

The Role of the Judiciary in Pushing the Legal Frontiers for City-level Transition and Sustainability

DATE

Friday, January 26, 2024

| A REPORT

ORGANIZED BY



UN-HABITAT



Stellenbosch
UNIVERSITY
IYUNIVESITHI
UNIVERSITEIT

Chair in Urban Law and
Sustainability Governance
Faculty of Law



KONRAD
ADENAUER
STIFTUNG



TABLE OF CONTENTS

Setting the scene	4
Session 1: The role of the courts in the development of urban law	4
Question and Answer session	6
Session 2: Service delivery, accountability, and judicial involvement	7
Question and Answer session	10
Session 3: The real/potential impact of urban law judgements on local governance trajectories ...	11
Question and Answer session	13
Session 4: Judicial reflections on creativity v separation of powers, judicial deference, and other fault lines	14
Question and Answer session	16
Key Reflections and Main Takeaways	17





In-person attendees during the January 2024 Urban Law Day at Stellenbosch University, South Africa. Credit: Anel du Plessis, University of Stellenbosch Faculty of Law Chair in Urban Law and Sustainability Governance.


On Friday the 26th of January 2024, UN-Habitat’s Policy, Legislation and Governance Section, the University of Stellenbosch Faculty of Law Chair in Urban Law and Sustainability Governance, and the Konrad-Adenauer Stiftung Regional Programme Energy and Security and Climate Change in Sub-Saharan Africa organised an Urban Law Day Symposium. The Chair in Cities, Law and Environmental Sustainability (CLES) (North-West University, South Africa), and the University of Freiburg (Urban Footprints Project) were also partner institutions.

In line with this year’s theme of **“The Role of the Judiciary in Pushing the Legal Frontiers for City-level Transition and Sustainability”**, four panel sessions took

place, focusing on how the courts may contribute to urban law development (or not) by exploring conceptual ideas and cases that have appeared before domestic and other courts.


The consensus reached by the various academics, jurists and practitioners participating in the panels was that the judiciary and the legislation that it is tasked to enforce may discharge its functions in such a way that the rule of law is upheld and that access to justice is promoted, especially in the face of climate crises and the challenges posed by urbanisation. Approximately 52 scholars attended the Urban Law Day – 32 in person and an average of 20 online.

ATTENDANCE




52

SCHOLARS




32

IN PERSON



20

ON-LINE



STELLENBOSCH UNIVERSITY

SETTING THE SCENE

Anne Amin (*UN-Habitat*)

One of the main objectives of the 2024 Urban Law Day was to understand the synergies and tensions between well-intended urban laws and policies and the work of institutions responsible for social order and protection of the rule of law.

Laws and the effects of their application can facilitate or undermine inclusivity; the urban space represents an area in which the paradoxical nature of legal frameworks is exhibited. On the positive side, urban law can offer a stable and predictable framework for action and even an avenue for the inclusion of vulnerable groups. On the other hand – urban law can deliberately or inadvertently promote exclusion, marginalisation, and poverty.

The search for sustainability is not only the responsibility of the executive and the legislative arms of the law. The judiciary, as a trusted gatekeeper and protector of fundamental rights and freedoms, has eminent roles to play in safeguarding our common future in sustainability.

Courts all over the world balance the interests of society with economic development, environmental sustainability, and the competing interests of persons and entities.

In developing countries, especially those in Africa, the role of the judiciary is particularly important, given that the bulk of the population is poor and there is widespread reliance on natural resources for livelihood and sustenance.

In addition to the formal justice system, alternative dispute resolution mechanisms such as mediation and arbitration are crucial for a fair and sustainable justice system. This is true in light of the limitations of the formal court system, which may involve lengthy and costly processes laced with complex procedures that limit access for the poor, women and other vulnerable groups may be further marginalised.

SESSION 1: THE ROLE OF THE COURTS IN THE DEVELOPMENT OF URBAN LAW

The first session of the day, chaired by Samuel Njuguna (UN-Habitat), focused on the role of the court in developing urban law. The panellists comprised of Justice Ziona Ntaba of the High Court of Malawi (Zomba Division) and Professor Elmien du Plessis, Acting Judge of the South African High Court, and Professor of Law at the University of Pretoria.

