

## Vampire or Prince?

### The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*

I like to listen. I have learned a great deal from listening carefully. Most people never listen.

– Ernest Hemingway

We are going to court because the government does not want to listen.

– Jomo Mogale, Merafong Demarcation Forum Chairman<sup>1</sup>

#### PROLOGUE

On 19 August 2005 the Municipal Demarcation Board published the following innocent-sounding suggestion of the Minister of Provincial and Local Government:

The municipal areas of Merafong City Local Municipality (CBLC8) and Westonaria Local Municipality (GT414) to be excluded from the municipal area of West Rand District municipality (CBDC8), and included into the municipal area of Southern District Municipality (DC40).<sup>2</sup>

Translation: the Merafong City Municipality – a West Rand municipality spanning the boundary between Gauteng and North West – would be ‘moved’<sup>3</sup> so as to fall entirely in

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<sup>1</sup> I Lekota ‘Flames in Khutsong’ *Sowetan* 25 May 2007 <http://www.sowetan.co.za/Columnists/IdoLekota/Article.aspx?id=473030>, quoted in 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, 63.

<sup>2</sup> Municipal Demarcation Forum ‘Proposals for the Determination or Re-Determination of Municipal Boundaries in terms of the Local Government: Municipal Demarcation Act, 1998, read with section 2 of the Local Government: Cross-Boundary Municipalities Act, 2000, and the Local Government: Municipal Structures Act, 1998’ (19 August 2005), available at <http://www.demarcation.org.za//documents/redeterminations/2005Aug19/KZN-EC%20Boundaries%20Notice1.pdf> (accessed on 15 November 2009).

<sup>3</sup> The municipality itself would not move. The provincial boundary would be moved while the municipality remained stationary. However, for ease of reference, I will, throughout this article, talk about Merafong having been ‘moved’.

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North West. The proposal was linked to the publication of two bills<sup>4</sup> that would amend the Constitution to alter provincial boundaries and eliminate all cross-boundary municipalities. These local government oddities had been universally condemned as creating unnecessary duplication and decreasing local government efficiency.

This apparently sensible bureaucratic re-arrangement set off ‘widespread and spontaneous mass protest’ in Merafong.<sup>5</sup> Beginning soon after the notice was published, and continuing throughout September, the protests were organized by political parties – including the African National Congress (ANC) – NGOs, taxis, and social movements.<sup>6</sup> In reaction to the protests, the Demarcation Board reversed course and issued a new notice keeping Merafong in Gauteng.<sup>7</sup> The community celebrated, but their ‘triumph was short-lived.’<sup>8</sup> On 31 October, only a day after they held a formal celebration, the Board – again at the Minister’s request – published a new proposal again putting Merafong entirely in North West.<sup>9</sup>

Merafong erupted. Residents took to the streets ... and then blockaded them with rocks and burning tyres. Schools were closed, interrupting Matric exams. Firebombs and more rocks were thrown. The police responded with rubber bullets. People were arrested.<sup>10</sup> An emergency meeting was held with Sydney Mufamadi, then Minister for Provincial and Local Government, on 5 November. The Minister assured residents that their concerns would be taken into account in the legislative process.<sup>11</sup> But the protests continued. At one protest a

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<sup>4</sup> The Twelfth Amendment Bill, B33B-2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Bill, B36B-2005.

<sup>5</sup> *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* [2008] ZACC 10, 2008 (5) SA 171 (CC), 2008 (10) BCLR 968 (CC) at para 135 (Moseneke DCJ, dissenting).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at para 136.

<sup>8</sup> *Ibid* at para 137.

<sup>9</sup> *Ibid.*

<sup>10</sup> For accounts of the protests, see, SAPA “‘Mafikeng is Far from Here’” (3 November 2005) *News24* available at [http://www.news24.com/Content/SouthAfrica/News/1059/351678d488e240dd9c1047b7fd98528c/03-11-2005-11-21/Mafikeng\\_is\\_far\\_from\\_here](http://www.news24.com/Content/SouthAfrica/News/1059/351678d488e240dd9c1047b7fd98528c/03-11-2005-11-21/Mafikeng_is_far_from_here) (accessed on 16 November 2009); SAPA ‘Protestors Block the Streets’ (3 November 2005) *News24* available at [http://www.news24.com/Content/SouthAfrica/News/1059/5ee076946a514b1c86aac3fa8c852e03/03-11-2005-11-39/Protestors\\_block\\_streets](http://www.news24.com/Content/SouthAfrica/News/1059/5ee076946a514b1c86aac3fa8c852e03/03-11-2005-11-39/Protestors_block_streets) (accessed on 16 November 2009); Baldwin Ndaba ‘Residents Boil Over Move to North West’ (4 November 2005) *The Star* available at <http://www.thestar.co.za/index.php?fSectionId=129&fArticleId=2980442> (accessed on 16 November 2009).

<sup>11</sup> *Merafong* (n 5 above) at para 138.

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leader reacted to the Minister’s suggestion thus: ‘The community is aware of the legislative process, but they want more face-to-face consultation.’<sup>12</sup>

A few days later, on 15 November, the National Assembly passed the bills.<sup>13</sup> The laws moved to the NCOP, which intended to pass the bill in just less than a month. The NCOP’s strict timetable meant that provincial legislatures only had until 30 November (the date of the NCOP select committee meeting) to listen to their constituents. Unlike most provincial legislatures,<sup>14</sup> the Gauteng Provincial Legislature’s (GPL) Local Government Portfolio Committee (the GPL Committee) held a joint public meeting with the North West legislature in Carletonville – Merafong’s urban centre. The meeting was well attended and the participants overwhelmingly and vociferously supported remaining in Gauteng.<sup>15</sup> The residents also made written representations to the GPL in the same vein.<sup>16</sup>

Once again, their united opposition seemed to have succeeded: on 29 November, the GPL Committee adopted a negotiating mandate to take to the NCOP select committee that would approve the Bill on the condition that it was amended to keep Merafong in Gauteng. But, again, Merafong’s residents were to be disappointed. At the select committee meeting, the GPL Committee was informed that it could not propose amendments to the Amendment Bill in the NCOP; it could only approve the whole bill, or veto the part that affected its boundaries.<sup>17</sup> Confronted with these limitations the GPL Committee reversed course and recommended a final mandate that would support the entire bill.<sup>18</sup> On 6 December the GPL approved the negotiating mandate. On 15 December, the NCOP voted unanimously in favour of the bill. The process was completed when Acting President Zola

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<sup>12</sup> SAPA ‘Khutsong Gathers to Protest Demarcation’ (11 November 2005) *Mail & Guardian Online* available at <http://www.mg.co.za/article/2005-11-11-khutsong-gathers-to-protest-demarcation> (accessed on 16 November 2009).

<sup>13</sup> *Merafong* (n 5 above) at para 134.

<sup>14</sup> For a full account of the extent of public involvement in all nine provinces, see *Matatiele Municipality & Others v President of the Republic of South Africa & Others* (2) [2006] ZACC 12; 2007 (1) BCLR 47 (CC).

<sup>15</sup> *Merafong* (n 5 above) at paras 33 (Van der Westhuizen J) and 141 (Moseneke DCJ, dissenting). See also SAPA ‘Speakers Shouted Down’ (25 November 2005) *The Citizen* available at <http://www.citizen.co.za/index/article.aspx?pDesc=10781,1,22> (accessed on 17 November 2009). The residents also made written representations in the same vein. *Merafong* (n 5 above) at para 32.

<sup>16</sup> *Merafong* (n 5 above) at para 32.

<sup>17</sup> *Ibid* at para 36.

<sup>18</sup> *Ibid* at para 37.

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Skweyiya signed the law on 24 December. Merafong would be moved to North West on the day of the local government election, 1 March 2006.<sup>19</sup>

The people of Merafong refused to accept the outcome of the ‘democratic’ process:

Khutsong was in flames on Wednesday night [December 15] as residents dodged police bullets to torch councillors’ homes and municipal buildings. ... One group were seen ripping apart a T-shirt with the president’s image on it, setting it alight while shouting: “Fuck you, Mbeki!” Resident Paseka Mofokeng said the government should stop taking decisions without their consent. “We don’t want to be incorporated into North West - we are not going anywhere,” he said.<sup>20</sup>

Residents also burned down the municipality’s library and damaged the swimming pool, roads, and other infrastructure.<sup>21</sup> Although they petered out slightly in the coming weeks, protests continued throughout December and January and intensified again in February in the lead up to the election. The government’s attitude to the protests is best summed up in President Mbeki’s contribution to the last weekly ANC newsletter for 2005.<sup>22</sup> Mbeki complained that in 2005 ‘we have seen activities that are totally foreign to our broad movement.’<sup>23</sup> He continued:

I refer to the destruction of the property and symbols of our movement, and contemptuous disregard for our movement’s democratic processes, such as those that relate to the selection of our candidates for our legislatures. ... I also have in mind mischievous efforts to elevate administrative issues, such as the demarcation of provincial boundaries, into important issues of the national democratic revolution, to divert attention away from the fundamental concerns of the masses of the people.<sup>24</sup>

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<sup>19</sup> Proclamation No R8 of 2006, published in GG 28568 on 27 February 2006.

<sup>20</sup> Baldwin Ndaba & Solly Maphumulo ‘Khutsong Erupts in Flames of Fury’ (15 December 2005) *The Star* 1, available at [http://www.iol.co.za/general/news/newsprint.php?art\\_id=vn20051215064429710C691218&sf=](http://www.iol.co.za/general/news/newsprint.php?art_id=vn20051215064429710C691218&sf=) (accessed on 18 November 2009).

<sup>21</sup> Jillian Green ‘Khutsong Family’s Memories Reduced to Ashes’ (20 December 2005) *The Star* 2, available at [http://www.iol.co.za/index.php?click\\_id=13&art\\_id=vn20051220071756474C231199&set\\_id=](http://www.iol.co.za/index.php?click_id=13&art_id=vn20051220071756474C231199&set_id=) (accessed on 18 November 2009).

<sup>22</sup> 5(50) *ANC Today* (16-22 December 2005) available at <http://www.anc.org.za/ancdocs/anctoday/2005/at50.htm> (accessed on 18 November 2009).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid. See also ‘Misunderstanding in Khutsong’ (23 February 2005) *The Citizen* <http://www.citizen.co.za/index/article.aspx?pDesc=13879,1,22> (accessed on 18 November 2009) (Speaking shortly before the election, amid continuing disturbances, Mbeki said: ‘The fact of the matter is that we now have a particular legal position. Parliament has passed various laws and all of that, including a constitutional

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When the election finally came, only 232 of the 29 540 registered voters cast their ballots.<sup>25</sup>

But the election was only the beginning of Merafong's struggle. Protests, formal demands for reincorporation into Gauteng, school boycotts and disruption of services continued on-and-off throughout 2006<sup>26</sup> and 2007.<sup>27</sup>

Meanwhile, the residents, under the banner of the Merafong Demarcation Forum (MDF) also contemplated legal action. After an unsuccessful High Court bid to postpone the 2006 election, they decided to wait for the outcome of a similar complaint in the Constitutional Court raised by Matatiele Municipality – which had been moved from KwaZulu-Natal to the Eastern Cape. After *Matatiele*<sup>28</sup> was decided favourably in August 2006 the MDF decided to approach the Constitutional Court. Further logistical problems delayed the filing until mid-2007 and the case was finally heard on 20 September 2007. The hearing was not uneventful. It was accompanied by mass protest where residents burnt tyres outside the courthouse and carried posters reading: "Fuck the oppression" and "If I die buried (sic) me upside down so that NW can kiss my ass".<sup>29</sup> After the hearing, Merafong returned to a simmer as the municipality awaited the Court's decision...

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amendment, and so on. We have an established legal position in the country and I think all of us should respect that.)

<sup>25</sup> SAPA 'ANC wins in Khutsong' (2 March 2006) *News24* available at <http://www.news24.com/printArticle.aspx?iframe&aid=f35fb89d-9989-4aad-9ff6-fcfb2f0d722f&cid=1057> (accessed on 18 November 2009).

<sup>26</sup> See, for example, SAPA 'Residents to Protest Again' (4 October 2006) *Independent Online*, available at [http://www.iol.co.za/index.php?set\\_id=14&click\\_id=6&art\\_id=qw1159975261856B221](http://www.iol.co.za/index.php?set_id=14&click_id=6&art_id=qw1159975261856B221) (accessed on 18 November 2009); Baldwin Ndaba 'Khutsong Residents Resume Reincorporation Bid' (25 August 2006) *The Star* 2, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=15&art\\_id=vn20060825040755200C747092](http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20060825040755200C747092) (accessed on 18 November 2009).

<sup>27</sup> See, for example, SAPA 'Khutsong Situation Calm' (5 March 2007) *Independent Online* available at [http://www.iol.co.za/index.php?set\\_id=14&click\\_id=6&art\\_id=nw20070305104257979C134844](http://www.iol.co.za/index.php?set_id=14&click_id=6&art_id=nw20070305104257979C134844) (accessed on 18 November 2009); SAPA 'Unruly Gang Stones Motorists' (22 April 2007) *Independent Online* available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=nw20070422090316875C283569](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20070422090316875C283569) (accessed on 18 November 2009).

<sup>28</sup> *Matatiele* (n 14 above).

<sup>29</sup> SAPA 'Protestors Burn Tyres Outside Concourt' (20 September 2007) *Independent Online* available at [http://www.iol.co.za/index.php?art\\_id=nw20070920121218285C310857](http://www.iol.co.za/index.php?art_id=nw20070920121218285C310857) (accessed on 18 November 2009).

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### INTRODUCTION

The Constitutional Court's response to the *Merafong* boundary dispute is a landmark in mapping the contours of the nature of public participation and deliberation in South Africa. It not only clarifies the legal framework, it will form a central part of public discourse about the value of public participation and deliberation.

