

VAMPIRE OR PRINCE? THE LISTENING  
CONSTITUTION AND *MERAFONG DEMARCATION  
FORUM & OTHERS V PRESIDENT OF THE  
REPUBLIC OF SOUTH AFRICA & OTHERS*

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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 for 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

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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.

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 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) – Non-Governmental Organisations (NGOs), taxi associations, 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 single day after the community had held its 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. Arrests followed.<sup>10</sup> An

<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 sec 2 of the Local Government: Cross-Boundary Municipalities Act, 2000, and the Local Government: Municipal Structures Act, 1998’ (19 August 2005), <http://www.demarcation.org.za/documents/redeterminations/2005Aug19/KZN-EC%20Boundaries%20Notice1.pdf> (accessed 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’.

<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) para 135 (Moseneke DCJ, dissenting).

<sup>6</sup> As above.

<sup>7</sup> *Merafong* (n 5 above) para 136.

<sup>8</sup> *Merafong* (n 5 above) para 137.

<sup>9</sup> As above.

<sup>10</sup> For accounts of the protests, see, SAPA “‘Mafikeng is far from here’” *News24* 3 November 2005 [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 16 November 2009); SAPA ‘Protestors Block the Streets’ *News24* 3

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 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 both bills.<sup>13</sup> The laws moved to the National Council of Provinces (NCOP): Parliament's second house intended to pass the bills 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 (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 12th Amendment Bill on the condition that Merafong was kept 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 approve or reject the whole bill – or veto part of the bill.<sup>17</sup> Confronted with these limitations the GPL Committee reversed course and recommended a final mandate that would support the entire

November 2005 [http://www.news24.com/Content/SouthAfrica/News/1059/5ee076946a514b1c86aac3fa8c852e03/03-11-2005-11-39/Protesters\\_block\\_streets](http://www.news24.com/Content/SouthAfrica/News/1059/5ee076946a514b1c86aac3fa8c852e03/03-11-2005-11-39/Protesters_block_streets) (accessed 16 November 2009); Baldwin Ndaba 'Residents boil over move to North West' (4 November 2005) *The Star* <http://www.thestar.co.za/index.php?fSectionId=129&fArticleId=2980442> (accessed 16 November 2009).

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

<sup>12</sup> SAPA 'Khutsong gathers to protest demarcation' *Mail & Guardian Online* 11 November 2005 <http://www.mg.co.za/article/2005-11-11-khutsong-gathers-to-protest-demarcation> (accessed 16 November 2009).

<sup>13</sup> *Merafong* (n 5 above) 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) paras 33 (Van der Westhuizen J) and 141 (Moseneke DCJ, dissenting). See also SAPA 'Speakers shouted down' *The Citizen* 25 November 2005 <http://www.citizen.co.za/index/article.aspx?Desc=10781,1,22> (accessed 17 November 2009).

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

<sup>17</sup> *Merafong* (n 5 above) para 36.

bill.<sup>18</sup> On 6 December the GPL approved the final mandate. On 15 December, the NCOP voted unanimously in favour of the 12th Amendment Bill. The process was completed when Acting President Zola 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

<sup>18</sup> *Merafong* (n 5 above) para 37.

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

<sup>20</sup> B Ndaba & S Maphumulo ‘Khutsong Erupts in Flames of Fury’ *The Star* 15 December 2005 1, [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 18 November 2009).

<sup>21</sup> J Green ‘Khutsong family’s memories reduced to ashes’ *The Star* 20 December 2005 2, [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 18 November 2009).

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

<sup>23</sup> As above.

attention away from the fundamental concerns of the masses of the people.<sup>24</sup>

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

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 Municipality & Others v President of the Republic of South Africa & Others (2)*<sup>28</sup> was decided favourably in August 2006, the MDF decided to approach the Constitutional Court. Logistical problems delayed the filing until mid-2007. The case itself 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 ...

<sup>24</sup> As above. See also 'Misunderstanding in Khutsong' *The Citizen* 23 February 2005 <http://www.citizen.co.za/index/article.aspx?pDesc=13879,1,22> (accessed 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 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' *News24* 2 March 2006 <http://www.news24.com/printArticle.aspx?iframe&aid=f35fb89d-9989-4aad-9ff6-fc6b2f0d722f&cid=1057> (accessed 18 November 2009).

<sup>26</sup> See, for example, SAPA 'Residents to protest again' *Independent Online* 4 October 2006 [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 18 November 2009); Baldwin Ndaba 'Khutsong residents resume reincorporation bid' *The Star* 25 August 2006 2, [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 18 November 2009).

<sup>27</sup> See, for example, SAPA 'Khutsong situation calm' *Independent Online* 5 March 2007 [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 18 November 2009); SAPA 'Unruly gang stones motorists' *Independent Online* 22 April 2007 [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 18 November 2009).

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

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

# 1 Introduction

The Constitutional Court's response to the Merafong boundary dispute redrew the contours of public participation and deliberation in South Africa. The Court's decision not only clarifies the formal legal framework for public participation and deliberation. The Court's reasoning will, inevitably, form a central part of public discourse about the value of public participation and deliberation.

*Merafong*, however, is truly fascinating because it can be read in two radically different ways. On the first account, *Merafong* sucks 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 complete, nor entirely satisfactory. The reading that you prefer will probably depend on prior commitments regarding the place of participatory democracy and deliberation in a primarily representative government. However, I hope that my musings on *Merafong* will achieve three ends. 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 proffer a conceptual framework that, I hope, enables us to better understand the Constitutional Court's attitude toward participation.

I begin, in section 2, by briefly outlining the theories of participatory and deliberative democracy, how they relate to one another, and the manner in which they are reflected in various provisions of our Constitution. Section 3 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 value of listening. Section 4 considers the 'Vampire reading' of *Merafong* and a line of cases that seems to support it. In section 5, 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 section 6, I expand on that view and 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 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 the adequacy and the accuracy of my previous suggestions about the place of participation in South Africa.

Before we get started, I want to note three important cases that were handed down in 2010, after writing this article, that speak directly to my thesis: *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others*; *Albutt v Centre for the Study of Violence and Reconciliation & Others* and *Law Society of South Africa & Others v Minister of Transport & Another*.<sup>30</sup> I want to make clear up front that my failure to deal with these cases in depth is a result of timing, not my judgement of their relevance. If I were to write this article today, they would receive a much more complete treatment. In my view, all three cases fit into and confirm the conceptual framework I develop.<sup>31</sup>

## 2 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 sketch of

<sup>30</sup> For a discussion of both cases, see A Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt*' (2010) 127 *South African Law Journal* 580. For a discussion of *Law Society*, see M Bishop & J Brickhill 'Constitutional Law' 2010 (4) § 2.1.

<sup>31</sup> First, in *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* [2010] ZACC 5 2010 6 BCLR 320 the Constitutional Court finally brought to an end Matatiele's legal challenges to force the government to return it to KwaZulu-Natal. The Court rejected a rationality challenge for largely the same reasons as those it employed in *Merafong*. In addition, the Court was unmoved by various public participation challenges, most relevantly for this article, Nkabinde J rejected Matatiele's argument that the public participation procedures had been a mere formality to legitimate a decision that had already been taken. Second, in *Albutt v Centre for the Study of Violence and Reconciliation & Others* [2010] ZACC 4; 2010 3 SA 293 (CC) the Constitutional Court upheld a rationality challenge to the President's practice of not giving victims a chance to be heard before considering a pardon for political criminals. The *Albutt* Court necessarily endorses a flexible conception of rationality that can vary on the context in which it is raised. As I note, this is in conflict with the official line that endorses a formal, mechanical version of rationality review. Third, in *Law Society of South Africa & Others v Minister of Transport & Another* [2010] ZACC 25, 2011 1 SA 400 (CC), 2011 2 BCLR 150 (CC) the Court rejected a rationality challenge to the abolition of the common-law right to claim damages from the wrongdoer in motor vehicle accidents. However, Moseneke DCJ upheld a rationality challenge to the tariffs that the Road Accident Fund was willing to pay victims of road accidents. The case once again demonstrates the malleability of rationality review that I describe later.

the truly complex terrain of democratic theory.<sup>32</sup> It is meant to provide only the most basic outline to frame the discussion to come.

## 2.1 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>33</sup> Democracy is founded on the simple idea of *self-government*.<sup>34</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 commitment to self-rule, differences abound. Those differences flow, in large part, from different responses to the two central questions that face the designers of any given democratic system are: (a) *who* will take decisions? (b) *how* will they take those decisions? We can, if we move along these two rough axes, briefly categorise the most popular types of democracy.