The panellists' interventions focussed on how the courts deal with complex urban law cases in relation to issues of land, evictions, and service delivery and how they envision a more proactive and engaged role for the judiciary in questions of urban development, despite the limits of constitutional law and the separation of powers.



Presentations during session 1. Credit Anne Amin, UN-Habitat & Prof. Anel du Plessis, University of Stellenbosch Faculty of Law Chair in Urban Law and Sustainability Governance.

Justice Ziona Ntaba

Justice Ntaba highlighted the crucial role the judiciary plays in building urban law jurisprudence. Emphasising the foundational importance of Malawian constitutional law, she stressed the need for a compassionate approach by the courts, ensuring that the courts recognise and consider the human impact of their judgments as important aspects of good governance. Further, she underscored the significance of accountability, transparency, integrity, and financial probity in strengthening confidence in public institutions. This, she stated, encapsulates the work done by the judiciary.

While acknowledging existing urban development policy frameworks in Malawi, gaps were identified, particularly in addressing issues of climate change. The existing policy, she also noted, will often, in times of uncertainty, defer to the courts for opinions on the matter. Nevertheless, most cases before the court are brought as a result of litigation.

Elmien Du Plessis

Prof. Elmiën Du Plessis, in her presentation on “Human(e) Justice,” advocated for a compassionate approach by courts to legal proceedings, particularly

Justice Ntaba also discussed various hurdles in implementing urban law, citing incongruence and enforcement challenges. Looking at various cases of urban law that were litigated before the court. Using the examples of eviction and infrastructure collapse, she noted that often, as a result of pleadings, urban law cases end in injunctive relief. The result is that cases before the court often do not have the opportunity to address substantive issues of the law that may move the law forward. To overcome these challenges, she advocated for a proactive judiciary. She noted that a fundamental aspect of a proactive judiciary is ensuring that the courts are more accessible to the public and not merely institutions for the elite echelons of society. She noted that public participation and the right to be heard are fundamental in ensuring that all people’s rights are protected and fulfilled.

in urban law cases before the South African High Court. She proposed a therapeutic justice model that recognises the emotional dimensions of conflicts,

urging judges to consider the impact of their decisions on litigants' experiences. However, she acknowledged the challenges of implementing therapeutic justice within an adversarial legal system bound by pleadings and precedents that may not reflect modern South Africa. Despite these challenges, Prof. Du Plessis noted a gradual influence of therapeutic justice in the South African legal system, particularly evident in eviction cases. Courts have increasingly emphasised grace and compassion, adopting a guardian role in eviction proceedings and actively considering occupiers' interests and constitutional values. She explored the complexities of evictions from "family homes" in South Africa, where

disputes arise over ownership between customary and common law. Courts must navigate these conflicts by recognising the significance of customary law within the legal framework and by upholding constitutional principles to protect the notion of a customary "family home." Prof. Du Plessis emphasised the holistic impacts of urban law issues on litigants, including financial, emotional, and social aspects, advocating for judicial officers to develop the law, including customary law, in alignment with constitutional principles. She concluded by highlighting the value of therapeutic justice in navigating urban conflicts and promoting ongoing cohabitation in urban spaces despite disputes.

QUESTION AND ANSWER SESSION

Q 1: Do individuals receive financial support to pursue urban law cases, or are they typically represented by NGOs or community representatives? Access to court is crucial for fostering developments in this regard.

» *Q 1 Response: Justice Zione Ntaba*

Justice Ntaba noted that access to justice remains a widespread challenge in Africa, as many individuals lacking the means to approach the court do not typically pursue these cases. She noted that NGOs open doors for those who would not typically have access to justice. However, these organisations also come with their own challenges, including funding sources.

Q 2: Do climate adaptation issues already play a role in your cases, and which ones in the context of your presentations?

» *Q 2 Response: Prof. Elmien Du Plessis*

Prof. Du Plessis highlighted that climate adaptation issues, such as houses built on flood lines, frequently come before the court. These cases often involve conflicts between city authorities seeking to relocate people from flood-prone areas and residents resisting eviction due to lack of alternative accommodation. Prof. Du Plessis said that the court must determine whether removal is justified when individuals have nowhere else to go, especially considering the risk of homes being swept away during flooding.