The interesting thing about *Merafong* is that there are two ways to read it. It can be read as sucking the lifeblood out of the duty to facilitate public involvement and the ideal of public deliberation till all that is left of either is a hollow shell. *Merafong* on this reading is a Vampire. Alternatively, we can read *Merafong* as giving dormant citizenship the kiss of life by focusing attention on alternative forms of participation. Here, *Merafong* is more like Prince Charming in *Sleeping Beauty*. Neither reading is entirely satisfactory, and which you prefer will probably depend on your prior commitments about the place of participatory democracy and deliberation in a primarily representative government. However, I hope my musings on *Merafong* will achieve three things. First, I want to connect participation and deliberation as committed to the same ideal: listening. Second, I intend to show that the seemingly disparate elements of *Merafong* can be understood as speaking to that ideal. Last, I hope to suggest a framework to discuss the Constitutional Court's attitude to participation.

I begin, in Part I, by briefly outlining the theories of participatory and deliberative democracy, how they relate, and how they are incorporated in our Constitution. Part II discusses the decision in *Merafong*. I focus on three issues: the facilitation of public involvement; the rationality claim; and the capacity of provinces to propose amendments to constitutional amendment bills in the NCOP. I show how these three seemingly disparate issues all speak to the issue of listening. Part III considers the 'Vampire reading' of *Merafong* and considers a line of cases that seems to support it. In Part IV, I consider a different line of cases that suggests that the Constitutional Court has a more complicated view of participation than the Vampire reading suggests. Finally, in Part V I expand on that view, indicate how it allows the two lines of cases to be read – with only minimal friction – together. In conclusion, I explain some of the difficulties in choosing between the two and

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suggest what work still needs to be done. In an epilogue, I provide a factual account of what happened to *Merafong* after the Court decision. I leave the account without comment as I want it to serve both as an optimistic bookend to the prologue, and as an opportunity for the reader to evaluate her own perceptions about the worth of my suggestions and the place of participation in South Africa.

### **PART I: TAXONOMY OF DEMOCRACY**

To understand the decision in *Merafong* and what it means for South African democracy, we need, first, to briefly categorize the various forms of democracy at play. What follows is, necessarily, a caricature of the truly complex terrain of democratic theory. It is meant to provide only the most basic outline to frame the discussion to come.

#### **1.1 Theory**

Let's begin with the word 'democracy'. As Theunis Roux notes, '[d]emocracy is a noun permanently in search of a qualifying adjective.'<sup>30</sup> Democracy is founded on the simple idea of *self-government*.<sup>31</sup> All strains of democracy share this common theme: in some way, to some degree, through some mechanism, the people must be ruled only by themselves. Despite this shared centre, there is still a lot to fight about. Two of the central questions in designing a democratic system are: (a) *who* will take decisions? (b) *how* will they take those decisions? We can, on these rough axes, briefly categorize the most popular types of democracies both on the basis of which question they focus on and on the answer they provide.

Representative democracy answers the *who* question with: 'fairly chosen representatives'. You get different varieties within that broad field that afford more or less discretion to individual representatives or to political parties. Direct democracy, too, is concerned with *who* decides, and says: 'everybody'. Today, direct democracy is normally achieved by

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<sup>30</sup> T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed, 2006) at 10-1.

<sup>31</sup> Democracy is *not*, at least as it is understood in political theory, about majority rule. Majority rule is the dominant *mechanism* to achieve self government in most modern democracies, but it is not necessary for a state to be called 'democratic'. In fact, as I explain shortly, many theorists argue that there are far *more* democratic ways to order a society than simple majority rule.

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referendum or initiative. Participatory democracy is often seen as a compromise on the ‘*who*’ question between representative and direct democracy. It acknowledges that the realities of a complex modern state demands that representatives take most decisions, but requires extensive participation in political affairs by the general citizenry. For the participatory democrat, only decisions that flow from a process that involved meaningful public involvement are democratically legitimate.

Other forms of democracy address *how* decisions are taken. While democracy is primarily associated with voting – or what political theorists call ‘aggregation’ – as the mechanism of decision-making, decisions can also be taken by bargaining (‘interest-trading’), or by arguing about what the best decision is.<sup>32</sup> Garden variety majoritarian democracy relies, in theory, on aggregation, while pluralist democrats contend that, in fact, decisions in most democracies are taken by bargaining. Deliberative democrats believe decisions are legitimate only if they emerge from argument, or what they call ‘deliberation’. There is much squabbling about the precise nature of and conditions for ‘deliberation’,<sup>33</sup> but it involves, at a minimum, ‘arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality’.<sup>34</sup>

No actual democracies adhere to a single theory; they all incorporate elements of different levels of participation and forms of decision-making. The ideal types are not meant to describe actual democracies, but to allow us to discuss the elements of those democracies and the weight that should be given to each in our own.

With that rough structure in mind, it seems that participatory and deliberative democracy are concerned with different questions. However, if you look a bit closer at the actual theories, there is extensive overlap. Participatory democrats generally believe decisions should be taken through deliberation, and deliberative democrats almost universally call for greater

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<sup>32</sup> J Elster ‘Introduction’ in J Elster (ed) *Deliberative Democracy* (1998) 5-7.

<sup>33</sup> See, for example, A Guttmann & D Thompson *Democracy and Disagreement* (1996) (Argue that deliberation must be reciprocal – in the sense that you respect an opponent’s view, even if you think it wrong – publicity and accountability).

<sup>34</sup> Elster (n 31 above) at 8.

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citizen participation. In his call for a type of participatory democracy he calls ‘strong democracy’, Barber argues that political action must be an exercise of free choice:

Just as we would not understand a sleepwalker to be a human agent or a hysteric to be a human actor, so a rabble is not an electorate and a mob is not a citizenry. If action is to be political, it must ensue from forethought and deliberation, from free and conscious choice.<sup>35</sup>

‘Participatory politics’, Barber continues, ‘deals with public disputes and conflicts of interest by subjecting to them to a never-ending process of deliberation, decision, and action.’<sup>36</sup> Which is just as well, because the participatory democracy advocated by Barber and others,<sup>37</sup> ‘make[s] sense only in a context of public discussion wherein each individual can think, ponder and have the opportunity to change, either totally or in part, his or her original position as a result of the exchanges.’<sup>38</sup> Without deliberation, participatory politics is simply the rule of the many.

And deliberative democrats all see the deliberation they prize occurring not only amongst the elite in the halls of power, but around the dinner table and the water cooler and between citizens and the state in equal relations of power. Ackerman and Fishkin, for example, call for ‘Deliberation Day’ in which all citizens will gather in groups to discuss the issues of the day.<sup>39</sup> Michael Walzer suggests why deliberative democrats are also populists:

Imagine a group of bureaucrats deliberating with great seriousness for many hours, and then doing what they have concluded is the right thing to do – without taking into account the recorded

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<sup>35</sup> B Barber *Strong Democracy: Participatory Politics for a New Age* (20<sup>th</sup> Anniversary Edition, 2003, originally published in 1984) at 126.

<sup>36</sup> Ibid at 151.

<sup>37</sup> See, for example, C MacPherson *The Life and Times of Liberal Democracy* (1977), C Pateman *Participation and Democratic Theory* (1970).

<sup>38</sup> D Vitale ‘Between Participatory and Deliberative Democracy: A Contribution to Habermas’ (2006) 32 *Philosophy & Social Criticism* 739 at 754 (She continues: ‘The participatory conception does not share some democrats’ enthusiasm for technological innovations that could solve the time and space problems of contemporary societies by providing a direct electronic democracy, because these exclude the essential element of direct deliberations with face-to-face interactions, that is, with dialogue, discussion, exchange of arguments, doubts, wills and worries.’ Ibid.)

<sup>39</sup> B Ackerman & JS Fishkin *Deliberation Day* (2004).

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preferences of a majority of the people .... The chosen policy of the deliberating bureaucrats might well be the “best” one, but it would not be the right policy for a democratic government.<sup>40</sup>

Without extensive participation, deliberative democracy is simply the rule of the few.

Part of the explanation for the similarity in the two theories is that both participatory and deliberative democrats are reacting to the empty pluralist democracy described by Schumpeter.<sup>41</sup> In brief, Schumpeter depicted modern democracies as societies where decisions are taken by an elite few based on narrow self-interest subject only to occasional elections. Each of the more progressive forms of democracy reacts to a different element of this description. Participatory democracy objects to the exclusion of the vast majority of citizens from the decision making process. Barber calls this the ‘dispositional elitism’ of liberal democratic theory.<sup>42</sup> Deliberative democrats push back against the removal of reason from politics in favour of interest:

the ideal of deliberative democracy says that in voting it is the role, perhaps the duty, of democratic citizens to express their impartial judgments of what conduces to the common good of all citizens, and not their personal preferences based on judgments of how measures affect their individual or group interests.<sup>43</sup>

Finally, the supposed benefits of both approaches are substantially similar. Both argue that following their course will achieve better results, ensure greater legitimacy for decisions and promote enhanced feelings of citizenship. And in both theories, it is the combination of participation and reason – not either on its own – that achieves these goals.

There is, it seems to me, a clear common idea at the core of both lines of thought. Ignoring for a moment the differences of emphasis between the two, and the diversity within each camp, both theories envision a society in which the government is required to *listen* to the

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<sup>40</sup> M Walzer ‘Deliberation, and What Else?’ in S Macedo *Deliberative Politics: Essays on Democracy and Disagreement* (1999) 58 at 68.

<sup>41</sup> See generally, J Schumpeter *Capitalism, Socialism and Democracy* (1943) as discussed in Roux (n 30 above) at §10.2(i).

<sup>42</sup> Barber (n 35 above) at 95.

<sup>43</sup> Samuel Freeman ‘Deliberative Democracy: A Sympathetic Comment’ (2000) 29(4) *Philosophy and Public Affairs* 371 at 375.

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people and people are required to *listen* to each other. There is, here, a big difference between listening and hearing. In any free society people ‘hear’ each other. They know that people have different views and sometimes they are confronted with those views, but they don’t react. ‘Hearing’ is an entirely passive activity. Listening is active. It requires real engagement and a willingness to change your mind. If you interact with a person when you have no intention of changing your mind, or when the system prevents you from changing your mind, you are not listening, you are merely hearing. Participatory and deliberative democratic theorists believe in listening, and that as many voices should be listened to as possible.

### 1.2 Participation and Deliberation in the Constitution

All this theory is all well and good, but it is meaningless to a discussion about constitutional law unless it is incorporated into our Constitution. Luckily, the Constitutional Court has explicitly recognized that both participation and deliberation are part of our constitutional framework. Firstly, in *Doctors for Life* the Court, in deciding that legislation could be declared invalid for lack of public involvement in the lawmaking process, held that the Constitution has ‘participatory elements’:<sup>44</sup>

[O]ur democracy includes as one of its basic and fundamental principles, the principle of participatory democracy. The democratic government that is contemplated is partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes. Parliament must therefore function in accordance with the principles of our participatory democracy.<sup>45</sup>

The Court went on to recognize the direct benefits of participatory democracy in the same terms as participatory theorists:

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<sup>44</sup> *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 111.

<sup>45</sup> *Ibid* at para 116.

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It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling.<sup>46</sup>

The representative and participatory elements of our democracy ‘should not’, Ngcobo J argued, ‘be seen as being in tension with each other. They must be seen as mutually supportive.’<sup>47</sup> Participation is a requirement for representative democracy to work and ‘provides vitality’ to democratic representation.

Secondly, the Court has endorsed both the substantive ideal of deliberative democracy that power must be exercised in the public good, and the idea that free debate is vital to achieve that. One, in several judgments, the Court has adopted Ettienne Mureinik’s formula that the Constitution is a transformative document that constitutes ‘a bridge away from a culture of authority . . . to a culture of justification’.<sup>48</sup> The Court has interpreted this to require that ‘governmental action to relate to a defensible vision of the public good’.<sup>49</sup> Two, in discussing the privilege of members of the legislature to speak without threat of civil or criminal punishment, the Court has unanimously held that the purpose of the privilege is to ‘encourage vigorous and open debate in the process of decision-making’<sup>50</sup> and that it promotes ‘democracy and full and effective deliberation.’<sup>51</sup> It has described the privilege as ‘fundamental to democracy’<sup>52</sup> and a ‘bulwark of democracy’ that ‘advances effective democratic government.’<sup>53</sup> Three, the Court also endorsed the idea that deliberation is central to democracy – although ultimately subordinate to majority decision-making – in *Democratic Alliance v Masondo*.<sup>54</sup> The High Court too has held that members of parliament

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<sup>46</sup> Ibid at para 115.

<sup>47</sup> Ibid.

<sup>48</sup> E Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *SAJHR* 31 at 32 quoted in *Prinsloo v Van der Linde and Another* [1997] ZACC 5, 1997 (6) BCLR 759 (CC), 1997 (3) SA 1012 (CC) at para 25.

<sup>49</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 752 (CC) at para 25.

<sup>50</sup> *Swartbooi and Others v Brink and Another* 2003 (1) BCLR 21 (CC) at para 20.

<sup>51</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), 2007 (1) BCLR 1 (CC) at para 39.

<sup>52</sup> *Swartbooi* (n 50 above) at para 20.

<sup>53</sup> *Dikoko* (n 51 above) at para 39.

<sup>54</sup> 2003 (2) BCLR 128 (CC).

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must retain the freedom to vote against party lines as to hold otherwise would undermine deliberative democracy.<sup>55</sup>

Lastly, the premier commentary on the nature of the democracy envisioned by the Constitution – Theunis Roux’s chapter on Democracy in *Constitutional Law of South Africa* – recognizes the document’s participatory and deliberative elements and the synthesis between them. I don’t have the space to recount Roux’s reasoning, only to restate, in part, the principle of democracy he identifies:

Government in South Africa must be so arranged that the people, through the medium of political parties and regular elections in which all adult citizens are entitled to participate, exert sufficient control over their elected representatives to ensure that: (a) representatives are held to account for their actions, (b) government *listens* and responds to the needs of the people, in appropriate cases directly (c) collective decisions are taken by majority vote after due consideration of the views of minority parties, and (d) the reasons for all collective decisions are publicly explained.<sup>56</sup>

While the foundation of the system is clearly representative, the qualifications in (b), (c) and (d) all incorporate the twin ideas that people have a right to participate and that decisions must be based on public reason following some form of deliberation. He also includes the requirement that government *listens* to its people.