Representative democracy answers the *who* question with: 'fairly chosen representatives'. Different varieties of representative democracy 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 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 demand 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 involves 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>35</sup> Garden variety majoritarian democracy relies, in theory, on aggregation, while pluralist

<sup>32</sup> Readers interested in a more complete theoretical account of democracy in South Africa should see T Roux 'Democracy' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd ed, 2006) Chapter 10.

<sup>33</sup> T Roux 'Democracy' in S Woolman *et al* (n 32 above) § 10-1.

<sup>34</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.

<sup>35</sup> J Elster 'Introduction' in J Elster (ed) *Deliberative democracy* (1998) 5-7.



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>36</sup> but it involves, at a minimum, ‘arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality’.<sup>37</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 democracy and deliberative democracy are concerned with different questions. However, if you look a bit closer at the actual theories, there is an extensive overlap. Participatory democrats generally believe decisions should be taken through deliberation, and deliberative democrats almost universally call for greater 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>38</sup>

‘Participatory politics’, Barber continues, ‘deals with public disputes and conflicts of interest by subjecting them to a never-ending process of deliberation, decision, and action.’<sup>39</sup> Which is just as well, because the participatory democracy advocated by Barber and others,<sup>40</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

<sup>36</sup> See, for example, A Guttman & D Thompson *Democracy and disagreement* (1996) (Arguing that deliberation must be reciprocal – in the sense that you respect an opponent’s view, even if you think it wrong – public and accountable).

<sup>37</sup> Elster (n 35 above) 8.

<sup>38</sup> B Barber *Strong democracy: Participatory politics for a new age* (20th Anniversary Edition, 2003, originally published in 1984) 126.

<sup>39</sup> Barber (n 38 above) 151.

<sup>40</sup> See, for example, C MacPherson *The life and times of liberal democracy* (1977), C Pateman *Participation and democratic theory* (1970).

exchanges.<sup>41</sup> Without deliberation, participatory politics is simply the rule of the many.

Not surprisingly, deliberative democrats view deliberation as a polycentric process: deliberation is not, and ought not, to be confined to the elite that occupy halls of power; it takes place, as importantly, 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 a *Deliberation Day* in which all citizens will gather in groups to discuss the issues of the day prior to a national or local vote.<sup>42</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 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>43</sup>

Without extensive participation, deliberative democracy would be reduced to 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>44</sup> In brief, Schumpeter depicted modern democracies as societies where

<sup>41</sup> D Vitale ‘Between participatory and deliberative democracy: A contribution to Habermas’ (2006) 32 *Philosophy & Social Criticism* 739, 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.’)

<sup>42</sup> B Ackerman & JS Fishkin *Deliberation day* (2004).

<sup>43</sup> M Walzer ‘Deliberation, and what else?’ in S Macedo *Deliberative politics: Essays on democracy and disagreement* (1999) 58, 68. The anonymous referee helpfully pointed out that Walzer – and his compatriot on this issue – Jeremy Waldron – would see judicial review as antithetical to a proper participatory democracy. Listening, they would say, does not occur in judicial review. While I agree with these theorists’, endorsement of participation or listening as central to democracy, I do not see the same conflict with judicial review. Judicial review can be seen as the enforcement of the ideals of elites over the voices of the people. But judicial review can also be seen as an institutional mechanism that promotes debate between different elements of government and between the people and the government. Indeed, for many people going to court is the only way to be heard. If we see judicial review as giving people a voice they wouldn’t otherwise have and promoting ongoing discussion about important issues, then it is not antithetical to the value of listening. For an explication of this way of understanding judicial review, see MC Dorf & CF Sabel, ‘A constitution of democratic experimentalism’ (1998) 98 *Columbia Law Review* 267.

<sup>44</sup> See generally, J Schumpeter *Capitalism, socialism and democracy* (1943) as discussed in Roux ‘Democracy’ in S Woolman *et al* (n 32 above) §10.2(i).

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>45</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>46</sup>

Finally, the alleged 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 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, and engage one another, as possible.

## 2.2 Participation and deliberation in the Constitution

All this theory is all well and good: but it would be utterly irrelevant to this case comment, or a discussion of South African constitutional law generally, unless these various elements of democratic theory had

<sup>45</sup> Barber (n 38 above) 95.

<sup>46</sup> S Freeman 'Deliberative democracy: A sympathetic comment' (2000) 29(4) *Philosophy and Public Affairs* 371, 375.

been incorporated into our Constitution. As it turns out, its a thesis I need not prove. The Constitutional Court has explicitly recognised 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>47</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>48</sup>

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

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>49</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>50</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 Etienne 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>51</sup> The Court has interpreted this to require that ‘governmental action [relate] to a defensible vision of the public

<sup>47</sup> *Doctors for Life International v Speaker of the National Assembly & Others* [2006] ZACC 11, 2006 6 SA 416 (CC), 2006 12 BCLR 1399 (CC) para 111.

<sup>48</sup> *Doctors for Life* (n 47 above) para 116.

<sup>49</sup> *Doctors for Life* (n 47 above) para 115.

<sup>50</sup> As above.

<sup>51</sup> E Mureinik ‘A bridge to where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 32 quoted in *Prinsloo v Van der Linde & Another* [1997] ZACC 5, 1997 6 BCLR 759 (CC), 1997 3 SA 1012 (CC) para 25.

good.<sup>52</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>53</sup> and that it promotes ‘democracy and full and effective deliberation.’<sup>54</sup> It has described the privilege as ‘fundamental to democracy’<sup>55</sup> and a ‘bulwark of democracy’ that ‘advances effective democratic government.’<sup>56</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>57</sup> The High Court too has held that members of parliament must retain the freedom to vote against party lines as to hold otherwise would undermine deliberative democracy.<sup>58</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* – recognises the document’s participatory and deliberative elements and the synthesis between them. I do not have the space to recount Roux’s reasoning. However, restating, in part, the principle of democracy he identifies should suffice:

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>59</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. His account also embraces the notion that government must *listen* to its people.

<sup>52</sup> *Prinsloo* (n 51 above) para 25.

<sup>53</sup> *Swartbooï & Others v Brink & Another* [2003] ZACC 25, 2006 1 SA 203 (CC), 2003 5 BCLR 502 (CC) para 20.

<sup>54</sup> *Dikoko v Mokhatla* [2006] ZACC 10, 2006 6 SA 235 (CC), 2007 1 BCLR 1 (CC) para 39.

<sup>55</sup> *Swartbooï* (n 53 above) para 20.

<sup>56</sup> *Dikoko* (n 54 above) para 39.

<sup>57</sup> [2002] ZACC 28, 2003 2 BCLR 128 (CC), 2003 2 SA 413 (CC).

<sup>58</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) 749E (Constitution envisages a ‘deliberative democracy’).

<sup>59</sup> Roux (n 32 above) at 10-68 (my emphasis).

This section identified the shared beliefs of participatory and deliberative democrats and discussed how the Constitution incorporates those ideas. The next section discusses *Merafong* and indicates how the findings on seemingly disparate issues all speak to the idea of democratic listening.

### 3 *Merafong*

*Merafong* is a complicated decision; there are six judgments and several inter-related issues. After being supplemented by the Justices,<sup>60</sup> the MDF's complaints were: (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>61</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>62</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): in short, 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. I do not consider, in any detail, the disagreement between Van der Westhuizen J and Moseneke DCJ. The omission warrants explanation. 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, renders a vote regarding the law in question invalid – actually exists.<sup>63</sup> Second, the debate is intensely focused on the minutiae of the section 74(8) process and the consequences of the particular legislation in question. Third, as I explain below the entire Court is obviously wrong about whether provinces can propose amendments to section 74 bills in the NCOP. This renders much of the

<sup>60</sup> The judgments of both Moseneke DCJ and Sachs J rely primarily on their own ideas, not the submissions of the parties.

<sup>61</sup> Langa CJ, Ngcobo J, Skweyiya J, Yacoob J and Mpati AJ concurred.

<sup>62</sup> Yacoob J concurring.

<sup>63</sup> *Merafong* (n 5 above) para 74.

discussion about the consequences of voting for or against a section 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 section 74 bills in the NCOP.