» *Q 2 Response: Justice Zione Ntaba*

Justice Ntaba emphasised the importance of empowering affected individuals to enforce their rights, particularly in accessing the legal system for climate adaptation cases. Despite perceptions that courts are only for the elite, Justice Ntaba noted that she believes that the Malawian judicial system allows for individuals to have the right to represent themselves in court without a lawyer. She stressed the judiciary's responsibility to provide a platform for individuals to present their cases in a straightforward manner and receive justice, regardless of social status.

Q 3: Both panellists referred to the idea that while the law is good, but the implementation of the law is bad. What role does the judiciary play to ensure the implementation of the law?

» Q 3 Response: **Prof. Elmien Du Plessis**

Prof. Du Plessis noted that one approach to address the issue of good law, but bad implementation, is through the issuance of structural interdicts by courts. In such instances, the judge directs the city to undertake specific actions, necessitating the city to furnish detailed plans regarding implementation methods and associated costs. Moreover, in cases concerning land reform and restitution, personal cost orders have been issued when interdicts were not adhered to.

SESSION 2: SERVICE DELIVERY, ACCOUNTABILITY, AND JUDICIAL INVOLVEMENT

The second session of the day, chaired by Johandri Wright from the University of the Western Cape, focused on themes of service delivery, accountability, and judicial involvement. Panellists included Prof. Jaap de Visser from the University of the Western Cape, Ms. Anne Amin and Mr. Samuel Njuguna from UN-Habitat's

Policy, Legislation and Governance Section, Prof. Robert Kibugi from the University of Nairobi and the Centre for Advance Studies for Environmental Law and Policy, and Dr. Chantelle Moyo from the Konrad-Adenauer-Stiftung Regional Programme on Energy Security and Climate Change in Sub-Saharan Africa.



Session 2 panellists. Credit: Prof. Anel du Plessis, University of Stellenbosch Faculty of Law Chair in Urban Law and Sustainability Governance.

Jaap de Visser

Prof. Jaap de Visser, in his presentation “Shaping City Powers Judicial Intervention 1999-2023,” posed six questions to delineate the framework of local governments’ powers in South Africa. Firstly, he scrutinised whether the status of cities is protected, highlighting the constitutional affirmation that cities possess original authority rather than delegated authority, with limitations on intervention. Secondly, Prof. De Visser examined the definition and protection of city executive and administrative authority, illustrating the responsibilities and constraints placed on cities in areas like land use management and national licensing. The third question probed into the extent to which other governments can overrule city decisions, citing instances of provincial overruling and the absence

of appeals against original municipal decisions at a senior government level. The fourth question explored a city’s legislative capacity, asserting that city by-laws do not necessitate national approval. The fifth and sixth questions delved into uncharted territories, addressing the ambiguity surrounding the regulation of city powers by other governments and the potential for cities to claim additional powers. Prof. De Visser emphasised that in 92 per cent of the judgments before the courts, the city’s arguments are accepted, noting the discernible judicial trend in the first four questions while acknowledging the uncertainty surrounding the regulatory extent and potential expansion of city powers in the final two inquiries.

Anne Amin

In her second presentation of the day, Ms. Anne Amin emphasised the crucial role of legislation and governance as catalysts for change, particularly within the framework of Sustainable Development Goal 11 (SDG11), which focuses on sustainable cities and communities. Ms. Amin highlighted the pivotal role of urban legislation in advancing various SDGs, but highlighted the hindrance posed by unclear or complex provisions. Ms. Amin shared insights from UN-Habitat’s country projects, presenting two sets of case studies on planning law and public participation. These case studies underscored the importance of inclusive public participation, prioritising the involvement of specific groups and addressing citizens’ demands for transparency. The significance of participatory spatial planning in upholding fundamental human rights, aligning with SDG 11.1 and the New Urban Agenda, was emphasised, particularly in the resolution of land disputes. Ms. Amin stressed the principle of accountability, asserting that

states must establish mechanisms providing certainty for citizens exercising property rights amid disputes. The case studies revealed diverse approaches among nations in handling urban planning and land disputes, some relying on specialised bodies and others on general court systems. Regardless of the approach, the necessity for fair, impartial, and transparent dispute resolution mechanisms with avenues for challenging planning decisions, including appeal or judicial review, was highlighted. Ms. Amin advocated for Alternative Dispute Resolution (ADR) mechanisms, emphasising their potential to overcome the limitations of the formal court system, ensuring accessibility for a broader population. Ms. Amin underscored the importance of ADR frameworks prioritising impartiality, swiftness, cost-effectiveness, and flexibility, while ensuring that the outcomes are treated seriously, fostering more accessible and equitable dispute resolution within urban planning contexts.

