the Court with suspicion believing that, like other institutions of bourgeois democracy, it is biased towards the ruling class. This position is exemplified by the Merafong Demarcation Forum which was consistently betrayed by various state institutions. Thus, when the movement got to court, they acted

92 Sibusiso Zikode, interview 15 August 2010, Durban.
93 Chance (n 78 above).
94 n 26 above.
95 These include the 900 applicants in the famous *Government of South Africa v Grootboom* 2001 (1) SA 46 (CC), available at http://www.constitutionalcourt.org.za/Archimages/2798.PDF (accessed 30 October 2012), and some 36 000 individuals affected in *President of Republic of South Africa v Modderklip Boerdery Ltd* 2005 (5) SA 3 (CC), available at http://www.constitutionalcourt.org.za/Archimages/3493.PDF (accessed 30 October 2012).

like they would act before any other state organ, that is, make their displeasure violently visible. On the other hand, movements that have tried to campaign extra-institutionally and suffered constant repression like Abahlali baseMjondolo welcome the opportunity to appear before this majestic institution and its bewitching edifice and to enter into a courtroom battle with the state. For rights-based movements like the TAC, however, going to court is not just another tactic; the court is an indispensable terrain of their struggle.

Secondly, the chapter showed that positionality matters. To understand the divergent perceptions of the Court, one would need to understand the bifurcated nature of the South African polity. This bifurcation is not only between the rural areas (residents as subjects) and the urban areas (residents as citizens). In the urban areas, there is also a split with favourable political opportunities available for more resource-endowed, suburb-based NGOs and social movements, while poor, township-based movements operate under political threats marked by illegality, repression and marginalisation. The TAC, a middle-class professionalised movement, operates at the national level where, overwhelmingly, the body politic is characterised by what Comaroff and Comaroff refer to as an 'almost fetishised faith to constitutionality and the rule of law'.[96] The TAC's positive attitude to the Court has therefore to do with the fact that access to the Court is relatively easy for the movement,[97] and the fact that the movement has reasonable expectations that the Court's decisions will be enforced.

On the other hand, locally-based movements are often left frustrated with unenforced court decisions.[98] Thus, referring to its prominent and successful Constitutional Court case, Abahlali bemoans the fact that they 'won the case against the Slums Act and yet government continues to build transit camps'.[99] Furthermore, although suppressed movements like Abahlali

96 J Comaroff & J Comaroff 'Policing culture, cultural policing: Law and social order in post-colonial South Africa' (2004) 29 *Law and Social Enquiry* 513 515.

97 The TAC's rights-based campaign is bolstered by the fact that right from the start, it could rely on the AIDS Law Project (ALP, now Section 27) for support and mutual strategising. The relationship between the TAC and ALP is symbiotic. Achmat was ALP's founding director and until 2008 its board member. The executive director of Section 27 is Mark Heywood who was TAC's treasurer until 2008 and is now a member of the TAC Secretariat. The General Secretary of TAC, Vuyiseka Dubula, is Chairperson of Section 27's board of directors. Lastly, Nonkosi Khumalo, a senior researcher at Section 27, has been seconded to the TAC as its full-time Chairperson. Unlike the TAC, most social movements do not have the benefit of a permanent legal advocacy organisation partner, although more recently Abahlali has benefitted from its very close relationship with the Socio-economic Rights Institute of South Africa.

98 See, for examples, *Abahlali* and SERI 'eThekwini Municipality Disobeys Court Order to Provide Housing and Investigate Corruption' Press Release 29 February 2012 available at http://www.abahlali.org/node/8648 (accessed 30 October 2012). L Sinwell 'Wynberg concerned citizens' disempowering court victory' 2010 21 *Urban Forum* 153; CAWP 'Johannesburg Water defies court ruling on prepaid water meters' Press Statement 8 May 2008, available at http://apf.org.za/spip.php?breve14 2008 (accessed 15 October 2012).

99 'Statement on the anniversary of the attack on *Abahlali baseMjondolo*' *Abahlali* Press Statement 26 September 2010, available at http://www.abahlali.org/node/7324 (accessed 30 October 2012).

value the Court's recognition of their struggle, given the fact that such movements are, *de facto*, positioned outside of civil society, counter-hegemonic movements' engagement with the Court is fraught with danger. For instance, the 2009 attack on Abahlali and the almost three-year expulsion from its headquarters has meant that, although Abahlali continues to engage courts in pursuance of its goals (with great success), it continues to worry about the local consequences of high-profile court decisions. Thus, after a recent important victory before the Durban High Court, the movement expressed the following reservation:

> While we celebrate this victory, Abahlali are worried that we may be attacked and receive death threats, as happened after the Constitutional Court victory against the KZN Slums Act when Kennedy Road was attacked leaving two people dead in September 2009.[100]

Lastly, the Constitutional Court has failed to be an 'institutional voice for the poor'.[101] Jackie Dugard sums this failure up as follows:

> 'Court has balked at allowing poor people who might otherwise be denied justice to gain direct access and has failed to operationalise a meaningful recognition of poverty in its socio-economic judgments.'[102]

In addition, the Court has arguably failed in its mission to facilitate 'constitutional dialogue', making it inaccessible, unaccountable and ultimately alien to poor people. Its practice is characterised by thinly-reasoned judgments, a failure to translate and make its judgments widely accessible, and a willingness to engage more with academics, NGOs and English-medium media than with social movements, trade unions, poor people's organisations and African-language media.[103]

In conclusion, we can make the following general observations regarding the road from the street to the Court:

(a) During the course of claim-making, post-apartheid social movements mobilise the law in order to frame their demands and thus draw public sympathy (sometimes making explicit reference to the Bill of Rights and sometimes in referring just to a 'right').

(b) Even though social movements and community organisations appeal to rights to legitimise their demands, before resorting to courtroom-based strategies, they often resort to illegal and extra-legal tactics to press for their demands.

100 'Court Victory Against the eThekwini Muncipality!' Media Statement issued by Abahlali baseMjondolo and Socio-Economic Rights Institute of SA (SERI) 19 September 2012 available at http://abahlali.org/node/9170 (accessed on 30 October 2012).

101 J Dugard & T Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in R Gargarella *et al* (eds) *Courts and social transformation in new democracies: An institutional voice for the poor?* (2006) 107-125.

102 Dugard (n 34 above) 1-2.

103 Madlingozi (n 33 above).

(c) Although most movements do not believe that courts are 'legitimate' forums to resolve their disputes, they ended up going to court in order to revive their struggles after they had been crushed through criminalisation and intimidation by the state.

(d) Having said this, most social movements make reference to previous judgments of the Constitutional Court to buttress their claims during their extra-legal campaigns, suggesting that they consider the decisions of the Court to have some binding authority.

(e) Deciding to take the route of litigation and eventually landing in court involves a lot of resources which by nature - except the TAC - social movements do not have. The decision to resort to court-based strategies is therefore dependent on the support and solidarity from public interest litigation NGOs.