### 3.1 Public involvement

The main issue before the Court was whether the GPL had fulfilled their duty under section 118(1)(a) of the Constitution to 'facilitate public involvement in the legislative and other processes of the legislature and its committees'. The Court recognised in *Doctors for Life* that section 118(1)(a) imposed a justiciable obligation on provincial legislatures,<sup>64</sup> and that 'legislative processes' encompassed determining mandates for votes in the NCOP. If the duty was not fulfilled, then the legislation would be invalid.<sup>65</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>66</sup>

But what is the nature of the obligation imposed on the legislature? Restating section 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>67</sup> The legislature must however have 'considerable discretion to determine how best to fulfill their duty'.<sup>68</sup> Nonetheless, the Court would review the specific measures taken to enhance involvement for individual pieces of legislation. The standard that government must meet in fulfilling both parts of the

<sup>64</sup> *Doctors for Life* (n 47 above) para 124. An identical duty rests on the NA (sec 59(1)(a)) and the NCOP (sec 72(1)(a)). There is a weaker constitutional duty on local government; sec 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.'

<sup>65</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 – secs 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>66</sup> *Matatiele* (n 14 above).

<sup>67</sup> *Doctors for Life* (n 47 above) para 120.

<sup>68</sup> *Doctors for Life* (n 47 above) para 123. See also *Doctors for Life* (n 47 above) para 145 ('this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures.')

duty is *reasonableness*.<sup>69</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>70</sup>

Determining what was reasonable required the Court to strike a balance between respecting the Legislature's autonomy and the citizenry's 'right to participate in public affairs'.<sup>71</sup> Summarising, 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>72</sup>

*Doctors for Life* and *Matatiele* were groundbreaking in terms of constitutional doctrine. However, the 'new' doctrines were also rather easy to apply to the cases before the Court. Both cases concerned important and controversial legislation,<sup>73</sup> and in both cases the NCOP and the provincial legislatures had recognised 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.

As a result, the MDF's argument that the GPL nonetheless failed to fulfil the duty recognised in *Doctors for Life* was strained. Three grounds of attack remained. The MDF argued, first, that the whole process was a charade: the decision to move Merafong to North West

<sup>69</sup> *Doctors for Life* (n 47 above) paras 126-128.

<sup>70</sup> *Doctors for Life* (n 47 above) para 128. See also *Matatiele* (n 14 above) para 68.

<sup>71</sup> *Doctors for Life* (n 47 above) para 145.

<sup>72</sup> As above.

<sup>73</sup> *Doctors for Life* concerned legislation about abortion and traditional healers.



had already been taken by the ANC National Executive Committee in 2004. The Court was unimpressed with the 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>74</sup> The Court did not reject the proposition that, if given the right evidence, it might uphold such a claim. It merely rejected the MDF's claim on the facts.

The MDF next contended that, despite the GPL's direct and honest engagement, their participation was not 'meaningful' because the MDF's 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>75</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 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>76</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.

<sup>74</sup> *Merafong* (n 5 above) para 49.

<sup>75</sup> *Merafong* (n 5 above) para 50. See also para 282 (Ngcobo J, concurring) ('The purpose of facilitating public involvement under sec 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.')

<sup>76</sup> *Merafong* (n 5 above) para 51.

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>77</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>78</sup> There was little, if any, chance that more consultation would change the outcome and more talking without any hope of a different result, 'could strengthen possible perceptions that the consultation was not meaningful.'<sup>79</sup>

Sachs J would have upheld the MDF's position on 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>80</sup>

He emphasised that he was not calling for continuous dialogue in all cases.<sup>81</sup> But in the peculiar circumstances of this case, such ongoing conversation and consultation was required.<sup>82</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

<sup>77</sup> *Merafong* (n 5 above) para 55.

<sup>78</sup> *Merafong* (n 5 above) para 59.

<sup>79</sup> As above. But see para 291 (Sachs J, dissenting) ('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>80</sup> *Merafong* (n 5 above) para 292 (Sachs J is referring to the benefits ascribed to participatory democracy in *Doctors for Life* (n 47 above) para 115, quoted at § 1.2 above.)

<sup>81</sup> *Merafong* (n 5 above) 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>82</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. *Merafong* (n 5 above) paras 295-297.

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>83</sup>

## 3.2 Rationality

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

### 3.2.1 Substantive rationality

The MDF argued that moving Merafong to North West 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>84</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>85</sup> – but the substance of the test is the same. 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 as to why Merafong would enjoy a better home in one province rather than 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>86</sup> and that

<sup>83</sup> *Merafong* (n 5 above) paras 300-301.

<sup>84</sup> *Harksen v Lane NO* [1997] ZACC 12, 1998 1 SA 300 (CC), 1997 11 BCLR 1489 (CC) para 53. See also, eg, *Prinsloo* (n 51 above) para 25 (CC); *Jooste v Score Supermarkets Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18, 1999 2 SA 1 (CC), 1999 2 BCLR 139 (CC) para 17 (CC); *Weare & Another v Ndebele NO & Others* [2008] ZACC 20, 2009 1 SA 600 (CC), 2009 4 BCLR 370 (CC) para 46 (CC); *Van der Merwe v Road Accident Fund & Another* [2006] ZACC 4, 2006 4 SA 230 (CC), 2006 6 BCLR 682 (CC) at para 42.

<sup>85</sup> *Merafong* (n 5 above) para 62. See also 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 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>86</sup> *Merafong* (n 5 above) para 110.

they felt an emotional attachment to Gauteng.<sup>87</sup> The government responded that Merafong needed to be moved to North West to increase that province's share of the equitable revenue,<sup>88</sup> and that Merafong already received many services from the neighbouring North West town of Potchefstroom.<sup>89</sup>

Justice Van der Westhuizen did not 'succumb[ ] to the temptation' to consider these arguments.<sup>90</sup> Instead, he noted that the purpose of the Acts was to abolish cross-boundary municipalities. This legitimate purpose could be achieved in '[m]ore ways than one', including locating Merafong entirely in Gauteng or entirely in North West.<sup>91</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>92</sup>

### 3.2.2 *Change of heart*

While all the judges agreed on the substantive 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 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>93</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>94</sup>

Moseneke DCJ took a different position. In his view, these reasons were insufficient to explain the *change*: 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>95</sup> The reasons offered by the GPL were insufficient for this task.

<sup>87</sup> *Merafong* (n 5 above) para 112.

<sup>88</sup> *Merafong* (n 5 above) para 113.

<sup>89</sup> *Merafong* (n 5 above) para 111.

<sup>90</sup> *Merafong* (n 5 above) para 114.

<sup>91</sup> *Merafong* (n 5 above). See also 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>92</sup> *Merafong* (n 5 above) para 114.

<sup>93</sup> *Merafong* (n 5 above) para 264.

<sup>94</sup> *Merafong* (n 5 above) para 268.

<sup>95</sup> *Merafong* (n 5 above) para 175 (my emphasis).

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>96</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 have supported the general part of the bill abolishing cross-boundary municipalities, but rejected one of the changes to its boundary. This position would not have any of the negative effects the GPL feared. It would instead split Merafong in half according to the existing provincial boundary – a consequence which, in Moseneke DCJ’s 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.

### 3.3 Proposing amendments

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 section 74 of the Constitution does not make specific provision for amendments while sections 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 amendment bills.

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>97</sup> Delegates

<sup>96</sup> The Act altered Gauteng’s boundary in two other regions.

<sup>97</sup> See for example, S Budlender ‘National legislative authority’ in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd ed 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.’

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>98</sup>

Third, rule 174(3) of the Joint Rules of Parliament only makes provision for amendments following a section 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. The National Assembly may amend the bill and initiate the process again. The implication, according to the Court, is that there is no space for amendments outside that process.

### 3.4 *Merafong* is about listening

While section 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 section 118 defines the extent of the government's constitutional 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 scrutinise 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 proposals presented to lawmakers during the participatory process and considering whether they should or should not have

<sup>98</sup> *Merafong* (n 5 above) para 80.

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. I must add that I do not mean to reduce the value of participation to reaching better (more rational) decisions; like the Constitutional Court, I think participation has both inherent value and instrumental value.

Of course, this last proposition rests upon a notion that rationality is a malleable, rather than a determinate concept. It is malleable. I explain in more depth below how the degree of scrutiny can be manipulated.<sup>99</sup> But for now the contrast between the majority and Moseneke DCJ's understanding of rationality review will suffice. The majority, in Ngcobo J's judgment, is willing to call both the 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. However, once the GPL Committee had 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). Bracketing, for the moment, who you might think is right on the facts, the higher standard set by Moseneke DCJ is more likely to weed out naked preferences and encourage participation. That is so because, once it has accepted a public-minded reason for its first choice, the government is obliged – on this account of rationality – to offer a plausible *public reason* for its change of heart. It cannot alter its course for vaguely defined and unlikely fears (interrupting the elections) nor for private reasons (ANC headquarters says so).