Samuel Njuguna

Mr. Samuel Njuguna emphasised the pivotal role of climate litigation as a critical instrument for ensuring governmental and corporate accountability in addressing climate change, echoing insights from the 2023 UN global report on climate litigation. Acknowledging the disproportionate impacts of climate change on vulnerable communities, he stressed the urgent need for decisive action to limit global warming to 1.5 degrees Celsius within the current decade. He highlighted climate litigation as a mechanism to uphold human rights, noting the increasing number of international cases asserting climate change as a violation of these rights, with significant legal advancements since 2020. Moreover, he underscored the role of climate rights litigation in advancing the recognition of women's rights and sustainable development objectives.

Within the realm of climate litigation, he outlined key areas of focus, including cases targeting the preservation of fossil fuels and carbon sinks to mitigate long-term global impacts, as well as holding corporations accountable for environmental harm through corporate liability and addressing greenwashing practices. Additionally, he discussed how litigation addresses governments' failures to adapt to and mitigate the consequences of climate change, particularly in preparing for foreseeable impacts. Looking forward, he anticipated a rise in climate litigation cases involving migrants, internally displaced individuals, and asylum seekers seeking relocation due to climate-induced factors, underscoring the evolving landscape of climate litigation in response to emergent challenges.

Robert Kibugi

Prof. Kibugi's presentation delved into the intricate interplay of service delivery, accountability, and judicial intervention in Kenya's urban law landscape, particularly focusing on the functions of local governments in the context of service delivery. His examination began with the scrutiny of the 2020 transfer of power from the Nairobi city government to the national government amidst political turmoil, culminating in the establishment of the Nairobi Metropolitan Services. Despite the court's recognition of the transfer as unlawful, its temporary suspension of the declaration of invalidity raised concerns about accountability as local functions were being administered at the national level.

Additionally, Prof. Kibugi underscored the critical role of public participation in local government financing, highlighting the court's insistence on meaningful consultation to influence decisions. Finally, he addressed a legal challenge regarding land rights in informal settlements, shedding light on jurisdictional questions and emphasising the court's responsibility in safeguarding fundamental human rights. Through his comprehensive analysis of case law, Prof. Kibugi emphasised the importance of local government processes for accountability, while stressing the vital role courts play in ensuring their integrity.

Chantelle Moyo

Dr. Moyo addressed the session's theme by discussing the provision of electricity services in South Africa, focusing on judicial involvement and accountability amidst load-shedding challenges. She looked specifically at the court's response to a case involving local government, Eskom, as the national electricity

provider, and private entities who were litigating the issue of electricity provision. *The case of Sonae Arauco (SA) Pty Ltd v Mbombela Local Municipality and Others* 4 All SA 543 (MM) highlighted the private entity's claim that load-shedding breached its constitutional right to uninterrupted electricity provision, emphasising

the municipality's obligation to provide electricity to residents, as well as it had previously entered into an agreement with the municipality that it would not be subjected to load shedding. While the local municipality, as the first respondent, argued that load-shedding was necessary to reduce the national grid's load, the court ruled in favour of the private sector entity, emphasising municipalities' constitutional duty to prioritise community needs.

This judgement signifies the increasing number of electricity provision cases brought before the court, contributing to jurisprudential clarity on the functional areas of local municipalities and their obligations in the energy governance context. Further, the court's decision underscores the importance of honouring agreements and fulfilling obligations even amidst challenges, shedding light on the interplay between local and national entities in service provision.

QUESTION AND ANSWER SESSION

Q 1: Does South African law include provisions regarding electricity? Is Eskom required to provide affordable, accessible, and reliable electricity?

