

Public Participation in the Demarcation of Municipal Boundaries in South Africa

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DECLARATION

I, Omphile Boitumelo Tina Tong, hereby declare that this dissertation is my original work submitted for the fulfilment of the requirements for Master of Laws in Public Law and Legal Philosophy at the North West University (Mafikeng Campus) and has never been presented in any other institution by any person for any qualification. I also declare that any secondary information used in this dissertation has been duly acknowledged and referenced in accordance with the requirements of the University.

Omphile Tong

Signature

20 November 2018

Date

DEDICATION

This dissertation is dedicated to my family and friends for their endless love and support.

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Firstly, I would like to thank the Almighty God for giving me strength and courage to never give up on myself and my work.

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LIST OF ABBREVIATIONS AND ACRONYMS

ANC	African National Congress
CMC	Computer-mediated communication
CODESA	Convention for a Democratic South Africa
DA	Democratic Alliance
IEC	Independent Electoral Commission
LGNF	Local Government Negotiating Forum
LGTA	Local Government Transition Act
MDB	Municipal Demarcation Board
MEC	Member of the Executive Council
NCOP	National Council of Provinces
NP	National Party
SALGA	South African Local Government Association
TMT	Technology-mediated communication

ABSTRACT

Municipal boundary demarcation is a contested issue in the democratic South Africa. The issues of boundary demarcation are complex in that they are impacted by several factors. These factors include public participation, community objections, the interference of political parties on boundary demarcation and service delivery demands on new municipalities and governance concerns all have a role to play in the demarcation of municipal boundaries.

The function of the Municipal Demarcation Board (MDB) is to review, determine and revise municipal boundaries and ward boundaries within municipalities in South Africa. In fulfilling its functions, the MDB needs to be transparent and accountable when it reaches its decisions. The reason for this is that boundary demarcation is about spatial transformation and is the key to local government reform.

Public participation is important for the communities that are affected by the demarcation decisions. However, the concept of having a say is not clear cut. Contestation arises around who has the final say, and whether all the voices, the perspectives, the desires and the ambitions of the communities are sufficiently expressed and acknowledged.

Keywords: Public Participation, Municipal Boundaries, Demarcation, constitutional democracy

Chapter 1 Introduction

1.1 Background to the study

In April 2007, members of the public in Khutsong, in the Gauteng Province, violently protested against the demarcation of a part of the Merafong Municipality from Gauteng Province to the North-West Province.¹ They burnt tyres on roads, brandished weapons and pelted police with stones.² Teachers also participated in the protests through boycott of classes.³ Although public consultations were held to ascertain the views of the people in relation to the demarcation, it was clear that the people of Merafong did not want their municipality to become part of the North-West Province. They wanted to remain in Gauteng. Parliament ignored their views and incorporated the municipality into the North-West Province.⁴ This sparked off violent protests in an attempt to compel a reversal of the demarcation decision. When the protest action failed to bear fruit, the community went to the Constitutional Court, alleging that the government did not want to listen.⁵ While the Court was hearing oral argument in their case, the people chanted outside in support of their cause.⁶

Almost ten years after the Merafong protests, the people of Vuwani in the Limpopo Province opposed the demarcation of Vuwani to a new municipality in Limpopo, the LIM 345 Municipality.⁷ The protests in Vuwani were worse than those of Merafong as the protestors burnt more than 26 schools and barred children from attending

¹ IOL 2007 <https://www.iol.co.za/news/politics/khutsong-residents-protest-north-west-move-313207>.

² Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* 189.

³ Ndaba 2007 <https://www.iol.co.za/news/south-africa/teachers-protest-over-khutsong-issue-350272>.

⁴ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) paras 31-35.

⁵ The matter is reported in *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC).

⁶ Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* 189.