There is also a more fundamental way in which rationality is related to participation. It has always been a fundamental principal of administrative law that a decision-maker must 'hear the other side' before it decides. Better known by the Latin maxim '*audi alteram partem*' or, simply, the '*audi rule*', this principle is generally considered to be an incidence of procedural fairness. However, the principle is intended both to ensure fairness *and* to guard against irrationality. In the words of Ngcobo J, the *audi rule*

provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the

<sup>99</sup> See sec 3.2 below.

decision-maker to act fairly. It 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>100</sup>

If the *audi* rule serves the dual purposes of fairness and rationality, it also indicates that rationality has two separate elements. Ngcobo J again provides a lucid explanation:

[T]he requirement of the rule of law that the exercise of public power should not be arbitrary, has both a procedural and substantive component. Rationality deals with the substantive component, the requirement that the decision must be rationally related to the purpose for which the power was given and the existence of lawful reason for the action taken. The procedural component is concerned with the manner in which the decision was taken.<sup>101</sup>

Although Ngcobo J employs slightly different language,<sup>102</sup> the substance is clear. A decision will be substantively irrational if the means are not related to the ends, or the reasons provided for the decision do not support it.<sup>103</sup> But it can also be procedurally irrational if it was reached without gathering the relevant information, specifically, without *listening* to the other side. The central characteristic of the *audi* rule – of procedural rationality – is that it invalidates a decision even if it is ultimately substantively rational. The twin faces of rationality reflect the connection between deliberative democracy and participatory democracy. Both theoretical orientations believe that we reach better decisions through listening to others. Deliberative democrats focus on the substantive requirement that decisions are objectively justifiable. Participatory democrats stress the need to involve all affected citizens (who wish to be involved) in the decision-making process.

To return to *Merafong*, this discussion shows how rationality – in theory – is concerned both with the content of the ultimate decision

<sup>100</sup> *Masetlha v President of the Republic of South Africa* [2007] ZACC 20, 2008 1 SA 566 (CC), 2008 1 BCLR 1 (CC) para 187, quoted with approval by the majority in *Walele v City of Cape Town & Others* [2008] ZACC 11, 2008 6 SA 129 (CC), 2008 11 BCLR 1067 (CC) para 27.

<sup>101</sup> *Masetlha* (n 100 above) para 184.

<sup>102</sup> He seems to consider arbitrariness and rationality to be separate concepts.

<sup>103</sup> See *Albutt* (n 31 above) (Ngcobo CJ held that it was irrational for the President to determine pardon applications for Apartheid-era crimes without hearing from the victims. He did not rely on the procedural element of rationality, but on the link between victim participation and the purposes of the pardon dispensation, namely, promoting nationally unity and reconciliation. '[G]iven our history, victim participation in accordance with the principles and the values of the TRC was the only rational means to contribute towards national reconciliation and national unity. It follows therefore that the subsequent disregard of these principles and values without any explanation was irrational.' *Albutt* (n 31 above) para 69. As I discuss below, the rationality standard in *Albutt* is clearly far higher than that ordinarily employed by the Court.)



and with any procedural failure. If the decision was taken without any public participation, or if the participation was mere show, that would threaten not only the distinct constitutional duty to facilitate public involvement, but also the procedural rationality of any ensuing decision. Rationality is, therefore, not unconnected to the participation challenge: they share a common home in the constitutional demand to listen and both are directly related to the deliberative and participatory threads in our Constitution. I must stress that this is only a theoretical link: Doctrinally, a separate procedural rationality claim could probably not have been launched in *Merafong*.<sup>104</sup> And it was not raised by the MDF. But the theoretical connection holds. The demand for public participation can be seen as enforcing the same values that the *audi* rule does in administrative contexts.

This section outlined the Court's reasoning and explained how the various factors relate to the political ideal of listening. The next section offers a rather pessimistic account of *Merafong*. On this reading, the Court's decision in *Merafong* sucks the life out of the public's right to meaningful participation and truly engaged deliberation.

## 4 Count *Merafong*

It is a fact that may not be disputed that not all engagements between the state and the people are meant to be meaningful. What is called 'engagement' or 'public participation' is often just a kind of instruction, sometimes even a threat. Many times it is done in such a way that all possibilities for real discussion and understanding are closed from the start. In these cases what is called engagement is really just a way for the state to pretend to be democratic when in reality all decisions are already taken and taken far away from poor people.<sup>105</sup>

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 support the idea that the Court is no fan of listening. To be clear, the views here are not, necessarily, my considered views, they simply offer an alternative way of looking at the case.

<sup>104</sup> Firstly, as I discuss below, the Constitutional Court has rejected the idea that rationality requires the President to hear the other side. Secondly, it is unlikely to add anything. A court would not uphold a procedural rationality claim if it had rejected the participation challenge.

<sup>105</sup> S Zikode 'Meaningful engagement' <http://www.abahlali.org/node/5538> (accessed 20 November 2009).

#### 4.1 ‘Cynical charade’

The gut reaction of a participatory democrat to the decision on section 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 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>106</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.’<sup>107</sup>

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>108</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*

<sup>106</sup> *Doctors for Life* (n 47 above) 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, the MDF 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 the MDF did not question the correctness of the *Doctors for Life* majority. *Merafong* (n 5 above) at para 46. While one can appreciate the tightrope the Justice had to walk, this response is entirely unconvincing. The MDF’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>107</sup> The Court endorsed and applied this approach again in *Poverty Alleviation* (n 31 above) paras 59-63.

<sup>108</sup> *Merafong* (n 5 above) para 51.

for Life standard. But although the door may remain open in theory, it is virtually impossible<sup>109</sup> to imagine evidence that would satisfy a court that the legislators were not open to persuasion. Unless the legislators themselves announced that they only held the hearings for show 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>110</sup> And that conflict is enough to satisfy *Merafong*. The combination of the impossibility of finding evidence of earplugs, and the fact that adhering to 'policies of Government' justify ignoring public submissions, render the enforcement of this duty pointless.

The story behind the passage of the KwaZulu-Natal Slums Act suggests that government is well aware of this legal loophole. Sbu Zikonde, the President of Abahlali Basemjondolo, offers the following account of the hearings afforded the public regarding the Act:

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 organised 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 monopolised and abused in order to justify the exclusion of the public from the discussions that really matter.<sup>111</sup>

Given the *Merafong* doctrine, it is hardly surprising that Abahlali's challenge to the constitutionality of the Act did not raise the futility of the public hearings.<sup>112</sup>

The story of Matatiele confirms this suspicion. The community got the original constitutional amendment moving them to the Eastern

<sup>109</sup> But see *Mlokoti v Amathole District Municipality & Another* 2009 6 SA 354 (E) (The Court invalidated a decision by the Municipal Council to appoint a municipal manager. The judgment rested, in part, on a letter by the Mayor to the head of the Regional ANC Executive Committee acknowledging that the Council had ignored the appointment process and recommendations and acted solely on the orders of the ANC.) See also M Bishop & J Brickhill 'Constitutional law' 2009(4) JQR §2.12 (discussing *Mlokoti*).

<sup>110</sup> *Merafong* (n 5 above) para 50.

<sup>111</sup> Zikonde (n 105 above).

<sup>112</sup> *Abahlali Basemjondolo Movement SA & Another v Premier of the Province of KwaZulu-Natal & Others* [2009] ZACC 31, 2010 2 BCLR 99 (CC) (discussed in 5.1 below).

Cape declared invalid for lack of participation. The government then re-enacted exactly the same legislation but this time after going through the right participatory motions. The continued and widespread opposition to moving Matatiele to the Eastern Cape was ignored. The process of participation was clearly nothing but a formality.<sup>113</sup>

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 their decisions in the same fair and open participatory process.’<sup>114</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. A powerful argument. And it is part of the basis for the more optimistic account of *Merafong* I offer below.<sup>115</sup> However, I do want to note that alternative conceptions of section 118 exist that would have afforded the public more meaningful participation.

First, Justice Sachs’ duty to report back is an extension of a bigger idea: that the legislature must give reasons for dismissing submissions made during the public participation processes. There are potent philosophical and policy reasons to take this option. In a recent article, Glen Staszewski argues that the dominant notion that government is primarily held accountable politically – that is, by elections – is ‘wildly unrealistic.’<sup>116</sup> In short, the all-or-nothing nature of elections, and the fact that citizens generally do not understand policy decisions, makes it impossible for citizens to hold elected officials to account for individual policy decisions. At best,

<sup>113</sup> After the second constitutional amendment, the change in ANC leadership heralded a change in approach. As they did with *Merafong* (see Epilogue below) the Zuma leadership engaged with the community to find a solution. Eventually an ANC run referendum was held, but it was marred by irregularities and the results were ignored. At the time of writing, Matatiele remained in the Eastern Cape, despite continued opposition.