» *Q 1 Response: Dr. Chantelle Moyo*

Dr. Moyo explained that Eskom, as a public entity, is tasked with supplying electricity. It engages in contracts with municipalities to provide bulk electricity, which the municipalities then distribute to residents. However, many municipalities in South Africa fail to pay for these services, leading to substantial debt and numerous challenges. In some cases, she noted, Eskom resorts to legal action to compel municipalities to settle their debts, and that despite the apparent clarity of the revenue collection framework for municipalities, the situation is more complex. Dr. Moyo ended by saying that revenue generated from electricity often subsidises other municipal services like roads and water, complicating the financial landscape.

Q 2: How does the promotion of housing rights through recent programs impact ownership, compared to the advancement observed in informal settlements and evictions?

» *Q 2 Response: Mr. Samuel Njuguna*

Mr. Njuguna emphasised that in the continuum of land rights, formal ownership serves as a means rather than an end. He stated that evictions should be regarded as a last resort, underscoring the significance of legal substance in guaranteeing procedural and substantive rights, including adequate notice and suitable housing for affected individuals. Mr. Njuguna highlighted that from a human rights perspective, fulfilling minimum criteria for adequate housing, such as cultural appropriateness and accessibility, is crucial, along with ensuring safety and habitability. However, effective enforcement remains paramount.

SESSION 3: THE REAL/POTENTIAL IMPACT OF URBAN LAW JUDGEMENTS ON LOCAL GOVERNANCE TRAJECTORIES

The third session of the day was chaired by Prof. Anél Du Plessis, incumbent in the Chair in Urban Law and Sustainability Governance at Stellenbosch University, South Africa. The panel discussed the practical, whether actual or theoretical, impacts of the decisions of the judiciary on local government, and what these decisions would mean for the way forward for local government.

The panel comprised of Dr. Susan Knox-Mosdell, principal legal advisor to the Energy and Climate Change Directorate of the City of Cape Town, Mr. Stephen Berrisford of Pegasys Global Consulting, and Dr. Maria Mousmouti of the Institute of Advanced Legal Studies (University of London).



Session 3 panellists. Credit Anne Amin, UN-Habitat

Susan Knox-Mosdell

Dr. Knox-Mosdell focussed her discussion on the impact of building development case law on municipalities, and the scope for municipal legislative reform. It was stressed that the current *National Building Regulations and Standards Act 103 of 1977* is an archaic piece of legislation and cannot be properly read in line with the Constitution of the Republic of South Africa, 1996 ("Constitution"). She argued that it is time for the Act to be repealed, and for a better framework to be created. Reasons for this are that the Act has no flexibility, the current building development management regime is not inclusive, and the Act lends to legal challenges

through the way in which decision-makers may make their decisions.

Dr. Knox-Mosdell consulted two cases in which the inadequacies of the Act are apparent. The first is that of *City of Johannesburg Metropolitan Municipality v Chairman of the Regulations Review Board and Others* 2018 (5) SA 1 (CC), where the South African Constitutional Court found section 9 of the Act to be inconsistent with the original constitutional powers of municipalities over building regulations, and that a new appeals vehicle must be developed.

The second is that of *City of Cape Town v Independent Outdoor Media (Pty) Ltd and Others* 2024 (1) SA 301 (WCC) where section 29(8) of the Act was confirmed as being invalid in that it usurps the original legislative powers of municipalities by requiring the relevant Minister to endorse the promulgation of a by-law.

Stephen Berrisford

Mr. Berrisford discussed some of the complexities surrounding the financing of urban infrastructure. He posed the question of how much a developer should supply to the municipality to build their infrastructure, and how the costs are to be set and shared. This was a key question in *South African Property Association v City of Johannesburg* [2023] ZAGPJHC 1347 (22 November 2023) (“SAPOA v City of Johannesburg”). This case showed that what is required is a well-established land-based financing instrument. Amongst other uncertainties which were present in 1996, one was that around town planning, which played such an influential part in South Africa's previous regime. *The Spatial Planning and Land Use Management Act* 16 of 2013 created some clarity but was otherwise ambiguous.

Maria Mousmouti

Dr. Mousmouti spoke on the role of judges on good urban law and governance. The main motif of her discussion was that legislation lives in a cycle and is not linear. This means that there must be clear policy before drafting the law, and that if unsure of what is trying to be achieved, problems will follow. Clear procedures must be considered after the delivery of a judgement, and laws must be re-evaluated, but this does not mean that laws must be changed with each judgement.