This section identified the shared beliefs of participatory and deliberative democrats and how the Constitution incorporates those ideas. The next section discusses the *Merafong* decision and indicates how seemingly disparate findings all speak to the idea of democratic listening. Before I move on, I want to pause to acknowledge that I am focusing on particular elements of South African democracy. I do not intend to provide a complete account – I leave that to Roux. My task is to discuss the impact of *Merafong* on the participatory and deliberative elements of our democracy.

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<sup>55</sup> *Max v Independent Democrats & Others* 2006 (3) SA 112 (C) at 121F. See also at *City of Cape Town v Ad Outpost (Pty) Ltd & Others* 2000 (2) SA 733 (C) at 749E (Constitution envisages a ‘deliberative democracy’).

<sup>56</sup> Roux (n 30 above) at 10-68 (my emphasis).

**PART II: Merafong**

*Merafong* is a complicated decision; there are six judgments and several inter-related issues. After being supplemented by the Justices,<sup>57</sup> the MDF's complaints were, in summary: (a) the GPL failed to 'facilitate public involvement'; (b) the decision to move Merafong to North West was substantively irrational; (c) the GPL's change of mind between its negotiating mandate (which kept Merafong in Gauteng) and its final mandate (which moved Merafong to North West) was irrational. Van der Westhuizen J wrote for a clear majority<sup>58</sup> that rejected all the challenges to the Acts. Ngcobo J – joined by the same majority – wrote to supplement Van der Westhuizen J's reasons for rejecting (c). Skweyiya J<sup>59</sup> wrote separately to tell the people of Merafong to seek a political solution. The primary disagreement came from Moseneke DCJ. The Deputy Chief Justice (joined by Madala, Nkabinde and Sachs JJ) would have upheld the challenge on ground (c) as the GPL Committee had misunderstood the consequences of its decision. Justice Madala wrote a short concurring judgment supporting that conclusion. Sachs J alone would have upheld the claim on ground (a) because the GPL had failed to return to the residents to explain their abandonment of the negotiating mandate.

I do not consider all of the arguments in the case. Particularly I do not consider the detail of the disagreement between Van der Westhuizen J and Moseneke DCJ. I feel I should explain this omission. First, the majority does not even decide whether the principle on which Moseneke DCJ relies – that a mistaken understanding of the law governing parliamentary procedure or the consequences of a vote in favour of legislation render a vote for the legislation invalid – actually exists.<sup>60</sup> Second, the debate is intensely focused on the minutiae of the s 74(8) process and the consequences of the particular legislation in question. Third, the Court is obviously wrong about whether provinces can propose amendments to s 74 bills

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<sup>57</sup> The judgments of both Moseneke DCJ and Sachs J rely primarily on their own ideas, not the submissions of the parties.

<sup>58</sup> Langa CJ, Ngcobo J, Skweyiya J, Yacoob J and Mpati AJ concurred.

<sup>59</sup> Yacoob J concurring.

<sup>60</sup> *Merafong* (n 5 above) at para 74.

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in the NCOP. This renders much of the discussion about the consequences of voting for or against a s 74(8) bill irrelevant. For these three reasons, I believe that the disagreement, while interesting, will have limited relevance beyond this case.

I do however consider elements of all three claims. I discuss (a) in full. I then contemplate (b) and (c) together. Lastly, I look at a small element of (c), whether provincial legislature's have the power to propose amendments to s 74 bills in the NCOP.

### **2.1 Public Involvement**

The main issue before the Court was whether the GPL had fulfilled their duty under s 118(1)(a) of the Constitution to 'facilitate public involvement in the legislative and other processes of the legislature and its committees'. The Court recognized in *Doctors for Life v Speaker of the National Assembly & Others* that s 118(1)(a) created a justiciable obligation on provincial legislatures<sup>61</sup> and that 'legislative processes' included determining mandates for votes in the NCOP. If the duty was not fulfilled, the legislation would be invalid.<sup>62</sup> *Matatiele Municipality & Others v President of the Republic of South Africa & Others* confirmed that this obligation applied not only to ordinary legislation, but also to constitutional amendments.<sup>63</sup>

But what is the nature of the obligation imposed on the legislature? Restating s 118(1)(a) in new language, the *Doctors for Life* Court tells us it 'means taking steps to ensure that the public participate in the legislative process.'<sup>64</sup> The legislature must however have 'considerable discretion to determine how best to fulfil their duty'.<sup>65</sup> Nonetheless, the Court would review the specific measures taken to enhance involvement for individual pieces of

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<sup>61</sup> *Doctors for Life* (n ?? above) at para 124. An identical duty rests on the NA (s 59(1)(a)) and the NCOP (s 72(1)(a)). There is a weaker constitutional duty on local government; s 152(1)(e) identifies one of the objects of local government as: 'to encourage the involvement of communities and community organisations in the matters of local government.' However, as I discuss in detail later, the Municipal Systems Act places much more specific obligations on municipalities.

<sup>62</sup> This holding was not undisputed. Three members of the Court – Skweyiya, Van der Westhuizen and Yacoob JJ – dissented. In their view, because the duty to facilitate public involvement was not included in the sections of the Constitution dealing with the legislative process – ss 74-76 – invalidity was not a necessary, nor the appropriate remedy. Justice Sachs wrote separately to caution that, although he supported invalidity in this case, it would not always be the best remedy.

<sup>63</sup> *Matatiele* (n ?? above).

<sup>64</sup> *Doctors for Life* (n ?? above) at para 120.

<sup>65</sup> *Ibid* at para 123. See also *ibid* at para 145 ('this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures.')

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legislation. The standard that government must meet in fulfilling both parts of the duty is *reasonableness*.<sup>66</sup> Expanding on that theme, Justice Ngcobo wrote:

Whether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliament's conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislation's content, importance and urgency.<sup>67</sup>

Determining what was reasonable required the Court to strike a balance between respecting the Legislature's autonomy and the 'right to participate in public affairs'.<sup>68</sup> Summarizing, Ngcobo J held: 'In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them. Our Constitution demands no less.'<sup>69</sup>

Although *Doctors for Life* and *Matatiele* were groundbreaking in establishing these principles, they were relatively easy cases to apply those principles. Both cases concerned important and controversial legislation,<sup>70</sup> and in both cases the NCOP and the provincial legislatures had recognized the need to hold public hearings on the issue, and then failed to do so. That allowed the Court to say: 'We aren't telling you what to do, we're just making sure you do what you already acknowledged was necessary.' *Merafong* was far trickier. The GPL did hold a public hearing, and endorsed the residents' views by incorporating them in its negotiating mandate. It only retreated from that position (on its version at least) in order not to scuttle what everybody – even the MDF – accepted was an admirable purpose: abolishing cross-boundary municipalities.

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<sup>66</sup> Ibid at paras 126-128.

<sup>67</sup> Ibid at para 128. See also *Matatiele* (n ?? above) at para 68.

<sup>68</sup> *Doctors for Life* (n ?? above) para 145.

<sup>69</sup> Ibid.

<sup>70</sup> *Doctors for Life* concerned legislation about abortion and traditional healers.

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The MDF's options to argue that the GPL nonetheless failed to fulfil the duty recognised in *Doctors for Life* were therefore limited, but it still had three grounds of attack. It argued, first, that the whole process was a charade as the decision to move Merafong to North West had already been taken by the ANC National Executive Committee in 2004. The Court was unimpressed with MDF's evidence on this score. Citing the committee's willingness to adopt the residents' view in its negotiating mandate, the Court concluded that the public meeting 'was not a cynical charade, but held in good faith'.<sup>71</sup> This was a *factual* holding, the Court did not reject the idea that, if given the right evidence, it might uphold such a claim.

The MDF next contended that, despite the GPL's direct and honest engagement, their participation was not 'meaningful' because their views did not carry the day. Unsurprisingly, the Court unanimously rejected this contention. In Justice Van der Westhuizen's words:

being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.<sup>72</sup>

Importantly, the Court did not see this holding as undermining the public's right to participate:

To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating

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<sup>71</sup> *Merafong* (n 5 above) at para 49.

<sup>72</sup> *Ibid* at para 50. See also *ibid* at para 282 (Ngcobo J, concurring) ('The purpose of facilitating public involvement under section 118(1) of the Constitution is not to have the views of the public dictate to the elected representatives what position they should take on a bill. The purpose of facilitating public involvement is to enable the legislature to inform itself of the fears and the concerns of the people affected. The decision as to how to address those concerns and fears is, by our Constitution, that of the elected representatives.')

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that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.<sup>73</sup>

Finally, it was suggested by Justice Sachs in oral argument – and eagerly supported by MDF’s counsel – that the GPL’s failure to report back to the community about why it could not vote to keep Merafong in Gauteng rendered the whole participation process unreasonable. The majority resisted this tempting solution. While it acknowledged that ‘[f]rom the perspective of respectful dialogue and the accountability of political representatives it might well have been desirable<sup>74</sup> to report back to the community, that did not make the rest of the process unreasonable. ‘The fact is’, Van der Westhuizen J held, that the community had a proper opportunity to air their views. The previous decisions of this Court ... do not require an ongoing dialogue.<sup>75</sup> There was little, if any, chance that more consultation would change the outcome and more talking without any hope of different results, ‘could strengthen possible perceptions that the consultation was not meaningful.’<sup>76</sup>

Sachs J would have upheld this point. The failure to return to the community, in his view, undermined all the rationales for requiring public participation in the first place:

It diminished the civic dignity of the majority. It denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcome in the eyes of the people. And finally, it gave rise to a strong perception ... that the legislative process had been a sham because an irreversible deal had already been struck at a political level outside the confines of the legislative process in terms of which, come what may, Merafong was going to go to North West.<sup>77</sup>

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<sup>73</sup> Ibid at para 51.

<sup>74</sup> Ibid at para 55.

<sup>75</sup> Ibid at para 59.

<sup>76</sup> Ibid. But see *ibid* at para 291 (‘In some ways an interrupted dialogue, when expectations of candour and open-dealing have been established and certain unambiguous commitments have been made, can be more disruptive of a relationship than silence from the start might have been.’)

<sup>77</sup> Ibid at para 292 (Sachs J is referring to the benefits ascribed to participatory democracy in *Doctors for Life* (n ?? above) at para 115, quoted at § ?? above.)

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He emphasised that he was not calling for continuous dialogue in all cases.<sup>78</sup> But in the peculiar circumstances of this case, it was.<sup>79</sup> With characteristic eloquence, Justice Sachs summed up his objection:

Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve. ... In choosing not to face the music (which, incidentally, it had itself composed) [the GPL] breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government.<sup>80</sup>

### 2.2 Rationality

I first discuss the substantive rationality claim – that there was no rationale to move Merafong at all – and then the claim that there was no reason for the GPL to change its mind after it had adopted the negotiating mandate.

#### 2.2.1 Substantive Rationality

The MDF argued that moving Merafong to Gauteng was irrational. The Court has regularly repeated the standard for testing the rationality of law: the law must bear ‘a rational connection to a legitimate government purpose’.<sup>81</sup> In *Merafong*, Justice Van der Westhuizen employed slightly different language – ‘a link is required between the means adopted by the legislature and the end sought to be achieved’<sup>82</sup> – but the substance of the test is the same.

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<sup>78</sup> *Merafong* (n 5 above) at para 293 (‘[T]here can be no doubt that participatory democracy does not require constant consultation by the Legislature with the public, nor does it presuppose that the views of the community will be binding on the Legislature, nor that the Legislature is precluded from changing its mind. Far from it. What is involved is not a set of prescriptions but an appropriate civic relationship.’)

<sup>79</sup> The three factors Sachs J identified as requiring further communication were: (a) the nature of the legislation; (b) the impact on the community; and (c) the strong expectation afforded by the Municipal Demarcation Board’s second demarcation and the negotiating mandate that they had convinced government of their case. Ibid at paras 295-297.

<sup>80</sup> Ibid at paras 300-301.

<sup>81</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) at para 53. See also, e.g., *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para 25 (CC); *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) at para 17 (CC); *Weare & Another v Ndebele NO & Others* [2008] ZACC 20 at para 46 (CC); *Van der Merwe v Road Accident Fund & Another* 2006 (4) SA 230 (CC) at para 42.

<sup>82</sup> *Merafong* (n 5 above) at para 62. See also, *Merafong* at para 171 (Moseneke DCJ, dissenting) (‘As a general rule courts should not attempt to second guess the legislature on the wisdom or otherwise of legislation properly adopted’) and para 260 (Ngcobo J, concurring) (‘It is by now axiomatic that our Constitution requires legislation to be rationally related to a legitimate government purpose. If legislation fails to meet this requirement, it is

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The law must, in some way, achieve the purpose it was intended to serve, and that end must be a legitimate one. In the context of *Merafong* that required that moving Merafong from Gauteng to North West served some purpose.

The Constitutional Court was presented with detailed arguments from both sides about why Merafong's better home would be in one province or the other. The residents passionately contended that service delivery would be better in Gauteng, that it would be easier for them to access government services in Gauteng<sup>83</sup> and that they felt an emotional attachment to Gauteng.<sup>84</sup> The government responded that Merafong needed to be moved to North West to increase that province's share of the equitable revenue,<sup>85</sup> and that Merafong already received many services from the neighbouring North West town of Potchefstroom.<sup>86</sup>

Justice Van der Westhuizen did not 'succumb[ ] to the temptation' to consider these arguments.<sup>87</sup> Instead, he noted that the purpose of the Acts was to abolish cross-boundary municipalities. This was a legitimate purpose that could be achieved in '[m]ore ways than one', including locating Merafong entirely in Gauteng or entirely in North West.<sup>88</sup> 'From economic, geographical and other perspectives the choice can be debated, but', the Court affirmed, 'it is one for the legislature to make.'<sup>89</sup>

### 2.2.2 Change of heart

While all the judges agreed on the general claim, they disagreed about whether it was rational for the GPL to change its mind. The simplest answer appears in Ngcobo J's separate judgment. He employed, with the support of the majority, the same reasoning that Van der

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inconsistent with the rule of law and is therefore invalid. This standard applies not only to statutes but also constitutional amendments. The requirement of rationality in legislation is a safeguard against arbitrariness or caprice in the exercise of legislative power. It is a requirement of the rule of law, one of the foundational values of our constitutional democracy.)