<sup>114</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 19-20.

<sup>115</sup> See sec 5.2 below.

<sup>116</sup> ‘Reason-giving and accountability’ (2008-2009) 93 *Minnesota Law Review* 1253 1266.

elections serve only as an imperfect proxy for real accountability. Accountability is a founding value of the Constitution<sup>117</sup> and the Constitutional Court has specifically recognised that accountability requires courts to give reasons for its decisions.<sup>118</sup>

Drawing from deliberative democratic theory, Staszewski argues that ‘public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions.’<sup>119</sup> As an accountability mechanism, reason-giving has the following advantages:

First, reason-giving promotes accountability by limiting the scope of available discretion and ensuring that public officials provide public-regarding justifications for their decisions. Second, reason-giving facilitates transparency, which, in turn, enables citizens and other public officials to evaluate, discuss, and criticise governmental action, as well as potentially to seek legal or political reform. Most fundamentally, reason-giving fosters democratic legitimacy because it both embodies, and provides the preconditions for, a deliberative democracy that seeks to achieve consensus on ways of promoting the public good that take the views of political minorities into account.<sup>120</sup>

Now, rationality review already imposes a form of reason-giving responsibility on government; it permits any person to take the government to court and force it to explain the rationale behind a decision. Staszewski calls for something deeper and more widespread: mechanisms broadly designed to influence the way we consider an array of fundamental public law issues. I am not advocating reason-giving in this broad sense. I do not believe that reason-giving is the panacea some suggest for what ails our political system. It also seems clear to me that enhanced reason-giving requirements have readily identifiable difficulties: (a) enforcement; (b) the burdens placed on government, and (c) the potential to promote accountability only to a small elite (who ostensibly represent the public.)

<sup>117</sup> Section 1(d) reads: ‘The Republic of South Africa is one, sovereign, democratic state founded on the following values: ... (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure *accountability*, responsiveness and openness.’ (my emphasis).

<sup>118</sup> See *South African Liquor Traders' Association & Others v Chairperson, Gauteng Liquor Board, & Others* [2006] ZACC 7, 2009 1 SA 565 (CC), 2006 8 BCLR 901 (CC) para 15 (Criticising the High Court for declaring a law invalid without reasons, the Court wrote: ‘the constitutional principle of accountability requires a court to give its reasons for its order, even where that order is unopposed.’) *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, & Others* [2009] ZACC 8, 2009 4 SA 222 (CC), 2009 2 SACR 130 (CC), 2009 7 BCLR 637 (CC) para 157 (The Court stressed the relevance of accountability in interpreting a statute to require a court to provide reasons for not allowing a child to testify through an intermediary.)

<sup>119</sup> Staszewski (n 116 above) 1278.

<sup>120</sup> As above.

However, in the specific context of constitution-mandated public participation, reason-giving is a useful tool to ensure that participation is meaningful and serves to promote further participation. It will be more difficult for legislators to refuse to listen to those who take the trouble to participate if they know they are required to provide reasons for rejecting their submissions. And by providing reasons, legislators simultaneously indicate to non-participants that participation is meaningful and thereby encourage them to take part in future. Reason-giving – in some form – would serve the deliberative and the participatory ends of mandated public participation. Unlike Justice Sachs duty to report back, reason-giving is not intended to extend the deliberation or change a decision already reached. Providing reasons would be the last word in the process. It would serve solely as a prophylactic measure to ensure that the participation itself was worthwhile.

It also seems to me that requiring reasons in this context would not impose too great a burden on legislators. Participation is ordinarily run by a legislative committee, not by the legislature as a whole. As we saw in *Merafong*, those committees already provide feedback to the legislature about the issues that were raised in the public participation process and the reasons for their proposed course of action. Requiring committees to give reasons in all cases, and that the reasons be more widely published – particularly to those who were involved in the participation – does not seem like an unreasonable burden. To be fair to the Court, this suggestion was not specifically raised – in either *Doctors for Life* or *Merafong*. However, the Court’s attitude in both cases strongly suggests that they would not support it.

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>121</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 section 118. Yet, the primary driver for changing the negotiating mandate was, ultimately, time. If the local elections had not been so near, then the GPL would no doubt have felt far more comfortable sending the legislation back to the National Assembly to be amended. And neither the GPL nor any other political institution could offer any reason, other than disorganisation or the intentional stifling of debate, why the amendment had to be introduced to Parliament so close to the election. If the Court had extended the scope of the section 118 inquiry to include what

<sup>121</sup> *Doctors for Life* (n 47 above) para 194.

happens between public hearings and the ultimate vote – not an outrageous position – then the legislature’s self-imposed urgency would have been relevant and the process might have been found wanting.

Finally, in other contexts (which I discuss in detail later)<sup>122</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 – at least in the abstract – that they could have done so here as well.

In sum, while the Court wants participatory democracy to ‘supplement and enhance the democratic nature of general elections and majority rule’,<sup>123</sup> the effect of *Merafong* is to subordinate participation to representation. Participation is only relevant if and when representatives want it to be.

## 4.2 Irrational democracy

The Vampire view of *Merafong* requires a bit of a diversion into the theory of the malleability of rationality review. I have explained this phenomenon in detail elsewhere,<sup>124</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 them.

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: does putting Merafong in North West *rather than* Gauteng serve a legitimate government purpose? In this version of the 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

<sup>122</sup> See sec 4 below.

<sup>123</sup> *Merafong* (n 5 above) para 50.

<sup>124</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). For more on this, see Price (n 30 above) (argues that *Poverty Alleviation* (n 31 above) and *Albutt* (n 31 above), decided within days of each other indicate very different degrees of rationality scrutiny); M Bishop & J Brickhill ‘Constitutional Law’ (2010) 1 *JQR* §2.1-2.2 (discuss *Albutt* and *Poverty Alleviation* and demonstrate the different levels of scrutiny employed).

well no matter which province *Merafong* is placed in. It demands a more specific goal that is served by placing Merafong in North West that would not be achieved if the municipality remained in Gauteng.<sup>125</sup> (Moseneke DCJ, as noted above, places a similar demand on the legislature.)

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>126</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 analyses 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>127</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>128</sup> Either the Court will always ask the question the way it does in *Merafong* and therefore find the law rational, or it will vary how it asks the question in order to reach the outcome it has already intuitively decided. Neither option promotes deliberation or participation.

<sup>125</sup> For a contrary point of view, see A Price ‘The content and justification of rationality review’ in Woolman & Bilchitz (n 124 above).

<sup>126</sup> *Prinsloo* (n 51 above) para 36.

<sup>127</sup> Price (n 125 above).

<sup>128</sup> I have suggested a test that tries to ensure government rationality without undue judicial interference in the other branches. Bishop (n 124 above).



And that – at least on the Vampire view – decreases the constitutional capacity to enhance listening. As I explained above,<sup>129</sup> if the goal of listening is to ensure government reaches the best decision, then the removal of an institutional check that ensures that decisions are, at the very least, rational, is highly undesirable. To put 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 guns, because ... well, just because really. This rather narrow understanding of rationality review discourages the government from listening to alternatives or even seeking out alternatives. From the perspective of political legitimacy, this narrow understanding of rationality review creates significant disincentives for citizens who have alternative views and wish to have them heard in various public fora – be they legislatures or courts.

Again, there is every possibility that government will often act rationally and abandon irrational plans in favour of rational ones suggested during the course of public participation. 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 listen.

### 4.3 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 section 74 bills in the NCOP. Recall that Van der Westhuizen J offered three reasons for his holding: (a) section 74, unlike sections 75 and 76, does not mention amendments; (b) the NCOP procedure is a mandated one; and (c) rule 174(3) provides a special procedure for section 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 section 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

<sup>129</sup> See sec 2.2 above.

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 respond by supporting a change to the legislation that they are considering, the scope of the Constitution and the legislative process (and any subsequent court proceedings) to accommodate those concerns all but disappears. The only option is the unattractive one of rejecting a bill altogether. This prospect is uninviting when most legislation contains a large range of uncontested provisions, or when the legislation has, for good reason, been fast-tracked. 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 question is section 65(1) of the Constitution. Section 65(1) makes a mandated vote the *default mechanism* for all decisions in the NCOP. Only where the Constitution provides otherwise – as it does, for example, in section 75 for bills that do not affect the provinces – are votes taken without mandates. 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 goods are exactly what prohibition of amendment denies.