Good urban legislation would have the features of being clear in purpose, have a clear, realistic, and feasible legal solution, having a solid administration or enforcement

Dr. Knox-Mosdell's discussion shows that jurisprudence, and the courts, have the ability to pave the way for municipalities to create their own building by-laws, but that if this is to be done, it should be in a phased-manner.

The Municipal Fiscal Powers and Functions Amendment Act of 2023, which promises to be of much more use and help, is awaiting signature.

Mr. Berrisford made the points that the current state of local government is a risky one, especially in Johannesburg. However, the judgement in **SAPOA v City of Johannesburg** has given reassurance for national government to proceed with the rolling out of national legislation. He concluded by saying that local government is key to urban change, urban resilience, and urban prosperity. It transpired from this presentation that knowledgeable champions of urban legal change are essential, and fundamental urban legal change takes time.

mechanism, being able to convey clear messages to all interested parties, being coherent with the rest of the legal system, meeting implementation requirements, and having a clear framework for monitoring, review, and evaluation.

Dr. Mousmouti concluded with the point that judges should contribute their perspective as a key legislative audience, but not dominate. They should bring the law to life, resolve disputes, enforce the law, and help ensure that laws are implemented. They should also take stock of judgements to “correct” points in the law that are not effective.

QUESTION AND ANSWER SESSION

Q 1: For contemporary issues like climate change, which are temperamental and influenced by ever-changing science, how do we make sure that our laws are fit for purpose and relevant? In light of the emerging trend of countries adopting climate change legislation (such as Namibia, South Africa, and Botswana), how do we make sure that the laws are relevant to contemporary issues, given how long that it often takes for laws to become enforceable?

» *Q 1 Response: Dr. Maria Mousmouti*

Dr. Mousmouti began by saying that climate change legislation is a good way of interpreting what “fit for purpose” means, and how it can be ensured. She explained that firstly, usually with these laws, very specific purposes are stipulated, and that this is a godsend because the benchmarks for that legislation are very clear. Secondly, to ensure the laws' efficacy, there is no other way than regularly reviewing the legislation. Dr. Mousmouti concluded by saying that this must be a systematic process where time must be given to determine whether the legislation has achieved its goals and what needs to change to reach those goals, and that being systematic is the only way. Dr. Mousmouti described this as the process of post-legislative scrutiny.

Q 2: Does the law, as it stands now, strike the right balance in value capture? Does it shy away investors and developers? Do international and national developers react differently? What are the environmental requirements for the infrastructure that is then actually being developed, is that also linked to the law? Is there something like common good, oriented housing where there is no investment of market players, and no sought profit?

» *Q 2 Response: Mr. Stephen Berrisford*

Mr. Berrisford started by saying that striking the right balance is very much a formula for cost-recovery, and that it is not strictly speaking land-value capture, but a mechanism to ensure that the infrastructure costs imposed on the municipality are recovered, and in a pro-rata manner linked to the size of the development. He went on to say that if the developers know that the city can guarantee them a higher level of service delivery, then developers are generally accepting of the value.

Mr. Berrisford provided that in the South African local government financing framework, low-income housing is largely covered by grants from central governments to the municipality. He concluded by stating that the shift that this legislation requires is that there must be an earmarked amount of money which goes to the bulk infrastructure.

SESSION 4: JUDICIAL REFLECTIONS ON CREATIVITY V SEPARATION OF POWERS, JUDICIAL DEFERENCE, AND OTHER FAULT LINES

The final session of the day considered whether any flexibility exists when considering legal norms such as the separation of powers, and judicial deference, when faced with urban law issues and cases. The panel comprised of Prof. Marius Pieterse of the University of the Witwatersrand, Prof. Sarah Swan of the Rutgers Law

School (who attended virtually), and Prof. Oliver Fuo of North-West University. The panellists were tasked with the question of whether, in the face of ever-evolving climate litigation, the law may become more creative in its application and understanding, and what role the judiciary may play in this.