<sup>83</sup> Ibid at para 110.

<sup>84</sup> Ibid at para 112.

<sup>85</sup> Ibid at para 113.

<sup>86</sup> Ibid at para 111.

<sup>87</sup> Ibid at para 114.

<sup>88</sup> Ibid. See also ibid at para 274 (Ngcobo J, concurring) ('This standard does not permit us to substitute our opinions as to what is appropriate for the opinions of the Legislature.')

<sup>89</sup> Ibid at para 114.

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Westhuizen J used to dismiss the general rationality claim. In crafting the final mandate the GPL was motivated, he argued, by a desire to (a) abolish cross-boundary municipalities; and (b) create viable municipalities.<sup>90</sup> As supporting an un-amended bill achieved those twin goals, it was rational to do so, even if there was no other reason to prefer the final mandate to the negotiating mandate.<sup>91</sup>

Moseneke DCJ took a different position. In his view, these reasons were insufficient to explain the *change* as the GPL, through its committee, was equally motivated by these two concerns when it adopted the negotiating mandate. ‘A reversal of this position without any explanation, prima facie, points to arbitrary or irrational conduct. There must therefore be a rational ground *for the reversal of its position*.’<sup>92</sup> The reasons offered by the GPL were insufficient for this task. The GPL believed that it could only vote ‘aye or nay’ for the whole bill and that the consequence of voting ‘nay’ would prevent the abolition of cross-boundary municipalities at least in the whole of Gauteng,<sup>93</sup> if not the whole country, and might disrupt the approaching local elections. Moseneke DCJ rejected all these assertions. In his view, the GPL could support the general part of the bill abolishing cross-boundary municipalities, but reject one of the changes to its boundary. This would not have any of the negative effects the GPL feared. It would instead split Merafong in half according to the existing provincial boundary which, in his view, was precisely what the people of Merafong desired. The change was therefore irrational and he would have invalidated the legislation.

Van der Westhuizen J disagreed with this approach on at least three grounds. First, he interpreted the residents’ demand to be for the *whole* of Merafong to go to Gauteng. Second, he would afford the GPL only one vote in the NCOP. As a consequence he was not, thirdly, willing to discount the possibility that at least some of the negative consequences the GPL identified would materialise. He therefore believed the change in mandate was rational.

### **2.3 Proposing Amendments**

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<sup>90</sup> Ibid at para 264.

<sup>91</sup> Ibid at para 268.

<sup>92</sup> Ibid at para 175 (my emphasis).

<sup>93</sup> The Act altered Gauteng’s boundary in two other regions.

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As part of the second leg of the rationality inquiry, the Court had to consider whether the legal advice the GPL Committee received – that it could not propose amendments to constitutional amendments in the NCOP – was correct. The Court unanimously held that it was. The Court had three bases for its decision. First, it noted that s 74 of the Constitution does not make specific provision for amendments while ss 75 and 76 – which deal with legislation other than constitutional amendments – does. The implication, according to the Court, is that the Constitution does not intend amendments to be made to constitutional amendments.

Second, the procedure in the NCOP is a mandated procedure. In the Court’s words:

Although the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned. The reason is of course the mandated nature of the process.<sup>94</sup> Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.<sup>95</sup>

Third, rule 174(3) of the Joint Rules of Parliament only makes provision for amendments following a s 74(8) veto which affects part of a bill. In that case the bill reverts to the National Assembly which must reconsider the new version – the bill minus the vetoed portion – and may amend it and the process starts again. The implication, according to the Court, is that there is no space for amendments outside that process.

### **2.4 Merafong is about listening**

While s 118 participation, rationality and the power to propose amendments seem to be a collection of unrelated issues, all those issues are connected by a common thread: listening in the participatory and deliberative sense. Let’s begin with the obvious. The decision on s 118

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<sup>94</sup> See eg Woolman et al *Constitutional Law of South Africa*, 2nd ed. Original Service 07-06 (Juta, Cape Town 2007) 17-5: “Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates.” (original footnote).

<sup>95</sup> *Merafong* (n 5 above) at para 80.

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defines the extent of the government’s obligation to listen when it facilitates public involvement. Similarly, the ability to propose amendments determines the conditions for deliberation when the NCOP considers a constitutional amendment. There is more space for meaningful participation (by provincial delegations) and deliberation if amendments can be proposed because more options are on the table.

However, rationality is also connected to deliberation and participation. How carefully the Court is willing to scrutinize the rationality of government action determines the outer boundaries of the quality of deliberation the Constitution demands. The more exacting the Court is, the closer it pushes the legislative (and executive) branch to the ideal of deliberation where only public reasons count and the decision-maker acts only after considering all views. The less demanding the Court’s review, the more space it provides for unprincipled decision-making based on private interests and for government to take decisions *without listening* to alternatives, whether from political parties, interest groups or the general public.

To see the relevance of rationality review to participation, it is helpful to consider the public participation and rationality challenges as different stages of the same challenge. We can make public participation meaningful in two ways. We can intervene by looking at the reasons presented to lawmakers and considering whether they should or should not have rejected them. That is a stringent standard that the Court rejects in *Merafong*. But we can also increase (at least slightly) the relevance of participation by demanding that the outcomes of the process – the laws – are rational, independent of what happened in the public participation process. The stricter we are at that end stage (the more likely courts are to invalidate laws as irrational) the more likely government is to *listen to* – rather than simply hear – compelling arguments at the participation stage.

Of course, this rests on the notion that rationality is a malleable, rather than a determinate concept. It is, and I explain in more depth below how the degree of scrutiny can be manipulated.<sup>96</sup> But for now the contrast between the majority and Moseneke DCJ will suffice to make the point. The majority, in Ngcobo J’s judgment, is willing to call both the

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<sup>96</sup> See 3.2 below.

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law itself and the GPL's change of mind 'rational' because there is a reason – the abolition of cross-boundary municipalities – supporting each. Moseneke DCJ is willing to accept that explanation for the law, but once the GPL Committee adopted one of two positions that achieved that goal (keeping Merafong in Gauteng), he demands an additional reason for reverting to the other (moving Merafong to North West). Independent of who you think is right on the facts, the higher standard set by Moseneke DCJ is more likely to weed out private interests and encourage participation. That is so because, once it has accepted a public-minded reason, the government must find a *public reason* to reject it. It cannot change course for vaguely defined and unlikely fears (interrupting the elections) nor for private reasons (ANC headquarters says so). And government would be even more inclined to listen if Moseneke's standard applied to the general case where government did not explicitly change its mind.

This section outlined the Court's reasoning and explained how the various factors, to varying degrees, relate to the political ideal of listening. The next section provides a pessimistic account of *Merafong* as sucking the life out of participation and deliberation.

### **PART III: COUNT *MERAFONG***

Here I explain how each of the three issues discussed previously could have been decided differently and how the decisions the majority reached can be viewed as diminishing the force of participation and democracy in our constitutional structure. I then describe two other cases that supports the idea that the Court is no fan of listening. To be clear, the views here are not, necessarily, my considered views, they are simply one way of looking at the case.

#### **3.1 'Cynical Charade'**

The gut reaction of a participatory democrat to the decision on s 118 is disappointment. The reasoning seems to strip the right announced in *Doctors for Life* – a right that held up so much promise of promoting public participation – of anything but purely procedural content. It also completely subordinates participatory democracy to representative

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democracy. Ironically, Justice Van der Westhuizen anticipated exactly this outcome in his *Doctors for Life* dissent:

I do not necessarily know how I might respond if members of the legislature decide to pursue the policies of their political party and in the process reject or ignore submissions made to them by a member of the public, which I may regard as eminently more reasonable. If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to “involve” the public by for example mechanically holding public hearings for every piece of legislation – or to make sure that hearings are not promised as in this case – participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it.<sup>97</sup>

After *Merafong* a legislature can meet its constitutional obligations by simply holding public hearings on any legislation that may be controversial. Even if the lawmakers *know* in advance that nothing the participants say could change their minds, they need do nothing else to ‘facilitate public involvement’.

Now, to be fair, the Court does not explicitly rule out the possibility that it will find that the duty to facilitate public involvement was not fulfilled if legislators attend hearings with metaphorical earplugs. By holding that ‘[p]ublic involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public’,<sup>98</sup> Justice Van der Westhuizen implies that if a plaintiff could show that the legislators were not willing to consider alternatives, the participation would not meet the *Doctors for Life* standard. But although the door may remain open in theory, it is virtually impossible to imagine evidence that would satisfy a court that the legislators were not open to persuasion. Unless the legislators themselves announced that the only holding the hearings for show – a possibility I

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<sup>97</sup> *Doctors for Life* (n ?? above) at para 244. *Merafong* Van der Westhuizen J was unwilling to explicitly endorse *Doctors for Life* Van der Westhuizen J’s pessimistic diagnosis. In arguing in favour of intervention, *Merafong* specifically referred to the *Doctors for Life* passage. Van der Westhuizen attempted to avoid any conflict by noting that his was a minority judgment and that *Merafong* did not question the correctness of the *Doctors for Life* majority. *Merafong* at para 46. While one can appreciate the tightrope the Justice had to walk, this response is entirely unconvincing. *Merafong*’s point in referring to the passage was that if, when it applied the *Doctors for Life* standard in its case, it made it purely procedural, then Justice Van der Westhuizen would be right about the emptiness of the *Doctors for Life* doctrine. In order to avoid that outcome, the *Merafong* court should not endorse a purely procedural right. That argument is not answered by simply noting that the insight came from a minority judgment.

<sup>98</sup> *Merafong* (n 5 above) at para 51.

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think we can discount – there would be no way to rebut the government’s assertion that they considered the public’s views, but those views were in ‘direct conflict with the policies of Government’.<sup>99</sup> And that conflict is enough to satisfy *Merafong*. It is the combination of the impossibility of finding evidence of earplugs, and the fact that ‘policies of Government’ justify ignoring public submissions that renders it fairly pointless to legally enforce this duty.

The story behind the passage of the KwaZulu-Natal Slums Act suggests that government is well aware of this legal loophole. This is the account of the public hearing given by Sbu Zikonde, the President of Abahlali Basemjondolo:

They started with a police helicopter just above us, flying low over the settlement. There were police everywhere. We were not allowed to speak if we couldn’t quote a section of Act. Those who did speak were dismissed without respect. Our concerns were treated as if they were ignorant or stupid. It became clear that there was no reason for the legislature to hold this public meeting except that they were required by the law to do it. We organized many shack dwellers to attend this meeting. We prepared for it very carefully. We read that Bill together line by line. We discussed each point in that Bill. On the day the Kennedy Road Community Hall was fully packed. But our presence was turned to be used to justify the passing of the Bill into an Act on the basis that a lot of people were present to endorse the Act! It is thus clear that the good move of holding public meetings can easily be monopolized and abused in order to justify the exclusion of the public from the discussions that really matter.<sup>100</sup>

And when Abahlali challenged the constitutionality of the Act, they did not raise the futility of the hearings. It is of course possible – likely perhaps – that often government will honestly seek and engage with the public. But insofar as *Doctors for Life* suggested that the Constitutional Court could ensure that they did, *Merafong* tells us that it is up to government whether it pays attention to its citizens or not. Commenting on *Doctors for Life*, Czapanskiy and Manjoo note that people will only continue to participate if ‘legislators act respectfully during hearings, make themselves open to changing their minds, and be prepared to justify

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<sup>99</sup> *Merafong* (n 5 above) at para 50.

<sup>100</sup> S Zikode ‘Meaningful Engagement’ available at <http://www.abahlali.org/node/5538> (accessed on 20 November 2009).

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their decisions in the same fair and open participatory process.<sup>101</sup> It is precisely those conditions – which *Doctors for Life* seemed to promise – that *Merafong* removes.

Those more sympathetic to the *Merafong* majority might argue that there was really no alternative that did not involve an undue judicial intrusion into the legislative sphere. This is a powerful argument, and it is the basis of the more optimistic account of *Merafong* I offer below.<sup>102</sup> However, while I do not intend to rebut it entirely, I do want to note that there were at least three alternative conceptions of s 118 that would make participation more meaningful. First, Justice Sachs’ duty to report back. Second, in *Doctors for Life*, the Court held that legislative timetables ‘must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.’<sup>103</sup> The need to meet a legislative timetable cannot, ordinarily, deny the right to participation. This issue did not directly arise in *Merafong* because the GPL did hold hearings and therefore, according to the majority, satisfied its duty under s 118. Yet, the primary driver for changing the negotiating mandate was, ultimately, time. If the local elections had not been so near, the GPL would no doubt have felt far more comfortable sending the legislation back to the NA to be amended. And there was no reason, other than disorganization or purposefully preventing debate, that the amendment had to be introduced to parliament so close to the election. If the court had extended the scope of the s 118 inquiry to include what happens between public hearings and the ultimate vote – not an outrageous position – then the timetable would have been relevant and the process might have been found wanting. Finally, in other contexts (which I discuss in detail later<sup>104</sup>) the Court *has* been willing to enter into the substance of government’s engagement with people and to require them to adopt reasonable possibilities that arise through deliberation. It is conceivable (although perhaps not advisable) that they could have done so here as well.

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<sup>101</sup> S Czapanskiy & R Manjoo ‘The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of this Right’ (2008) 19 *Duke Journal of Comparative and International Law* 1 at 19-20.

<sup>102</sup> See 5.2 below.

<sup>103</sup> *Doctors for Life* at para 194.

<sup>104</sup> See 4 below.

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In sum, while the Court wants participatory democracy to ‘supplement and enhance the democratic nature of general elections and majority rule’,<sup>105</sup> the effect of *Merafong* is to subordinate participation to representation. Participation is only relevant if and when representatives want it to be.