How then do we deal with the difference between sections 75 and 76 on the one hand, and section 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 section 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 section 74 bills in the NCOP.<sup>130</sup> Rule 224(1)(a) of the NCOP Rules reads: 'After a [section 74] Bill has been placed on the Order Paper but before the Council decides the Bill a member may place

<sup>130</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.

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 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 section 74(8) bills and other section 74 bills? Perhaps the Court believed rule 174(3) deals exclusively with section 74(8) bills and the other rules that I quote above do not apply to section 74(8) bills. There is no reason to credit that suggestion. First, the Court’s reasoning applies to *all* section 74 bills. Second, there is nothing in the rules that suggest that section 74(8) bills can only be amended by veto while other section 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 section 74(8) veto *without amendment*. Amendments for *all* section 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 this critique to sound melodramatic. The proposal of amendments to section 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.

#### 4.4 Supporting case law

In two other cases, the Court demonstrated a similar negative disposition towards enforcing the requirement that government must *listen* to alternative views. In both cases, the majority valued efficient executive action above participation and deliberation. In both cases, however, strong dissenting voices extolled the benefits of a strong ‘listening’ democracy.

The first case is *Democratic Alliance & Another v Masondo NO and Another*.<sup>131</sup> The Court had to decide whether mayoral committees established under section 60 of the Local Government: Municipal Structures Act<sup>132</sup> were ‘committees of the [municipal] council’ that must, in terms of section 160(8) of the Constitution,<sup>133</sup> include minority party representation. Langa DCJ, writing for the majority, noted that local government served (at least) two important goals:<sup>134</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>135</sup> Although he conceptualised these twin goals as ‘mutually reinforcing’,<sup>136</sup> he ultimately concluded that section 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>137</sup>

Justices Sachs, on the other hand, penned a judgment (while ultimately concurring with the majority), stressing 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>138</sup>

<sup>131</sup> n 57 above. My use of *Masondo* is inspired by, and relies on, Theunis Roux’s detailed discussion of the case. Roux ‘Democracy’ in Woolman *et al* (n 32 above) 10-72 - 10-75. Those seeking more detailed and insightful analysis along similar lines will find it there.

<sup>132</sup> Act 117 of 1998.

<sup>133</sup> Section 160(8) reads:

‘Members of a Municipal Council are entitled to participate in its proceedings and those of its committees that:

(a) allows parties and interests reflected within the Council to be fairly represented;

(b) is consistent with democracy; and

(c) may be regulated by national legislation.’

<sup>134</sup> He finds these goals in sec 152 of the Constitution. *Masondo* (n 57 above) para 16.

<sup>135</sup> *Masondo* (n 57 above) para 17.

<sup>136</sup> As above.

<sup>137</sup> *Masondo* (n 57 above) para 18.

<sup>138</sup> *Masondo* (n 57 above) paras 42-43 (Sachs J, concurring).

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 section 160(8)<sup>139</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>140</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>141</sup> Given the mixed character of local government – which is both legislative and executive in character – she concluded that even mayoral committees must have minority party representation. Majority-rule is the principle for ultimately taking a 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>142</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>143</sup> As to the second leg, although the Deputy Chief Justice admitted that executive action must comply with the

<sup>139</sup> *Masondo* (n 57 above) para 78 (O'Regan J, dissenting).

<sup>140</sup> *Masondo* (n 57 above) para 62 (O'Regan J, dissenting).

<sup>141</sup> *Masondo* (n 57 above) para 72 (O'Regan J, dissenting).

<sup>142</sup> n 100 above.

<sup>143</sup> *Masetlha* (n 100 above) 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, 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)).

strictures of legality and rationality, neither included a duty to hear the other side.<sup>144</sup>

In dissent,<sup>145</sup> Justice Ngcobo – joined by Justice Madala – explicitly recognised 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>146</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>147</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>148</sup>

*Masetlha* now has to be read with *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others*<sup>149</sup> and *Albutt v Centre for the Study of Violence and Reconciliation & Others*.<sup>150</sup> These cases send conflicting messages. In *Poverty Alleviation*, the Court confirmed that rationality is solely about substance, not procedure.

The applicants’ argument seeks to link process with outcome and, in doing so, muddles up the procedural requirement for legislative validity and the requirement that there be a rational connection between legislation and the legitimate governmental purpose sought to be

<sup>144</sup> *Masetlha* (n 100 above) 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 142 above) 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>145</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 100 above) para 227.

<sup>146</sup> *Masetlha* (n 100 above) para 181.

<sup>147</sup> *Masetlha* (n 100 above) para 184.

<sup>148</sup> *Masetlha* (n 100 above) para 187.

<sup>149</sup> *Poverty Alleviation* (n 31 above).

<sup>150</sup> *Albutt* (n 31 above).

achieved. Rationality necessarily concerns itself with outcome, in the sense that any legislation that results from the process must itself be rational. Legislation passed without adequate consultation could be rational but not pass constitutional muster because of a lack of consultation.<sup>151</sup>

This passage envisages a separation between rationality and participation along the same lines as *Masetlha*.

However, in *Albutt* the Court held that it was irrational to exclude victims from a process of granting pardons for apartheid-era crimes. Ngcobo CJ – now writing for the Court – did not rely on the procedural element of rationality he employed in *Masetlha*. Instead, he argued that victim participation was a necessary element of achieving the specific purpose of these pardons: national unity and reconciliation. However, it is difficult not to interpret the judgment as reflecting a marked general preference for participation as an element of rational decision-making (outside the specific factual confines of *Albutt*.) This reading is supported by Froneman J's concurring judgment – joined by Cameron and Van der Westhuizen JJ – which stresses the importance of participatory democracy to the case and its deep links with African tradition.<sup>152</sup> Nonetheless, *Masetlha* remains the black-letter law: rationality does not include a participation principle.

*Masondo* and *Masetlha* provide clear support for the Vampire or anti-listening interpretation of *Merafong*. But let us pause before we create an antinomy in the law where none need exist: an either/or between efficiency on the one hand and participation and deliberation on the other. None of the three dissenters in *Merafong*, *Masondo* and *Masetlha* suggest that efficient decision-making should be subordinate to or, god-forbid, undermined by the Constitution's commitments 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>153</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

<sup>151</sup> *Poverty Alleviation* (n 31 above) para 68.

<sup>152</sup> *Albutt* (n 31 above) paras 90-93. 'The notion of participatory democracy is ... an African one. Victim participation was the norm in deciding the proper 'punishment' for offenders in traditional African society. It was an expression of the participatory democracy practiced in those societies ... The main judgment therefore finds support in the African legacy of participation of citizens in affairs of the society, not as direct authority for its particular application to the facts of this case, but as further legitimisation that it accords with a tradition that runs deep in the lives of many people in this country.' As above para 91.

<sup>153</sup> *Masondo* (n 57 above) para 72. See also, para 78.

the Legislature is precluded from changing its mind.’<sup>154</sup> And in *Masetlha* 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>155</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>156</sup>

On the Vampire interpretation, the Constitutional Court in *Merafong* – and in *Masondo* and *Masetlha* – 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 and nuanced than I have as yet let on ...

## 5 Expanding participation

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*.

### 5.1 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

<sup>154</sup> *Merafong* (n 5 above) para 293.

<sup>155</sup> *Masetlha* (n 100 above) para 184.

<sup>156</sup> Roux ‘Democracy’ in Woolman *et al* (n 32 above) 10-42.



housing rights in *Kyalami*,<sup>157</sup> *Grootboom*<sup>158</sup> and *Port Elizabeth Occupiers*.<sup>159</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>160</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 section 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>161</sup> Expanding on what 'meaningful engagement' would entail, Yacoob J wrote:

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>162</sup>

<sup>157</sup> *Minister of Public Works & Others v Kyalami Ridge Environmental Association & Others (Mukhwevho Intervening)* [2001] ZACC 19, 2001 3 SA 1151 (CC), 2001 7 BCLR 652 (CC) 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>158</sup> *Government of the Republic of South Africa & Others v Grootboom & Others* [2000] ZACC 19, 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) 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 sec 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>159</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 1 SA 217 (CC), 2004 12 BCLR 1268 (CC) 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>160</sup> [2008] ZACC 1, 2008 3 SA 208 (CC), 2008 5 BCLR 475 (CC).

<sup>161</sup> *51 Olivia Road* (n 160 above) para 16.

<sup>162</sup> *51 Olivia Road* (n 160 above) para 15.