Marius Pieterse

Prof. Pieterse discussed socio-economic rights-based judicial review and remedies as adaptive law for urban resilience. He began by stating that the lack of socio-economic rights exacerbates the severities of natural disasters. He proposed that domesticating socio-economic rights can enhance a legal system's overall resilience and adaptiveness. The seminal case of *Government of the Republic of South African and Others v Grootboom and Others* 2001 (1) SA 46 was referred to, wherein it was decided that housing measures (as they then stood) were inadequate, that housing programmes

must be balanced and flexible, and that measures which ignore the most pertinent issues are unreasonable. Prof. Pieterse further referred to *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC), which was used as an example where meaningful engagement was offered as a solution. Meaningful engagement was further referred to in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2009 (9) BCLR 847 (CC).



Credit: Prof. Anel du Plessis, University of Stellenbosch Faculty of Law Chair in Urban Law and Sustainability Governance.

Prof. Pieterse concluded by stating that reasonableness and proportionality are under distress. To avert this distress and to mend these crises, socio-economic rights should be seen as rights of resilience, especially in that they are afforded core protections and have responsive remedies.

Sarah Swan

Prof. Swan spoke of the emerging trend of plaintiff cities, which entails judiciary and city led litigation in the US. She began by providing that climate change has meant that many more cities in the US are leading cases against the government. Even if successful, there is almost no way that the courts can cover the full monetary amount sought by the cities. Judicial perception is mixed when considering these types of cases. Many criticisms exist – mainly relating to locus standi, causation, and that they are politically fuelled. Prof. Swan went on to say that in reality, many of these claims fail in the early

stages. Despite this, the US has the most documented climate cases.

With litigation led by cities against government, the starting position is that the states may either authorise or pre-empt these issues. Sometimes, states do expressly authorise these suits (such as Wisconsin and Virginia, to name a few), but in other instances, states do not. It remains that US cities are restricted in how they can raise revenue, but there is an increasing trend of cities suing the US federal government for climate-related actions or inactions.

Oliver Fuo

Prof. Fuo spoke on the quest for efficient urban land management in South African cities and the need for purposeful judicial interpretation. He began by stating that proper planning and management of land use is pivotal to the creation and maintenance of a satisfactory quality of life for all of South Africa's people, and that when legislation which tries to regulate municipalities is intrusive, courts should not hesitate to strike it out as unconstitutional. He went on to say that those with the resources are able to challenge the rules of the municipality and that a municipality enjoys original and constitutionally entrenched powers.

Prof. Fuo referred to *City of Johannesburg Metropolitan Municipality v Zibi and Another* 2021 (6) SA 100 (SCA) where some of the municipality's powers were confirmed – that the adoption of a rates policy and the levying, recovering, and increasing of property rates by a municipal court is a legislative rather than an administrative act. This means that a validly adopted municipal rates policy has binding force as an executive policy and can be enforced. Ultimately, the intention of the law must be examined, and it must be asked (also by the judiciary) what the law sets out to achieve.

QUESTION AND ANSWER SESSION

Q 1: With by-laws, to what extent can we ensure that they are adaptable and flexible to cater for climate change, when discussing climate reliance, and moving towards resilient infrastructure, laws, cities, and especially in the socio-economic rights framework, delivering these rights in a sustainable and resilient way?

» Q 1 Response: **Prof. Marius Pieterse**

Prof. Pieterse explained that ensuring adaptability is easier with by-laws as they are meant to be procedurally adaptable tools. He said that one way to make any instrument more responsive is to review its responsiveness, and a way in which laws will become more responsive and adaptable is if the courts insist that they are when they review it.

Q 2: Where is the thin line between allowing the municipality, or not, the autonomy to practice functions, and supervising the municipality when it does not do what it should?

» Q 2 Response: **Prof. Oliver Fuo**

Prof. Fuo began by saying that it is difficult for us to have adaptive law, and judicial interpretation may be more useful, especially in the context of climate change where we know how dynamic it is. He explained that the law is usually static, but in the local government context, laws can always be revised and amended. This means that through judicial interpretation, courts have been able to take into consideration the historical context, and rights and values in the Constitution to interpret the law in such a way that it adapts to the issue which the court is faced with. Prof. Fuo explained that with supervision, there exist three main aspects: monitoring, regulating, and intervening. Further that with local government, the problems generally lie in the last two aspects, and with intervention, the autonomy of the municipality is safeguarded by virtue of the procedural and substantive requirements built into the relevant constitutional provisions.