### 3.2 Irrational Democracy

The Vampire view of *Merafong* requires a bit of diversion into the theory of the malleability of rationality review. I have explained this phenomenon in detail elsewhere,<sup>106</sup> but in short it says this: the outcome of a rationality review depends on a number of variables within a court’s control: (a) how it defines the action that it is subjecting to rationality review; (b) the level of abstraction at which it states the purpose; (c) the degree of connection it requires between the law and the purpose; and (d) what it means by ‘legitimate’. In this instance only (a) and (b) are relevant, so I will focus on those.

The question the Court answers in *Merafong* is: does the abolition of cross-boundary municipalities serve the purpose of abolishing cross-boundary municipalities. Of course it does because the *act* is defined as identical to the *purpose*. That is very different from the question the MDF asked the Court to decide: whether putting Merafong in North West *rather than* Gauteng served a legitimate government purpose. In this question the *act* is stated more specifically and cannot be answered by simple resort to ‘abolishing cross-boundary municipalities’ because that goal is served equally well no matter which province Merafong is placed in. It demands a more specific reason that would be served by putting Merafong in North West.<sup>107</sup> This is effectively the same move Moseneke DCJ makes to require a more specific reason for the change in mandates. In my view, however, it can apply with equal force even if the GPL had originally decided to place Merafong in North West.

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<sup>105</sup> *Merafong* (n 5 above) at para 50.

<sup>106</sup> M Bishop ‘Rationality is Dead! Long Live Rationality! Saving Rational Basis Review’ in S Woolman & D Bilchitz (eds) *Is This Seat Taken?* (forthcoming 2010).

<sup>107</sup> For a contrary point of view, see A Price ‘The Content and Justification of Rationality Review’ n S Woolman & D Bilchitz (eds) *Is This Seat Taken?* (forthcoming 2010).

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Now, the Constitutional Court has regularly cautioned: ‘As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way.’<sup>108</sup> On this understanding, it would be inappropriate to ask whether cross-boundaries could have been abolished ‘better’ by keeping Merafong in Gauteng. As attractive as this formulation may be to judges fearful of intruding into the legislative realm, *it does no work*. It does not tell us how to define either the method or the object and therefore does not tell us which question to ask.

The absurdity of phrasing all rationality challenges the way the *Merafong* Court does can easily be demonstrated. It would be rational, on the *Merafong* Court’s analysis, to abolish cross boundary municipalities by putting Merafong in the Western Cape and linking the two with a 1 metre wide strip along the N1. It would also be rational to break up Merafong so that the boundary of Gauteng resembled an elephant, a giraffe, or the ANC coat of arms. It would be rational to make each square kilometre of South Africa a separate province, as long as no municipality crossed a boundary. The fact that these are all obviously *irrational* should tell us there is something wrong with the way the Court analyzes rationality.

I do not mean to say that the outcome in *Merafong* was wrong. There were, arguably, some reasons to prefer North West as a home for Merafong over Gauteng, even if those reasons were outweighed by reasons on the other side. When there are reasons on both sides, the Court should not intervene.<sup>109</sup> My difficulty with Van der Westhuizen and Ngcobo JJ’s analysis of rationality is not the outcome, but the precedent the framework sets for future rationality challenges. It makes the courts toothless – or, at best, fickle and unprincipled – in ensuring the rationality of government action.<sup>110</sup>

And that – at least on the negative view – decreases the constitutional value of listening. As I explained above,<sup>111</sup> if the goal of listening is to ensure government reaches the best decision, then the removal of an institutional check that ensures decisions are, at the very

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<sup>108</sup> *Prinsloo v Van der Linde & Another* [1997] ZACC 5, 1997 (6) BCLR 759 (CC), 1997 (3) SA 1012 (CC) at para 36.

<sup>109</sup> Price (n 107 above).

<sup>110</sup> I have suggested a test that tries to ensure government rationality without undue judicial interference in the other branches.

<sup>111</sup> See 2.2 above.

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least, rational, is a negative. To the point differently, the Court's rationality standard allows government to choose a single abstract purpose and then select any means that have some rational chance of achieving the end. Even if there are other ways to achieve the same goal that are not merely better, but serve all the ends the government's proposed method does and more, without any negative side-effects, government is entitled to stick to its method, because... well, just because really. This discourages it from listening to alternatives when it likes its initial proposal and it disincentivises citizens from suggesting alternatives.

Again, there is every possibility that government will often act rationally and abandon irrational plans in favour of rational ones suggested in the public participation process. My point is that the Constitutional Court is structuring our law – and therefore influencing the character of our democracy – so lawmakers don't have to listen if they don't want to.

### **The Power to Amend**

To explain the Vampire reading of the Court's decision on this score, it is first necessary to explain why the Court was wrong to conclude that provincial delegations cannot propose amendments to s 74 bills in the NCOP. Recapitulating, Van der Westhuizen J offered three reasons for his holding: (a) s 74, unlike ss 75 and 76, does not mention amendments; (b) the NCOP procedure is a mandated one; (c) rule 174(3) provides a special procedure for s 74(8) bills.

These reasons, individually and collectively, fail to support the Court's conclusion. The problem is not that they are 'wrong'; they are all technically correct. The problem is that each of the three rationales leaves a great deal out.

One: It is true that the Constitution is conspicuously silent on the issue of amendments to s 74 bills, but it does not explicitly prohibit them. It is plausible to interpret this silence, as the Court does, as prohibiting amendments. But is there any underlying principle supporting that reading? It surely does not serve to enhance any form of democracy. The inability to propose amendments severely restricts the ability of delegations to the NCOP to listen to each other. A delegation may be aware of the concerns of other provinces, but if it cannot

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respond by supporting a change to the legislation they are considering, their scope to accommodate those concerns all but disappears. The only option is the unattractive one of rejecting a bill altogether; an unattractive prospect when most legislation contains a range of provisions, or when it is on an urgent timetable. The *Merafong* rule also renders representatives less effective at representing the wishes of their constituents. The story of *Merafong* makes these points more forcefully than any further explanation could.

But what about the Court's argument that it is the mandated nature of the NCOP that requires that amendments be prohibited even at some cost to democracy? The best answer to this is to look at ss 75 and 76 of the Constitution. The NCOP follows a mandated procedure for *all legislation* not just constitutional amendments. The Constitution explicitly contemplates the possibility of amendment within that mandated structure for other bills, and the Joint Rules explain how that occurs. Is there any reason why amendment would be practical for other bills, but not constitutional amendments? Absolutely none. If anything, amendments to our basic law require greater deliberation, participation and more effective representation than ordinary legislation. Those are exactly the goods that prohibiting amendment denies.

How then do we deal with the difference between ss 75 and 76 on the one hand, and s 74 on the other? The best explanation is that the Constitution leaves it up to the various legislative bodies – the NA, the NCOP and the various provincial legislatures – to decide how to deal with amendments to s 74 bills. That leads us to the most glaring omission in the Court's reasoning: the Court inexplicably fails to mention that the Joint Rules and the NCOP's rules make *specific provision* for provincial delegations to propose amendments to s 74 bills in the NCOP.<sup>112</sup> Rule 224(1)(a) of the NCOP Rules reads: 'After a [s 74] Bill has been placed on the Order Paper but before the Council decides the Bill a member may place amendments to the Bill on the Order Paper.' The rest of NCOP rules 224 and rules 225 and 228 go on to describe in great detail which amendments can be made, how they must be made, and the procedure to follow after amendment. That procedure is largely replicated in Joint rules

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<sup>112</sup> The GPL's rules do not directly address the question, but they say nothing to suggest that the GPL could not mandate its delegation to propose an amendment.

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176-179 and involves referral to a mediation committee virtually identical to the procedure followed for any other bill.

But isn't there a difference between s 74(8) bills and other s 74 bills? Perhaps the Court believed rule 174(3) deals exclusively with s 74(8) bills and the other rules that I quote above do not apply to s 74(8) bills. There is no reason to credit that suggestion. First, the Court's reasoning applies to *all* s 74 bills. Second, there is nothing in the rules that suggest that s 74(8) bills can only be amended by veto while other s 74 bills can, nor is there any principled reason to treat them differently. The explanation for rule 174(3) is that it is not at all concerned with the power to propose amendments but with the consequences of exercising the s 74(8) veto *without amendment*. Amendments for *all* s 74 bills are covered by the detailed procedure in the subsequent rules.

I cannot explain why the Court did not consider this reasoning or the rules I describe. The fact that it did not and was willing to rule out the possibility of amendments in the face of obvious arguments to the contrary is extremely worrying. I do not wish to be melodramatic about this. The proposal of amendments to s 74 bills in the NCOP does not arise that often and lawmakers remain free to listen to each other in all other contexts. But *Merafong* suggests that the Court does not understand the vital role the ability to react meaningfully to the opinions of others – to listen – must play in any participatory or deliberative process. And *Merafong* is not, unfortunately, an isolated incident.

### **3.4 Supporting Case Law**

There are at least two cases where the Court was unwilling to enforce the requirement that government *listen* to alternative views. In both cases, the majority valued efficient executive action higher than participation and deliberation. And in both cases there were strong dissenting voices that extolled the benefits of strong democracy.

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The first case is *Democratic Alliance & Another v Masondo NO & Another*.<sup>113</sup> The Court had to decide whether mayoral committees established under s 60 of the Local Government: Municipal Structures Act<sup>114</sup> were “committees of the [municipal] council” that must, in terms of s 160(8) of the Constitution,<sup>115</sup> include minority party representation. Langa DCJ, writing for the majority, noted that local government served (at least) two important goals:<sup>116</sup> ‘the development and promotion of democracy’ and ensuring ‘that government is efficient and effective in the rendering of services and the promotion of social and economic development’.<sup>117</sup> Although he conceptualized these twin goals as ‘mutually reinforcing’<sup>118</sup> he ultimately concluded that s 160(8) permitted the legislature to *exclude* minority parties from mayoral committees. A mayoral committee, Langa DCJ held, is an executive, not a ‘deliberative’ body, and its ‘primary purpose ... is to ensure effective and efficient government and service delivery’, not to deliberate.<sup>119</sup>

Justices Sachs wrote a judgment in which, while ultimately concurring with the majority, he stressed the virtue of participative, deliberative democracy:

The requirement of fair representation emphasises that the Constitution does not envisage a mathematical form of democracy, where the winner-takes-all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered. ... The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. In the end, the endeavours of both majority and minority parties should be directed not to exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, “South Africa belongs to all who live in it . . .”.<sup>120</sup>

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<sup>113</sup> [2002] ZACC 28, 2003 (2) BCLR 128 (CC), 2003 (2) SA 413 (CC). My use of *Masondo* is inspired by, and relies on, Theunis Roux’s detailed discussion of the case. Roux (n 30 above) at 10-72 – 10-75. Those seeking more detailed and insightful analysis along similar lines will find it there.

<sup>114</sup> Act 117 of 1998.

<sup>115</sup> Section 160(8) reads:

<sup>116</sup> He finds these goals in s 152 of the Constitution. *Masondo* (n 113 above) at para 16.

<sup>117</sup> *Masondo* (n 113 above) at para 17.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid* at para 18.

<sup>120</sup> *Ibid* at paras 42-43 (Sachs J, concurring).

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He came down against mandating minority party participation because he believed the Constitution gave Parliament sufficient leeway to structure local government in various ways, including one-party mayoral committees.

O'Regan J too held that requiring deliberation would 'enrich the quality of our democracy,' but she came down against the majority's interpretation of s 160(8)<sup>121</sup> Deliberation at the local level allows everybody concerned to 'contribute to the shared resolution of problems in a manner antithetical to our past but consistent with the process of transformation of local government'<sup>122</sup> and 'may well serve to deepen and legitimise [sic] democracy and may facilitate agreement about the manner in which transformation should take place.'<sup>123</sup> Relying on the mixed character of local government – which is both legislative and executive – she concluded that even mayoral committees must have minority party representation. Majority-rule is the principle for ultimately taking decision, but deliberation is the principle that governs the process up to the taking of the decision.

In the second case – *Masetlha v President of the Republic of South Africa & Another* – the former head of the National Intelligence Agency challenged his dismissal by the President on several grounds, including that the President had not granted him a hearing before firing him.<sup>124</sup> The claim was rooted either in existing administrative law precedent requiring procedural fairness when dismissing public servants, or in the basic principle of legality. The majority found against Masetlha on both legs. 'It would not be appropriate', Moseneke DCJ wrote, 'to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government'.<sup>125</sup> As to

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<sup>121</sup> Ibid para 78 (O'Regan J, dissenting).

<sup>122</sup> Ibid at para 62 (O'Regan J, dissenting).

<sup>123</sup> Ibid at para 72 (O'Regan J, dissenting).

<sup>124</sup> [2007] ZACC 20, 2008 (1) SA 566 (CC), 2008 (1) BCLR 1 (CC).

<sup>125</sup> Ibid at para 77. For criticism of this part of the decision, see C Hoexter 'Clearing the Intersection: Administrative Law and Labour Law in the Constitutional Court' (2008) 1 *Constitutional Court Review* 209 at 231 ('When one considers how well established the *audi alteram partem* principle is in our law generally, and how well established it is in the context of dismissal (at least in administrative law), the majority's conclusion seems sadly retrogressive.' (footnote omitted)).