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>163</sup> Finally, the Court noted that '[e]ngagement is a two-way process'<sup>164</sup> that 'will work only if both sides act reasonably and in good faith.'<sup>165</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>166</sup> the Court was confronted by the controversial N2 Gateway project. The N2 Gateway project planned to move residents of informal settlements along the N2 highway to Delft, an area some 15 km away. To cut 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 as to 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 government to understand the needs and concerns of individual households so that, where possible, it can take steps to meet their concerns.'<sup>167</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>168</sup>

Justice O'Regan highlighted the connection between the section 26(2) duty to engage and the right to just administrative action. She explained the purpose of engagement in the housing context in almost

<sup>163</sup> *51 Olivia Road* (n 160 above) para 19.

<sup>164</sup> *51 Olivia Road* (n 160 above) para 14.

<sup>165</sup> *51 Olivia Road* (n 160 above) para 20.

<sup>166</sup> [2009] ZACC 16, 2010 3 SA 454 (CC), 2009 9 BCLR 847 (CC).

<sup>167</sup> *Residents of Joe Slovo Community* (n 166 above) para 238 (Ngcobo J, concurring).

<sup>168</sup> *Residents of Joe Slovo Community* (n 166 above) para 244 (Ngcobo J, concurring).

identical terms to her defence of 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>169</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 relationships. It is to everyone’s advantage that they be encouraged to get beyond the present impasse and work together once more.<sup>170</sup>

Sachs J also took time to note the residents’ responsibilities on the ‘two-way street’ of engagement, requiring contributions and responsibilities from residents, as well as the state.<sup>171</sup>

The second sequel to *Olivia Road – Abahlali Basemjondolo Movement SA & Another v Premier of the Province of Kwazulu-Natal & Others*<sup>172</sup> – concerned the equally divisive KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act (Slums Act).<sup>173</sup> Allegedly designed to make Durban more attractive to tourists during the upcoming 2010 World Cup, the Slums Act was challenged by Abahlali BaseMjondolo – a radical social movement of

<sup>169</sup> *Residents of Joe Slovo Community* (n 166 above) para 296 (O’Regan J, concurring).

<sup>170</sup> *Residents of Joe Slovo Community* (n 166 above) para 408 (Sachs J, concurring).

<sup>171</sup> *Residents of Joe Slovo Community* (n 166 above) 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>172</sup> n 113 above.

<sup>173</sup> Act 6 of 2007.

shack dwellers working to improve their own conditions – on several grounds. Most importantly, for our immediate purposes, Abahlali Basemjondolo claimed that the Act 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>174</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>175</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>176</sup> Indeed, that was precisely the outcome of the Court-ordered engagement in *Olivia Road*. It transpired that the derelict buildings could be upgraded and the residents were not evicted.

## 5.2 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. However, it seems less inclined to do so when the ‘removal’ is of an altogether different nature: forced cross-border municipality movements. In *Merafong*, the Court seems aware that representative democracy and political demands can always trump the solutions that arise from

<sup>174</sup> *Abahlali* (n 113 above) para 97.

<sup>175</sup> As above.

<sup>176</sup> *Abahlali* (n 113 above) para 69 (Yacoob J, dissenting).

listening to the people whom the decision will ultimately affect. Rationality review *qua* rubber stamp enables the Court to avoid a larger and potentially more difficult confrontation with the state.

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 than the loss in the political cases. The claim rested on what the court has called a ‘right to participate’,<sup>177</sup> although it is not found in the Bill of Rights.

The second doctrinal distinction flows from the unintended consequences of the ‘timing’ of the various matters when they arrived before the Court. 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 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>178</sup> Such a high bar will rarely be cleared: so the test bears repetition. Even if plaintiffs 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

<sup>177</sup> *Doctors for Life* (n 47 above) para 129.

<sup>178</sup> *Glenister v President of the Republic of South Africa & Others* [2008] ZACC 19, 2009 1 SA 287 (CC), 2009 2 BCLR 136 (CC) para 44.

legislative process, but *undoing* the process altogether. Such a test stacks the deck against participation and deliberation. While the deck seems far more even handed in the housing cases, engagement still acknowledges the importance of the separation of powers and allows other branches significant room to define the right in question.<sup>179</sup>

These realist explanations may do some work when explaining why the Court reached different kinds of outcomes in the two streams of cases. They do not, however, explain why the Court appears to hold two seemingly inconsistent attitudes to listening. Is there some unified theory that can explain these different legal phenomena? And if such a unified theory exists, then does the Court's doctrine (in terms of this theory) bring out the best in the participatory and deliberative elements manifest in our Constitution?

## 6 Reconsidering *Merafong*

The government says that it wants to 'bring government to the people'. It is much better to 'bring government to the people' than to send in the police, the private security and the land invasions unit to evict and disconnect and to then call that good governance. But bringing the government to the people is not enough. Meaningful engagement will only happen when we can, through our struggles, bring the people into government.<sup>180</sup>

The answer to the first question is, I think, yes. By listening more closely to what the Court has been saying, one picks up a more *consistent* vision of representative, deliberative and participatory democracy. In addition, this latent vision suggests a far more positive evaluation of the Court's response to participation than the simple reading of *Merafong* offered earlier. Without claiming too much for the Court or my theory, I do want to suggest that this unified theory helps to bring out some of the more important participatory and deliberative processes embedded in the Constitution.

### 6.1 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

<sup>179</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 sec 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 sec 26(2) might.

<sup>180</sup> Zikode (n 105 above).

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 styles. Two, my purpose is to create a framework in which to make sense of the Constitutional Court's jurisprudence, not to get involved in a review of the 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 in terms of seven factors: (a) who organises 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, and to inform lawmakers about technical difficulties with legislation and people's attitudes towards the proposed legislative solution to a problem. 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. The 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 participants encompass just about any person – natural or juristic. Who participates depends on how the government invites participation. If it only requests petitions in the Government Gazette and holds hearings in Cape Town, then only well funded interest groups will be heard. If it goes out of its way to solicit involvement from a wider audience, then every interest citizen ought to be able to contribute to the government initiated legislative process. Lastly, this participation occurs at all three levels of government – national, provincial and local. However, this mode of participation most closely resembles the paradigm employed at the

highest reaches of government. 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 Court's decision in *Merafong*, the residents of Merafong engaged in radical participation. Radical participation is citizen-organised. 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 the 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 spaces open for citizens to act in such a potentially disruptive manner if they so choose. The primary legal protections are the rights to freedom of expression,<sup>181</sup> assembly<sup>182</sup> and association.<sup>183</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 organise 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 at this moment of history concern local 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

<sup>181</sup> Constitution sec 16.

<sup>182</sup> Constitution sec 17.

<sup>183</sup> Constitution sec 18.



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.

## 6.2 Braiding participation

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 form of participation 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>184</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>185</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 demobilising and disempowering drawn out technocratic procedures and allow the state to decide what it will and won’t accept as reasonable demands

<sup>184</sup> R Ballard ‘Participation, democracy and social movements’ (2008) 4 *Critical Dialogue* 17–19 [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 20 November 2009).

<sup>185</sup> As above.

for change.’<sup>186</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 tend to reinforce one another and become more extreme.<sup>187</sup> In addition, the more extreme a person’s belief, the more likely they are to be politically active.<sup>188</sup> There is nothing wrong with such activism 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 politics for a pluralism that rewards those who are the best protesters.

The ‘dangers’ of capture in traditional participation or decreased deliberation in radical participation makes mutual participation appear to be the most attractive option. Mutual participation, however, has its limits. 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 larger scale problems cannot always be solved by local participation. Once we scale up mutual participation from local spheres to the national level, we tend to end up with representative democracy accompanied by traditional participation. We cannot have national conversations about issues – or, more accurately, we cannot take decisions about national issues – without representatives or elections. This comes back to the efficiency problem I discussed earlier. Mutual

<sup>186</sup> R Pithouse ‘Rethinking public participation from below’ (2006) 2 *Critical Dialogue* 24–25 [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 20 November 2009).

<sup>187</sup> See, for example, CR Sunstein ‘Deliberative trouble? Why groups go to extremes’ (2000) 110 *Yale Law Journal* 71.

<sup>188</sup> D Mutz *Hearing the other side: Deliberative v participatory democracy* (2006).

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>189</sup> she concludes that people who are more exposed to contrary viewpoints, are likely to 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 is messy. We are not only concerned with a balance between participation and efficiency, but between two ideas that seemed like bedfellows: participation and deliberation. Mutz summarises 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>190</sup>

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

<sup>189</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. Second, the participation the survey measured was activities like voting, donating to candidates or putting up signs in support of a candidate. Mutz (n 188 above) 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>190</sup> Mutz (n 188 above) 133.