» Q 2 Response: **Prof. Marius Pieterse**

Prof. Pieterse provided that if wanting to intervene with the autonomy of a municipality, while being in line with the Constitutional divisions of responsibility, it must be done in a way that works with, instead of against urban autonomy. Prof. Pieterse explained that the Constitution provides for mechanisms that either work with cities (section 139(5)), or they are disbanded, and a new administrator is elected, and a new administration follows.

Q 3: What are the cost implications of cities being involved in a number of cases? Is it at the cost of the taxpayer that these litigations are funded?

» Q 3 Response: **Prof. Sarah Swan**

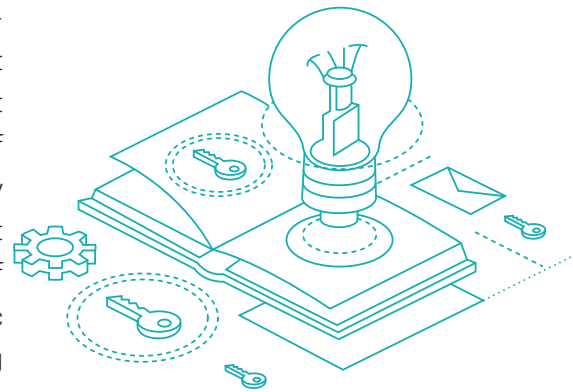
Prof. Swan answered that in large cities with their own affirmative litigation departments, the funding will mostly be taxpayer-generated. That is because the idea is that those departments can recoup those costs through settlements. She explained that for cities without the resources to have those internal departments, they will have to partner with private attorneys on the same basis that an average tort plaintiff would bring a case. Prof. Swan also explained that there is now a path to third party litigation funding for cities bringing claims in the US.

KEY REFLECTIONS AND MAIN TAKEAWAYS

The discussions were extremely interesting, vibrant, and relevant. The Urban Law Day was successful in exploring the role of the judiciary amidst considerable uncertainty of urban law issues (access to land, housing and property, poverty and informality, climate change, rapid urbanization etc.) and promoted learning, knowledge sharing and exchange of information and experiences which will better inform the role of the judiciary in the creation of more equitable and prosperous cities.

If there was one key cross-cutting message, it was that the rule of law is relevant to all three dimensions of sustainable development. By ensuring stable, transparent legal regimes, the rule of law promotes economic development. By ensuring equal opportunity and equitable

access to basic services, the rule of law promotes social development. By strengthening the legal framework to protect the environment and ensure the fair, sustainable management of natural resources, the rule of law protects the planet. Effective rule of law frameworks, together with sound implementation, help prevent and mitigate unconstitutionality, resolve grievances, and protect citizens' fundamental human rights.



Access to justice is a basic principle of the rule of law and in its absence, people are unable to have their voice heard, exercise their rights, challenge discrimination, or hold decision-makers accountable. In cities, the nature of spatial planning decisions with the potential to affect proprietary interests and cultural aspects of life, make disputes very likely. SDG 11.1 on access to adequate, safe, and affordable housing and the New Urban Agenda, reiterate that the settlement of land disputes is crucial

to enforce rights and ensure the smooth implementation of plans, informal settlements upgrading, as well as climate adaptation options (e.g., planned relocations).

A human rights-based approach dictates that the dispute resolution system must be inclusive and impartial, by

for example, providing physical and fiscal assistance to people who are unable to afford legal representation and access to the justice system. This also means recognizing alternative dispute resolution mechanisms, such as arbitration and mediation, which are generally confidential, less formal, less stressful than traditional court proceedings and importantly, seen as more accessible to the less privileged in society.

Report compiled by: Michaela O'Donoghue & Bryony Fox (University of Stellenbosch, South Africa)

www.unhabitat.org

X | @ : UNHABITAT

YouTube | UN-Habitat worldwide | UN-Habitat

www.urbanpolicyplatform.org

X | @ : @UNHABITAT_PLGS

YouTube | LinkedIn | Facebook : UN-HABITAT, PLGS

For further information, please contact:

UN-Habitat Policy, Legislation and Governance Section

Urban Practices Branch, Global Solutions Division

www.unhabitat.org



Urban Law Day

UN-HABITAT