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the second leg, although the Deputy Chief Justice admitted executive action comply with the strictures of legality and rationality, neither included a duty to hear the other side.<sup>126</sup>

In dissent,<sup>127</sup> Justice Ngcobo – joined by Justice Madala – explicitly recognized that both participatory governance and rational deliberation were at stake. He held, first, that ‘it is apparent from the Constitution that the democratic government that is contemplated is a participatory democracy which is accountable, transparent and requires participation in decision-making.’<sup>128</sup> Second, he explained the link between rationality and hearing the other side:

Acting fairly provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision. It enables the decision-maker to make a decision after considering all relevant facts and circumstances. This minimises arbitrariness. There is indeed an inter-relationship between failure to act fairly and arbitrariness.<sup>129</sup>

He makes the same point even more forcefully a few paragraphs later: ‘[The *audi* maxim] provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision ensures that the decision maker has all the facts prior to making a decision. This is essential to rationality, the sworn enemy of arbitrariness.’<sup>130</sup>

As additional cases where Court has preferred results that downplay or reject the value of listening in favour of efficient decision-making, *Masondo* and *Masetlha* provide support for the Vampire interpretation of *Merafong*. Despite the three majorities’ reliance on efficiency as the over-riding principle, none of the three dissenters suggested that efficient decision-making

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<sup>126</sup> *Masetlha* (n 124 above) at para 82. The judgment goes on to hold that even if procedural fairness was a requirement, it was satisfied in this case because the President asked Mr Masetlha for his views on the situation leading to his dismissal, although President Mbeki did not mention the possibility of dismissing him. As Hoexter notes, this standard sadly dilutes the quality of the *audi alteram partem* rule. Hoexter (n 125 above) at 233. It would also lessen the quality of the deliberation as one side would not understand the purpose of the deliberation. However, the much stronger point for my purposes is that the majority would be happy if no deliberation occurred *at all*.

<sup>127</sup> Justice Sachs wrote a concurring judgment in which he agreed ‘with the broad approach to legality adopted by Ngcobo J’, but did not agree that there was a duty to hear Mr Masetlha in this case. *Masetlha* (n 124 above) at para 227.

<sup>128</sup> *Ibid* at para 181.

<sup>129</sup> *Ibid* at para 184.

<sup>130</sup> *Ibid* at para 187.

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should be subverted to participation or deliberation. O'Regan J in *Masondo* repeatedly held that deliberation was 'subject ... to the right of the majority to make decisions.'<sup>131</sup> Justice Sachs in *Merafong* makes clear that 'participatory democracy does not require constant consultation by the Legislature with the public, nor does it presuppose that the views of the community will be binding on the Legislature, nor that the Legislature is precluded from changing its mind.'<sup>132</sup> And in *Masetlba* Justice Ngcobo writes that a 'reasonable balance' must be struck between hearing the other side and 'the contrary desirability of avoiding undue judicial interference in their administration.'<sup>133</sup> Listening and efficiency can exist in harmony. As Theunis Roux explains:

None of the democratic theorists ... would ... argue that a modern democracy should be beholden to the impossible ideal of decision-making by consensus, or to exhaustive processes of participation that ultimately run counter to governmental efficiency. Rather, deliberation and participation in decision-making are stressed for the contribution these processes can make to better informed and more legitimate decisions. But there is always a tipping point at which participation and deliberation cease to be useful, and instead become counterproductive.<sup>134</sup>

On the Vampire interpretation, the Constitutional Court in *Merafong* – and in *Masondo* and *Masetlba* – has incorrectly identified that 'tipping point' by affording too much deference to the other branches and placing too much emphasis on efficiency and not enough on the gains of listening.

However, there is another line of cases that suggests that the Court's attitude to participation and deliberation is more complicated...

### **Part IV: Expanding Participation**

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<sup>131</sup> *Masondo* (n 113 above) at para 72. See also, para 78.

<sup>132</sup> *Merafong* (n 5 above) at para 293.

<sup>133</sup> *Masetlba* (n 124 above) at para 184.

<sup>134</sup> Roux (n 30 above) at 10-42.

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In this section I consider a recent line of cases concerning engagement in eviction disputes. I then outline the sharp contrast between the Court’s approach to engagement in those cases and its attitude to participation and deliberation in *Merafong*, *Masetlha* and *Masondo*.

### 4.1 Eviction and Participation

In a recent string of cases, the Court has relied heavily on ‘meaningful engagement’ as a hook to solve housing rights disputes. The roots of this trend can be traced back to the Court’s earliest encounters with housing rights in *Kyalami*,<sup>135</sup> *Grootboom*<sup>136</sup> and *Port Elizabeth Occupiers*.<sup>137</sup> But engagement flowered in 2008, in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg & Others*.<sup>138</sup> The Court had to decide whether the City of Johannesburg had acted constitutionally in attempting to evict residents from derelict inner-city buildings and move them to the city’s outskirts. At the hearing, the Court ordered the residents and the city to negotiate to see if they could reach a settlement. They did, and the settlement became an order of the Court. But the interesting part is that – when it later gave reasons for its order – the Court held that, in addition to any other duties s 26(2) might impose, ‘a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [its] constitutional obligations’.<sup>139</sup> Expanding on what ‘meaningful engagement’ would entail, Yacoob J wrote:

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<sup>135</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19, 2001 (3) SA 1151 (CC), 2001 (7) BCLR 652 (CC) at para 111 (‘It may have been better and more consistent with salutary principles of good government if the government had found an appropriate method to inform the neighbouring residents of its intentions before contractors went onto the site, and if it had engaged them in discussion and the planning at an early stage of the project.’)

<sup>136</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 87 (‘I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation.’ The Court also highlighted s 2(1)(b) of the Housing Act 107 of 1997 which required government to ‘consult meaningfully’ with those who might be affected by housing development.)

<sup>137</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) at para 39 (In considering whether to order mediation to resolve a housing dispute, the Court wrote: ‘one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents.’)

<sup>138</sup> [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC).

<sup>139</sup> *Ibid* at para 16.

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Engagement has the potential to contribute towards the resolution of disputes and to increased understanding and sympathetic care if both sides are willing to participate in the process. People about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more. It must make reasonable efforts to engage and it is only if these reasonable efforts fail that a municipality may proceed without appropriate engagement. It is precisely to ensure that a city is able to engage meaningfully with poor, vulnerable or illiterate people that the engagement process should preferably be managed by careful and sensitive people on its side.<sup>140</sup>

The *Olivia Road* Court also held that the City had a duty to engage with all 63 000 people that might be evicted according to its plan in a systematic, rather than *ad hoc*, manner.<sup>141</sup> Finally, the Court noted that '[e]ngagement is a two-way process'<sup>142</sup> that 'will work only if both sides act reasonably and in good faith.'<sup>143</sup>

In two highly publicised and politically contentious housing cases the Court decided in 2009, it resorted (in part) to the newly-minted 'duty-to-engage' to solve the disputes. First, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others*<sup>144</sup> the Court was confronted by the controversial N2 Gateway project which planned to move residents of informal settlements along the N2 highway to Delft, an area some 15 km away. Cutting a long story short, the residents vigorously resisted the move and the government went to court for an eviction order. The case produced multiple judgments with no clear majority. Engagement was relevant in two contexts. First, the judges disagreed whether the engagement leading to the eviction application had been meaningful, and whether this rendered the government's actions unreasonable. Second, the judges all agreed on an order which, while granting the eviction, mandated ongoing, court-supervised engagement between the residents and the government to search for a mutually acceptable solution. Within these two contexts, the judges had many opportunities to expand on the purpose and content of engagement. According to Ngcobo J: 'The requirement of engagement flows from the need to treat residents with respect and care for their dignity. ... It enables the

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<sup>140</sup> Ibid at para 15.

<sup>141</sup> Ibid at para 19.

<sup>142</sup> Ibid at para 14.

<sup>143</sup> Ibid at para 20.

<sup>144</sup> [2009] ZACC 16.

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government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns.<sup>145</sup> He continued:

The goal of meaningful engagement is to find a mutually acceptable solution to the difficult issues confronting the government and the residents in the quest to provide adequate housing. This can only be achieved if all sides approach the process in good faith and with a willingness to listen and, where possible, to accommodate one another. ... Ultimately, the decision lies with the government. The decision must, however, be informed by the concerns raised by the residents during the process of engagement.<sup>146</sup>

Justice O'Regan highlighted the connection between the s 26(2) duty to engage and the right to just administrative action. She explained the purpose of engagement in the housing context in almost identical terms to the way she defended deliberation in *Masondo*: 'Th[e] purpose [of engagement] is to give affected parties an opportunity to be heard on a decision before it is finally made. Fair process improves the quality of decisions and establishes their legitimacy. However, it should not result in unnecessary and prolix requirements that may strangle government action.'<sup>147</sup>

But, as usual, the most eloquent exposition of engagement, and the clearest connection to the principles of participatory democracy, flowed from the pen of Justice Sachs.

This case compels us to deal in a realistic and principled way with what it means to be a South African living in a new constitutional democracy. It concerns the responsibilities of government to secure the ample benefits of citizenship promised for all by the Constitution. It expands the concept of citizenship beyond traditional notions of electoral rights and claims for diplomatic protection, to include the full substantive benefits and entitlements envisaged by the Constitution for all the people who live in the country and to whom it belongs. At the same time it focuses on the reciprocal duty of citizens to be active, participatory and responsible and to make their own individual and collective contributions towards the realisation of the benefits and entitlements they claim for themselves, not to speak of the well-being of the community as a whole. When all is said and done, and the process has run its course, the authorities and the families will still be connected in ongoing constitutional

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<sup>145</sup> Ibid at para 238 (Ngcobo J, concurring).

<sup>146</sup> Ibid at para 244 (Ngcobo J, concurring).

<sup>147</sup> Ibid at para 296 (O'Regan J, concurring).

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relationships. It is to everyone's advantage that they be encouraged to get beyond the present impasse and work together once more.<sup>148</sup>

Sachs J also took time to note the resident's responsibilities on the 'two-way street' of engagement, requiring contributions and responsibilities from residents, as well as the state.<sup>149</sup>

The second sequel to *Olivia Road – Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others*<sup>150</sup> – concerned the equally divisive KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (Slums Act).<sup>151</sup> Allegedly designed to beautify Durban for the upcoming 2010 World Cup, the Slums Act was challenged by Abahlali baseMjondolo – a radical social movement of shack dwellers working to improve their own conditions – on several grounds, including that it permitted eviction without engagement. Although the judges disagreed about whether the Slums Act could be interpreted to require engagement, they all agreed that engagement was necessary. Moseneke DCJ, for the majority, held that 'no evictions should occur until the results of the proper engagement process are known.'<sup>152</sup> 'Proper engagement', he tells us, 'would include taking into proper consideration the wishes of the people who are to be evicted; whether the areas where they live may be upgraded *in situ*; and whether there will be alternative accommodation. The engagement would also include the manner of eviction and the timeframes for the eviction.'<sup>153</sup> Yacoob J stressed that, in this context, engagement has real teeth: 'If it appears as a result of the process of engagement, for example, that the property concerned can be upgraded without the eviction of the unlawful occupiers, the municipality cannot institute eviction proceedings. This is because it would not be acting reasonably in the engagement process.'<sup>154</sup> Indeed, that was precisely the outcome of the Court-ordered

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<sup>148</sup> Ibid at para 408 (Sachs J, concurring).

<sup>149</sup> Ibid at para 407 (Sachs J, concurring) ('[T]hose who have been compelled by poverty and landlessness to live in shelters, should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency. ... The achievement of a just and equitable outcome required an appropriate contribution not only from the municipal authorities but from the residents themselves.')

<sup>150</sup> [2009] ZACC 31.

<sup>151</sup> Act 6 of 2007.

<sup>152</sup> *Abahlali* (n 150 above) at para 97.

<sup>153</sup> Ibid at para 97.

<sup>154</sup> Ibid at para 69 (Yacoob J, dissenting).

engagement in *Olivia Road*. It transpired that the derelict buildings could be upgraded and the residents were not evicted.

#### **4.2 The Engagement Gap**

The Court's emphasis on listening to citizens in the housing cases stands in stark contrast to its attitude in *Masondo* and *Masetlha* and our first reading of *Merafong*. First, the *Olivia Road*, *Joe Slovo*, and *Abahlali* courts developed a duty to engage where there was no textual hook to do so. On the other hand, the *Masondo* majority rejected a textual hook, the *Masetlha* majority reversed decades of common-law precedent and the *Merafong* majority chose to limit the potential reach of its recent dictum in *Doctors for Life*. Second, the housing cases not only require government to provide an opportunity to engage, but to take active steps to engage even in the face of resistance. In *Masetlha* and *Masondo* there was no duty to engage at all, and in *Merafong* the duty is limited to creating opportunities for – 'facilitating' – public participation, not demanding it. Third, the Court seems happy to force the government to adopt reasonable outcomes of engagement when it concerns eviction. It is not willing to do so in *Merafong* where representative democracy and political demands can always trump the solutions that arise from listening to the people whom the decision will affect and rationality is converted to a meaningless rubber stamp.

How do we explain this disjuncture? There are at least two doctrinal explanations. First, there are major differences in who, and what, is at issue. The housing cases concerned plaintiffs living in the worst conditions who stood to lose what little they still had. The political cases concern the head of the NIA and the main opposition party who would lose only their job (complete with golden handshake) or participation in a council. As serious as those consequences are, they clearly do not grab the Court in the same way as the loss of a home. Further, the housing cases concerned a specific right in the Bill of Rights. In *Masondo* and *Masetlha* only a relatively abstract principle of deliberation was at stake. *Merafong* seems to fall somewhere between these two extremes. The plaintiffs were needy insofar as one of their primary complaints about being moved to North West was service delivery. Moving to a new province, while not as serious as losing a house, is probably more personal and intense

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than the loss in the political cases. The claim rested on what the court has called a ‘right to participate’,<sup>155</sup> although it is not found in the Bill of Rights.

The second doctrinal cause is an unintended structural consequence of the way these cases come up. In both *Merafong* and *Masetlha* the decision had already been taken. Merafong had been moved and Billy Masetlha had been fired more than two years before the Court heard their complaints. In the housing cases the evictions had not yet occurred and the court case was brought precisely to decide what should be done. It is much more palatable for practical judges – which most of the Constitutional Court judges are – to order engagement in an ongoing process, than it is to undo steps that have already been taken for a mere principle. In the context of *Merafong*-style participation, the case will almost always be brought after the horse has bolted. In *Glenister* the Court held that courts can only intervene in the legislative process before legislation is passed ‘if an applicant can show that there would be no effective remedy available to him or her once the legislative process is complete, as the unlawful conduct will have achieved its object in the course of the process.’<sup>156</sup> This is a very high bar that will seldom be proved. Therefore, even if they are aware of the flawed procedure before the legislation is finalised, potential plaintiffs can only complain about the lack of participation after the legislation has been passed. The Court has to weigh asserting participation not only against encumbering the legislative process, but *undoing* the process altogether. This stacks the deck against participation and deliberation as it seems like a much greater intrusion into the other branches. The deck is stacked the other way in the housing cases where engagement has been used to respect the separation of powers by allowing the other branches greater room to define the right.<sup>157</sup>

But these are just legal realist explanations for why the Court reached different outcomes in the two streams of cases. They do not determine whether it makes sense for the Court to hold two seemingly contrary attitudes to listening? Is there some way to explain both

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<sup>155</sup> *Doctors for Life* (n ?? above) at para 129.