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.

Before I move on to considering how *Merafong* relates to this framework, I want to repeat myself: these three forms of participation are useful heuristics; 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>191</sup> The above triad serves as a conceptual tool on to which to map different kinds of participation: it is certainly not meant to serve as a set of descriptions and prescriptions about which kinds of participation one ought to adopt in the furtherance of specific ends or democracy itself.

### 6.3 Prince *Merafong*

The above 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 a decision was not taken with an open mind, government is free to ignore any alternative public submissions 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 that government accept 'reasonable' suggestions, or engage in ongoing deliberation, those who want government to listen may have been pushed towards traditional participation and away from radical

<sup>191</sup> T Madlingozi 'Post apartheid social movements and the quest for the elusive "new" South Africa' (2007) 34 *Journal of Law and Society* 77, 89.

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:

[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>192</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. 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. They may open the door to understanding and empathy.<sup>193</sup>

There is also a way to view the approach to rationality as promoting 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>194</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>195</sup> By getting judges out of the way, we may well get citizens to act.

<sup>192</sup> *Merafong* (n 5 above) para 308.

<sup>193</sup> Czapinskiy & Manjoo (n 114 above) 19.

<sup>194</sup> Barber (n 38 above) 143.

<sup>195</sup> Barber (n 38 above) 111.

In sum, *Merafong* can be seen as setting the appropriate level of traditional participation while taking into account the space required for other forms of participation. On this theory, although *Merafong* might limit the duty of government to listen in one sphere, it appropriately focuses citizens on other ways of participating which, all things considered, may ultimately be more effective.

## 7 Conclusion

I have traversed 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. 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. The validity of a constitutional doctrine about listening must be responsive to this research. My modest intention here is to convince readers that a complicated 'listening' democracy exists in South Africa and to offer a framework for constitutional lawyers and researchers who wish to create a useful empirical literature around participation.

### 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 services because we do not recognise the North West administration'.<sup>196</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>197</sup> That hope was rewarded only a week later when a high-level delegation of the ANC visited Merafong.<sup>198</sup> The Secretary General – Gwede Mantashe – told reporters that the ANC 'had

<sup>196</sup> K Mabuza & G Makhafola 'We won't pay, says Khutsong' *Sowetan* 18 June 2008 <http://www.sowetan.co.za/News/Article.aspx?id=786263> (accessed 15 November 2009). See also 'More protests planned in Gauteng' *Dispatch* 19 June 2009 <http://www.dispatch.co.za/article.aspx?id=214546> (accessed 15 November 2009).

<sup>197</sup> As above.

<sup>198</sup> P Tau 'ANC leaders want to resolve Khutsong dispute' *The Star* 26 June 2008 6, [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 15 November 2009). See also SAPA 'ANC meets forum over Merafong demarcation' *Mail & Guardian Online* 25 June 2008 <http://www.mg.co.za/article/2008-06-25-anc-meets-forum-over-merafong-demarcation> (accessed 15 November 2009).

listened to the residents' leaders' grievances and would table them before the full [National Executive Committee] for a political discussion.<sup>199</sup> Despite the hint of progress, violence accompanied the delegation's visit,<sup>200</sup> and protests continued through August<sup>201</sup> into September.<sup>202</sup> The ANC returned to Merafong in September. In what was described as a 'very positive' meeting, it seemed that legislation returning Merafong to Gauteng would be enacted as soon as October.<sup>203</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>204</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>205</sup> Jomo Mogale expressed Merafong's reaction: 'People are very excited. We are happy with the new (ANC) leadership because it listens to the people'.<sup>206</sup> However, the ANC denied that any decision had been taken, keeping the residents on edge.<sup>207</sup> Mashatile repeated his promise a few weeks later,<sup>208</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>209</sup> Shiceka also apologised to the people of Merafong and admitted that the government had erred in moving them to the North West.<sup>210</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

<sup>199</sup> As above.

<sup>200</sup> 'More violence hits Khutsong' *Sowetan* 26 June 2008 <http://www.sowetan.co.za/News/Article.aspx?id=790968> (accessed 15 November 2009).

<sup>201</sup> SAPA 'Merafong residents protest against services' *Independent Online* 8 August 2008 [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 15 November 2009).

<sup>202</sup> SAPA 'Khutsong to march for service delivery' *Independent Online* 25 September 2008 [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 15 November 2009).

<sup>203</sup> E Naki 'ANC set to break Merafong impasse' *Sowetan* 3 September 2008 <http://www.sowetan.co.za/News/Article.aspx?id=835349> (accessed 15 November 2009).

<sup>204</sup> As above.

<sup>205</sup> Z Mapumulo 'Mashatile's promise to Khutsong' *Sowetan* 6 October 2008 <http://www.sowetan.co.za/News/Article.aspx?id=856982> (accessed 15 November 2009).

<sup>206</sup> S Shoba 'Khutsong overjoyed to be back in Gauteng' *Business Day* 7 October 2008 <http://allafrica.com/stories/200810070084.html> (accessed 15 November 2009).

<sup>207</sup> Mapumulo (n 205 above) and Shoba (n 206 above).

<sup>208</sup> Political Bureau 'Khutsong to be returned to Gauteng' *The Mercury* 22 October 2008 4, [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 15 November 2009).

<sup>209</sup> 'Khutsong residents to get what they want' *Independent Online* 10 November 2008 [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 15 November 2009).

<sup>210</sup> I Lekota 'Minister says sorry to Khutsong: "Govt made a mistake"' 10 November 2008 *Sowetan* <http://www.sowetan.co.za/News/Article.aspx?id=880941> (accessed 15 November 2009).

unrealistic promises.<sup>211</sup> However, cabinet nonetheless placed the Constitution's 19th Amendment Bill and the Cross-Boundary Municipalities Laws and Related Matters Repeal Bill on the legislative agenda.<sup>212</sup>

The ANC's chief whip explained the decision to revisit Merafong as follows:

The broader picture for all of 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>213</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. The goal of these engagements will be to examine how best to accommodate the views of the majority of the affected communities.<sup>214</sup>

The plan was to have the legislation passed in time for the April 2009 general election,<sup>215</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>216</sup> The National Assembly eventually passed the bills on 18 February.<sup>217</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 councillors into exile, disrupted schooling and had all but stopped basic service delivery.<sup>218</sup>

<sup>211</sup> Shiceka 'Undermining Cabinet' *Cape Argus* 7 December 2008 6, [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 15 November 2008).

<sup>212</sup> As above.

<sup>213</sup> S Mkhwanazi 'Khutsong to be reincorporated before election' *The Mercury* 12 December 2008 2, [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 15 November 2009).

<sup>214</sup> E Mabuza 'State to resolve boundary disputes' *Business Day* 6 January 2009 <http://allafrica.com/stories/200901060082.html> (accessed 16 November 2009).

<sup>215</sup> SAPA 'Khutsong residents' fate in the hands of MPs' *Independent Online* 4 February 2009 [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 16 November 2009).

<sup>216</sup> SAPA 'Tight timeframes for legislation on Khutsong voters' *Citizen* 9 February 2009 <http://www.citizen.co.za/index/article.aspx?pDesc=88554,1,22> (accessed 16 November 2009).

<sup>217</sup> W Hartley 'New Chapter for Merafong as MPs Move to Rectify Blunder' *Business Day* 19 February 2009 <http://allafrica.com/stories/200902190080.html> (accessed 16 November 2009).

<sup>218</sup> As above.



The bills made it to a vote in the NCOP on 19 March. Introducing the bills there, Shiceka stressed the 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>219</sup>

President Motlanthe finally brought the bills into force on 9 April, giving them retrospective effect from 3 April,<sup>220</sup> ending Merafong's separation from Gauteng after 3 years, 1 month and 2 days. In the April 22nd national election, 75.7% of Merafong's registered voters cast their ballots, and 75.33% of them voted for the ANC.<sup>221</sup> There were no reports of protests or violence.

<sup>219</sup> S Mkhwanazi 'We made a mistake, says ANC' *The Star* 20 March 2009 6, [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 16 November 2009).

<sup>220</sup> SAPA 'Merafong goes back to Gauteng' *News24* 10 April 2009 [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 16 November 2009).

<sup>221</sup> Independent Electoral Commission 'Results report for Municipality G284 - Merafong City' (7 May 2009) <http://www.elections.org.za/NPEPWStaticReports/reports/ReportHandler.ashx?22+Apr+2009+National+Election%5cResults+Report%5cGauteng%5cGT484+-+Merafong+City+Carletonville.pdf> accessed (16 November 2009).