<sup>156</sup> *Glenister v President of the Republic of South Africa & Others* [2008] ZACC 19 at para 44.

<sup>157</sup> From a socio-economic rights perspective, this is a major weakness of the Court’s engagement approach. It allows the Constitutional Court – and encourages other courts – to avoid giving content to s 26(2). Engagement may be an attractive solution in cases that come to court, but it is unclear whether it will be as effective in promoting the right to housing in the vast majority of cases that don’t get litigated as a more substantive attitude to s 26(2) might be.

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attitudes in one coherent theory? And if the two can coexist, does the Court's doctrine, considered as a whole bring out the participatory and deliberative elements of our Constitution?

### **PART V: BRAIDING PARTICIPATION**

In this section I argue that there is a consistent political vision latent in the Court's jurisprudence and that it suggests a far more positive evaluation of the Court's response to participation than the simple reading of *Merafong* offered earlier.

#### **5.1 Participation Three Ways**

In order to draw the two strands of case law together, we need to imagine different realms of democratic participation. I posit three distinct styles of participation: traditional, radical and mutual. Before I explain what those are, I want to make two related qualifications. One, these three styles are a tool to describe different archetypes of participation, in reality many forms of participation will share elements of all three. Two, my purpose is to create a framework in which to make sense of the Constitutional Court's jurisprudence, not to get involved in political science literature about types of participation. While my cursory look at that literature suggests that my approach is plausible, I don't attempt to situate it within a detailed account of what others have said.

Back to the issue at hand: I classify these types based on seven factors: (a) who organizes the participation; (b) goals; (c) relationship to representative democracy; (d) formality; (e) the role of courts; (f) who is involved; and (g) the level of government where participation occurs. I don't suggest this is a closed list, but they seem like the most important factors.

Traditional participation is what was at stake in *Merafong*. It is initiated and controlled by government. It involves a formal procedure – whether requests for petitions or holding public hearings or something else – where government sets the agenda and invites citizens to respond. There is, or should be, an existing system that regulates the participation in a similar fashion for each individual event. The goals of traditional participation are, generally, to educate citizens about government action, to inform lawmakers about technical

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difficulties with legislation and people's attitudes towards it. As a result, it also allows the public to hold government accountable by requiring them to act in the face of public opinion. It is not, however, a deliberative process. As *Merafong* makes clear, this form of participation is always ultimately subservient to the forces of representative democracy. Government can choose to take account of concerns that arise from participation, or they can ignore them in favour of their own policies. Courts' role is to ensure that government acts reasonably to ensure the formal process happens and to uphold – in addition to the specific protections of the Constitution – a minimum level of rationality in the government's ultimate decision. Traditional participation can involve anybody, from the average worker to powerful companies. Who participates depends on how the government invites participation. If it only requests petitions in the Government Gazette and holds hearings in Cape Town, only well funded interest groups will be heard. If it goes out of its way to solicit involvement from a wider audience, there is no reason normal citizens cannot contribute. Lastly, this participation occurs at all three levels of government – national, provincial and local. However, it most closely resembles the paradigm at the higher levels. At the local level there is more provision made for deviation from the model.

Prior to and, as I relate in the epilogue, after the Constitutional Court decision, the residents of Merafong engaged in radical participation. Radical participation is citizen-organized. It includes any actions whereby citizens express their views about government action or policies outside of official channels. The most common forms are marches, protests, boycotts and use of the media. Citizen-led participation is not governed by any central body but is the spontaneous expression by a wide range of people. It is therefore informal, less focused and more diverse. Unlike traditional participation, radical action is not subservient to representative democracy. It operates outside the formal political system and therefore operates parallel to representative democracy. While the opportunity for and relevance of traditional participation ends the moment a decision is taken, invented participation has no end. It continues to put pressure on the representative system to take account of public demands even when that system has spoken 'finally' against them. The purpose of radical participation is to put (or keep) items on government's agenda, by expressing disapproval with the status quo or with proposed changes and to encourage government to act by threatening political consequences or social disruption. The role of courts here is to keep

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spaces open for citizens to act if they choose. The primary legal protections are the rights to freedom of expression,<sup>158</sup> assembly<sup>159</sup> and association.<sup>160</sup> As should be clear from the discussion thus far, radical participation is typically conducted by the public at large. However, political parties, labour unions and other parts of civil society are often required to organize effective participation and can direct or co-opt mass sentiment for their purposes. Finally, while citizens can stand up on any issue, from foreign policy to the provision of sanitation, the most common protests in South Africa concern local issues of service delivery.

Mutual participation exists somewhere between and apart from the other two forms. It does not matter who initiates it; it can be prompted by citizen demands, government willingness to listen, or court order. The defining feature of mutual participation is that it is a joint venture aimed at solving a common problem. The engagement ordered in *Olivia Road* and *Joe Slovo* are perfect examples. Both residents and government wanted to change the current situation, but in different directions and for different reasons. Engagement was the tool to allow/force the two to come up with a mutually acceptable solution. The process must therefore be a deliberative one in which the parties discuss the issue as equals, in good faith and with reason as the touchstone. The role of courts is both to start the engagement where necessary, and to ensure that the process remains deliberative. That is why courts are willing to order government to accept a solution that arises through the negotiation in the eviction cases when they would not do so in *Merafong*. Mutual participation is therefore neither subordinate nor parallel to representative government. It is truly supportive as it can only occur when the state willingly engages with its citizens on equal terms. In ideal form, mutual participation will involve interaction with those actually affected or their closely-controlled representatives. For reasons I will make clearer shortly, mutual participation occurs primarily at the local level and often as an *ad hoc* solution rather than a permanent structure.

Now, no single form of participation is superior to the others. They all serve different roles and all have a place in our democracy. However, undue focus on or preference for any one

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<sup>158</sup> Constitution s 16.

<sup>159</sup> Constitution s 17.

<sup>160</sup> Constitution s 18.

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form can interfere with the goals of the other two, or have other negative consequences for governance. First, there is a danger that either government or civil society can make traditional participation the sole focus for dialogue between the people and the state. For several reasons, that has the potential to ‘crowd out’ radical and mutual participation. Those engaging in traditional participation may be left with little energy to engage outside those spaces.<sup>161</sup> More importantly, promoting traditional participation allows the state to question the need for other forms of engagement:

Clearly the government is not *against* participation – it has taken steps to create forums for the people to speak. Having established its moral authority as a supporter of participation, it can demand to know why it would be necessary to operate outside of those forums it has established for the purpose.<sup>162</sup>

Or, as Pithouse puts it, relying exclusively on traditional forms of participation ‘will marginalise most people from transformative political engagement, channel popular militancy into demobilizing and disempowering drawn out technocratic procedures and allow the state to decide what it will and won’t accept as reasonable demands for change.’<sup>163</sup> Allowing space for radical participation – or, to put it more frankly, seeing protest as participation – denies the government a monopoly over the agenda.

Second, too much radical participation, to the exclusion of other forms of participation, is equally unhelpful. Radical participation almost by definition involves the making of demands by people who share a similar goal. Numerous studies have shown that when a group of like-minded people discuss an idea, their beliefs become more extreme.<sup>164</sup> In addition, the more extreme a person’s belief, the more likely they are to be politically

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<sup>161</sup> R Ballard ‘Participation, Democracy and Social Movements’ (2008) 4 *Critical Dialogue* 17 at 19 available at [http://www.cpp.org.za/publications/critical\\_dialogue/vol4no1\\_2008/art3.pdf](http://www.cpp.org.za/publications/critical_dialogue/vol4no1_2008/art3.pdf) (accessed on 20 November 2009).

<sup>162</sup> Ibid.

<sup>163</sup> R Pithouse ‘Rethinking Public Participation from Below’ (2006) 2 *Critical Dialogue* 24 at 24-25 available at [http://www.cpp.org.za/publications/critical\\_dialogue/vol2no1\\_2006/richard.pdf](http://www.cpp.org.za/publications/critical_dialogue/vol2no1_2006/richard.pdf) (accessed on 20 November 2009).

<sup>164</sup> See, for example, Cass R. Sunstein ‘Deliberative Trouble? Why Groups Go To Extremes’ (2000) 110 *Yale LJ*

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active.<sup>165</sup> There is nothing wrong with that if the participation is channeled into all three forms of participation. It *is* a problem if radical participation is seen as the only (or the only effective) means of participation because it necessarily results in ideas becoming more extreme without the mediating force of reason which is created when we *listen* to others. Just as government must listen to the people, the people must listen to each other and, more exactly, to those who disagree with them. Too much radical participation means that they only listen to those who agree with them. Participation ceases to be a deliberative exercise and becomes a shouting match in which we have traded the backroom influence of pluralistic policies for a pluralism that rewards those who are the best protestors.

This makes mutual participation seem like an attractive option. It does not carry the virus of government control or the danger of reverting to ‘popular pluralism’. Mutual participation, however, does not seem like a viable option to solve many disputes. It is perfectly suited to local problems that affect a defined group of people and a specific issue. Those conditions allow real engagement between state and citizens that is meaningfully deeper than representation. Citizens can become informed about the issue and there are not too many people to make representation the only feasible way of interacting. But as soon as we confront polycentric problems that affect large groups of people, mutual participation necessarily starts to transform into representative democracy accompanied by traditional participation. This comes back to the efficiency problem I discussed earlier. Mutual participation is necessarily a time-consuming process and too much of it prevents important and sometimes urgent decisions from being made.

Even if we could construct a system that elevated mutual participation to the national level – and our Constitution does not contemplate that – there are dangers in doing so. In her recent book *Hearing the Other Side: Deliberative v Participatory Democracy*, Diana Mutz argues that people who deliberate are less likely to participate. Through the analysis of extensive survey data,<sup>166</sup> she concludes that people who are more exposed to contrary viewpoints, are likely to

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<sup>165</sup> D Mutz *Hearing the Other Side: Deliberative v Participatory Democracy* (2006).

<sup>166</sup> I should mention two caveats about Mutz’s research. First, her study is about the USA. There are reasons to suspect that a similar study in South Africa might yield different results. However, it seems unlikely that the fundamental point would change, although the degree of conflict between participation and deliberation might well. Second, the participation the survey measured was activities like voting, donating to candidates or putting

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be better-informed and have more moderate views (which is good), but are *less likely* to participate in politics (which is bad). On the other hand, those who only speak to people of the same political stripe are going to have more extreme views (which is bad) but are *more likely* to get involved in political affairs (which is good). Democracy can be complicated. We are not only concerned with a balance between participation and efficiency, but between what seemed like bedfellows: participation and deliberation. Mutz summarizes the choice thus:

Because both participation and tolerance are highly valued in democratic systems, there is no easy answer to the question of how much political inactivity should be accepted in the name of greater tolerance, nor, conversely, of how much intolerance of oppositional views should be accepted in the name of encouraging political activism. My results suggest that within any given individual, enthusiastic participation rarely coexists with ongoing exposure to diverse political viewpoints and careful consideration of the political alternatives. Deliberation and participation, in other words, do not go hand in hand. Homogeneous and heterogeneous social contexts serve two different, yet important, purposes in this regard.<sup>167</sup>

Mutual participation is a deliberative process. Making it the only form of participation will not only stall decision-making, it will decrease participation.

I hope I have explained why no form of participation is sufficient on its own. Instead, we need to braid them together in a way that extracts the benefits of each without too much of the dangers or disadvantages. We need radical participation to ensure that issues of public concern are on the government's agenda and to pressure government to take them seriously. We need traditional participation to ensure government knows what people think, people know what government is doing, and to hold government directly accountable. And we need mutual participation to problem-solve, primarily, at the local level.

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up signs in support of a candidate. Mutz (n 163 above) at 112. This is participation *within* the existing representative system rather than political participation *outside* the ordinary institutions like protests, active non-voting or community support. While there doesn't seem to be any reason to expect the results would be any different if we looked at the stronger forms of democratic participation – indeed, I would expect this to enhance Mutz's theory – it is impossible to know.

<sup>167</sup> Mutz (n 163 above) at 133.

Before I move on to considering how *Merafong* relates to this framework, I want to repeat myself: these three forms of participation are archetypes; actual participation strategies will ‘run along a continuum with one end being more ‘in-system’ tactics and, on the other extreme, more extra-institutional tactics.’<sup>168</sup> The triad is intended as a conceptual tool, not a descriptive dogma.

### **5.2 Prince Merafong**

The framework provides a clean way both to read *Merafong* and the housing cases side-by-side and to provide a far more positive spin on *Merafong* itself. *Merafong* is not about participation in general, but about traditional participation. Radical participation is governed by the court’s jurisprudence on expression and assembly. And the Court has gone out of its way to encourage mutual participation, at least in the context of housing. We should not read *Merafong* as the be-all-and-end-all of the Court’s attitude to listening, but as part of a larger puzzle. Restraint on the Court’s part here may well be a good thing for participation overall.

To recap, the position post-*Merafong* is that government must take reasonable measures to facilitate public involvement but, absent (impossible-to-produce) evidence that this was not done with an open mind, government is free to ignore any submissions made in favour of its own policies. The limited role the *Merafong* majority gave to traditional participation can be seen as a positive for participation. If the Court had gone further and demanded government accept reasonable suggestions, or engage in ongoing deliberation, those who want to participate in government may have been pushed towards traditional participation and away from radical and mutual engagement. That would have had all the problems already described. The Court was clearly aware of the incentives that its decision would create, although not quite in the terms I have described. Skweyiya J made the point as follows:

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<sup>168</sup> T Madlingozi ‘Post Apartheid Social Movements and the Quest for the Elusive “New” South Africa’ (2007) 34 *Journal of Law and Society* 77 at 89.

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[I]f voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfil promises made by the same politicians without adequate explanation, then the politicians should be held accountable by the voters. Courts deal with bad law; voters must deal with bad politics. ... A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections.<sup>169</sup>

I would merely add that voters not only have the ballot box available to them, they also have the streets. In addition, while *Merafong* does not compel government to listen, it does make sure that they hear and, as Czapanskiy and Manjoo write,

[i]t may be difficult ... for legislators to listen to people as [*Doctors for Life*] requires and not take their views into account, at least to some degree. By listening, legislators may learn about the lives of people different from themselves. The may open the door to understanding and empathy.<sup>170</sup>

There is also a way to view the approach to rationality as promoting a participatory democracy. If we believe that courts were never particularly effective at weeding out government irrationality then, by refusing to play the role of watchdog to ensure government considers all sides and acts for public rather than private reasons, *Merafong* requires citizens to get up and do it themselves. This would be a boon for both participatory and deliberative democracy. Both prefer mass deliberation about public issues to determination by ‘experts’ or ‘elites’. In fact, many deliberative and participatory theorists, while not ruling out judicial review, are certainly suspicious of it. Barber, for example, argues that a democracy that refers questions to a ‘judicial elite’ is ‘deficient’ because it ‘has a corrosive impact on citizen activity’, promoting a ‘deferential’ citizenry that is ‘more fragmented than unified’.<sup>171</sup> Or as he puts it more provocatively earlier: ‘Politics, more even than nature, abhors a vacuum. Where citizens will not act, judges, bureaucrats, and finally thugs rush in.’<sup>172</sup> By getting judges out of the way, we get citizens to act.

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<sup>169</sup> *Merafong* (n 5 above) at para 308.

<sup>170</sup> Czapanskiy & Manjoo (n ?? above) at 19.

<sup>171</sup> Barber (n 35 above) at 143.

<sup>172</sup> *Ibid* at 111.

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There is, unfortunately, no positive spin on the decision regarding the ability to propose amendments. However, it will also have the most limited impact of the three issues considered, so there is still good reason to view *Merafong* positively overall.

In sum, *Merafong* can be seen as setting the appropriate level of traditional participation considering the need for other forms of participation to co-exist. On this theory, although *Merafong* might limit the duty of government to listen in one spheres, it appropriately focuses citizens on other ways of participating which, all things considered, will be ultimately be more effective.

### CONCLUSION

I have travelled a lot of ground in this essay, and it ends without a conclusion. I do not want to endorse either interpretation of *Merafong*. At present, I am still more pessimistic than optimistic about the impact that *Merafong* will have, but I think these issues are far too complicated to warrant any certainty at present. We don't know how the Court will develop doctrine around mutual participation, radical participation and the interaction between them. Nor do we know what impact, if any, *Merafong* will have on doctrine in other areas or on the actions or attitudes of those actually engaged in getting government to listen to them. I have not considered the extensive empirical literature about the nature of all forms of participation in South Africa.<sup>173</sup> The validity of our constitutional doctrine about listening must be responsive to this research. My modest intention here is to convince people that this is an important and complicated issue and suggest a framework for constitutional lawyers to engage the empirical literature in a meaningful way.

### EPILOGUE: WHATEVER HAPPENED TO MERAFONG?

After hearing that their court case had been rejected, the residents of Merafong held a mass meeting where, according to Jomo Mogale, they decided: “We are not going to pay for

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<sup>173</sup> See, for example, Madlingozi (n 168 above); FILL IN.

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services because we do not recognise the North West administration”.<sup>174</sup> However, the residents hoped that the new ANC leadership elected at Polokwane would be more sympathetic to their pleas and agreed to ‘maintain dialogue’ with the ANC.<sup>175</sup> That hope was rewarded only a week later when a high-level delegation of the ANC visited Merafong.<sup>176</sup> The Secretary General – Gwede Mantashe – told reporters that the ANC ‘had listened to the residents’ leaders’ grievances and would table them before the full [National Executive Committee] for a political discussion.’<sup>177</sup> Despite the hint of progress, violence accompanied the delegation’s visit,<sup>178</sup> and protests continued through August<sup>179</sup> into September.<sup>180</sup> The ANC returned to Merafong in September. In what was described as a ‘very positive’ meeting, it seemed that legislation would be enacted as soon as October.<sup>181</sup> This time round, Mantashe had this to say: “‘There is general acceptance that the matter needs to be resolved politically.... It won’t be a situation in which the ANC brings the solution. All parties must find a solution.’”<sup>182</sup>

At the beginning of October, Paul Mashatile (the then premier-elect of Gauteng) promised the people of Merafong that they would soon be returned to his province.<sup>183</sup> Jomo Mogale expressed Merafong’s reaction: “‘People are very excited. We are happy with the new (ANC)

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<sup>174</sup> Kingdom Mabuza & Getrude Makhafola ‘We won’t pay, says Khutsong’ (18 June 2008) *Sowetan* available at <http://www.sowetan.co.za/News/Article.aspx?id=786263> (accessed on 15 November 2009). See also ‘More Protests Planned in Gauteng’ (19 June 2009) available at <http://www.dispatch.co.za/article.aspx?id=214546> (accessed on 15 November 2009).

<sup>175</sup> Ibid.

<sup>176</sup> Poloko Tau ‘ANC leaders want to resolve Khutsong dispute’ (26 June 2008) *The Star* 6, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=124&art\\_id=vn20080626055621655C919442](http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=vn20080626055621655C919442) (accessed on 15 November 2009). See also SAPA ‘ANC meets Forum over Merafong Demarcation’ (25 June 2008) *Mail & Guardian Online* available at <http://www.mg.co.za/article/2008-06-25-anc-meets-forum-over-merafong-demarcation> (accessed on 15 November 2009).

<sup>177</sup> Ibid.

<sup>178</sup> ‘More Violence Hits Khutsong’ (26 June 2008) *Sowetan* available at <http://www.sowetan.co.za/News/Article.aspx?id=790968> (accessed on 15 November 2009).

<sup>179</sup> SAPA ‘Merafong Residents Protest Against Services’ (8 August 2008) *Independent Online* available at [http://www.iol.co.za/index.php?sf=139&set\\_id=1&click\\_id=13&art\\_id=nw20080808152034611C417310](http://www.iol.co.za/index.php?sf=139&set_id=1&click_id=13&art_id=nw20080808152034611C417310) (accessed on 15 November 2009).

<sup>180</sup> SAPA ‘Khutsong to March for Service Delivery’ (25 September 2008) *Independent Online* available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=139&art\\_id=nw20080925090820751C200183](http://www.iol.co.za/index.php?set_id=1&click_id=139&art_id=nw20080925090820751C200183) (accessed on 15 November 2009).

<sup>181</sup> Eric Naki ‘ANC set to break Merafong Impasse’ (3 September 2008) *Sowetan* available at <http://www.sowetan.co.za/News/Article.aspx?id=835349> (accessed on 15 November 2009).

<sup>182</sup> Ibid.

<sup>183</sup> Zinhle Mapumulo ‘Mashatile’s Promise to Khutsong’ (6 October 2008) *Sowetan* available at <http://www.sowetan.co.za/News/Article.aspx?id=856982> (accessed on 15 November 2009).

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leadership because it listens to the people”<sup>184</sup> However, the ANC denied that any decision had been taken, keeping the residents on edge.<sup>185</sup> Mashatile repeated his promise a few weeks later,<sup>186</sup> and in November Minister of Provincial and Local Government Sicelo Shiceka confirmed that “If the majority of people of Merafong in general (and) Khutsong in particular want to come to Gauteng that is going to happen.”<sup>187</sup> Shiceka also apologised to the people of Merafong and admitted that the government had erred in moving them to the North West.<sup>188</sup> While Shiceka’s comments were welcomed by Merafong, they did not endear him to his cabinet colleagues who criticised him for being ‘reckless’ and making unrealistic promises.<sup>189</sup> However, cabinet nonetheless placed the Constitution 19<sup>th</sup> Amendment Bill and the Cross-Boundary Municipalities Laws and Related Matters Repeal Bill on the legislative agenda.<sup>190</sup>

The ANC’s chief whip explained the decision to revisit Merafong as follows: “The broader picture for all us around (Khutsong) is about the stability of the land. We have seen the situation in that particular community. We have seen the violence in that community. We have seen people not attending school. That is why it’s back in parliament.”<sup>191</sup> As the process progressed, Shiceka assured the community that things would be done differently this time round:

Government officials will engage with structures and stakeholders in the community. Thereafter, I and other senior officials will meet with representatives of community stakeholders and structures.

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<sup>184</sup> Sibongakonke Shoba ‘Khutsong Overjoyed to be Back in Gauteng’ (7 October 2008) *Business Day* available at <http://allafrica.com/stories/200810070084.html> (accessed on 15 November 2009).

<sup>185</sup> Mapumulo (n ?? supra) and Shoba (n ?? supra).

<sup>186</sup> Political Bureau ‘Khutsong to be Returned to Gauteng’ (22 October 2008) *The Mercury* 4, available at [http://www.iol.co.za/general/news/newsprint.php?art\\_id=vn20081022054258319C323057&sf=](http://www.iol.co.za/general/news/newsprint.php?art_id=vn20081022054258319C323057&sf=) (accessed on 15 November 2009).

<sup>187</sup> ‘Khutsong Residents to Get What They Want’ (10 November 2008) *Independent Online* available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=6&art\\_id=nw20081110142417862C326970](http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=nw20081110142417862C326970) (accessed on 15 November 2009).

<sup>188</sup> Ido Lekota ‘Minister says Sorry to Khutsong: “Govt made a Mistake”’ (10 November 2008) *Sowetan* available at <http://www.sowetan.co.za/News/Article.aspx?id=880941> (accessed on 15 November 2009).

<sup>189</sup> Shiceka ‘Undermining Cabinet’ (7 December 2008) *Cape Argus* 6, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn20081207101403533C536982&newslett=1](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20081207101403533C536982&newslett=1) (accessed on 15 November 2008).

<sup>190</sup> Ibid.

<sup>191</sup> Siyabonga Mkhwanazi ‘Khutsong to be Reincorporated Before Election’ (12 December 2008) *The Mercury* 2, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=124&art\\_id=vn20081212054658963C434122](http://www.iol.co.za/index.php?set_id=1&click_id=124&art_id=vn20081212054658963C434122) (accessed on 15 November 2009).

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The goal of these engagements will be to examine how best to accommodate the views of the majority of the affected communities.<sup>192</sup>

The plan was to have the legislation passed in time for the 2009 general election,<sup>193</sup> but with the bills still in committee at the beginning of February, the IEC began to worry whether it would be passed in time.<sup>194</sup> The National Assembly eventually passed the bills on 18 February.<sup>195</sup> In the debate, Shiceka explained the reversal with a catalogue of the ills the original decision had caused: ‘Merafong and Khutsong had never been happy with the decision, had taken the government to court, had revolted, had taken to violent protest, driven councilors into exile, disrupted schooling and had all but stopped basic service delivery.’<sup>196</sup> The bills made it to a vote in the NCOP on 19 March. Introducing the bills there, Shiceka stressed then need for government to be responsive to the people: “These people were incorporated into the North West province against their will. ... The Freedom Charter says no government can claim legitimacy unless it is based on the will of the people. ... Today we are coming to reaffirm the principle that guided the ANC for the past 97 years.”<sup>197</sup> President Motlanthe finally brought the bills into force on 9 April, giving them retrospective effect from 3 April,<sup>198</sup> ending Merafong’s separation from Gauteng after 3 years, 1 month and 2 days. In the April 22<sup>nd</sup> national election, 75.7% of Merafong’s registered voters cast their ballots, and 75.33% of them voted for the ANC.<sup>199</sup> There were no reports of protests or violence.

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<sup>192</sup> Ernest Mabuza ‘State to Resolve Boundary Disputes’ (6 January 2009) *Business Day* available at <http://allafrica.com/stories/200901060082.html> (accessed on 16 November 2009).

<sup>193</sup> SAPA ‘Khutsong Residents’ Fate in the Hands of MPs’ (4 February 2009) *Independent Online* available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=6&art\\_id=nw20090204142612802C697612](http://www.iol.co.za/index.php?set_id=1&click_id=6&art_id=nw20090204142612802C697612) (accessed on 16 November 2009).

<sup>194</sup> SAPA ‘Tight Timeframes for Legislation on Khutsong Voters’ (9 February 2009) *Citizen* available at <http://www.citizen.co.za/index/article.aspx?pDesc=88554,1,22> (accessed on 16 November 2009).

<sup>195</sup> Wyndham Hartley ‘New Chapter for Merafong as MPs Move to Rectify Blunder’ (19 February 2009) *Business Day*, available at <http://allafrica.com/stories/200902190080.html> (accessed on 16 November 2009).

<sup>196</sup> *Ibid.*

<sup>197</sup> Siyabonga Mkhwanazi ‘We Made a Mistake, Says ANC’ (20 March 2009) *The Star* 6, available at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=13&art\\_id=vn20090320061051698C594435](http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20090320061051698C594435) (accessed on 16 November 2009).

<sup>198</sup> SAPA ‘Merafong Goes Back to Gauteng’ (10 April 2009) *News24* available at [http://www.news24.com/Content/SouthAfrica/Politics/1057/455129fbb4eb4170a9cc3fb868fae803/10-04-2009-08-10/Merafong\\_goes\\_back\\_to\\_Gauteng](http://www.news24.com/Content/SouthAfrica/Politics/1057/455129fbb4eb4170a9cc3fb868fae803/10-04-2009-08-10/Merafong_goes_back_to_Gauteng) (accessed on 16 November 2009).

<sup>199</sup> Independent Electoral Commission ‘Results Report for Municipality G284 – Merafong City’ (7 May 2009) available at <http://www.elections.org.za/NPEPWStaticReports/reports/ReportHandler.ashx?22+Apr+2009+National+E>