⁷ Mahopo 2017 <https://www.businesslive.co.za/bd/national/2017-02-06-vuwani-residents-protest-again-about-incorporation-into-lim-345-municipality/>.

school.⁸ The massive protests in Vuwani and Khutsong demonstrate that there are problems with the participation of the public in the demarcation of municipalities. At the centre of both protests is the question of the nature and extent of public participation in the demarcation of municipal boundaries. Protests against the demarcation of municipal boundaries have not been limited to Merafong and Vuwani. In *Matatiele Municipality v President of the Republic of South Africa*,⁹ the Constitutional Court considered the importance of public participation in municipal boundary demarcation. The obligation of the legislatures, at all the spheres of government, and the executive to facilitate public involvement in decision-making processes is an aspect of participatory democracy. It is a constitutional process meant to ascertain the views of the people and their wishes so as to mirror those aspirations in policy and subsequently, legislation.¹⁰

1.2 Problem Statement

Public participation in municipal boundary demarcation is a contentious and problematic issue which often sparks violence. Whereas the mission of the Municipal Demarcation Board, the state functionary charged with the demarcation of municipalities, is to "deepen democracy and to facilitate the socio-economic transformation of the country for the benefit of the citizens,"¹¹ it has made decisions which have seemingly ignored the will of the people. After the demarcations in Matatiele, Merafong and Vuwani, the people protested against what they perceived as a refusal of the government to 'listen' to them. The residents in these areas consistently, vehemently and violently expressed their desires for the boundaries of their municipalities not to be changed in the ways in which they had been.

Given the litigation preceded by massive destruction of property occasioned by protests against the demarcation of municipal boundaries, particularly in Merafong and Vuwani, a *prima facie* case can be made that public participation has been

⁸ For a collection of reports on the burning of schools and the Vuwani protests in general, see SABC 2016 <http://www.sabc.co.za/wps/portal/news/main/tag?tag=Vuwani>.

⁹ *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 CC.

¹⁰ Phooko 2014 *Potgieter* 40.

¹¹ Municipal Demarcation Board 2017 <http://www.demarcation.org.za/site/>.

ineffective and that the demarcations have been carried without the consent of the majority of the people concerned. If proven, this points to a failure of constitutional democracy; for the 'government is for the people, by the people and for the benefit of the people.'¹² The government derives its delegated authority from the people, as reflected in 'We, the people' in the preamble to the Constitution. As such, the people's will should always prevail.

This study presents an analysis of the nature and extent of public participation in the demarcation of municipal boundaries in South Africa. It examines the theoretical foundation for public participation in the South African constitutional democracy. It also discusses the applicable legislative and constitutional imperatives.

1.3 Literature Review

The constitutional framework for public participation in the making of decisions which fundamentally affect the people has been considered in several watershed cases. In *Doctors for Life International v Speaker of the National Assembly*,¹³ the court held that the political rights in section 19 of the Constitution, interpreted together with other rights in the Bill of Rights, require public participation. There are several ways through which the people can participate in government. Deegan¹⁴ distinguishes between participation by electoral means and participation through the consultative processes. McEwen¹⁵ submits that public participation is necessary and enables authorities to liaise with communities before making decisions. This promotes good governance and ensures a government that is open and responsive as required by section 1(d) of the Constitution.¹⁶ Lotswao¹⁷ opines that public participation ensures that the government adopts responsive policies. He argues that this fosters a democratic culture. At a local government level, public

¹² See the remarks in *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) para 1.

¹³ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 106.

¹⁴ Deegan 2002 *Common Wealth and Comparative Politics* 43-60.

¹⁵ McEwan 2003 *Geoforum* 470.

¹⁶ S 1 of the Constitution requires accountability, openness and responsiveness of government.

¹⁷ Lotswao 2009 *Journal of Southern African Studies* 903-904.

participation is very important as the people are directly affected by the decision made by municipalities.¹⁸

In a watershed decision, Madala J observed in a dissent that public participation was included in the Constitution "to salvage the dignity of black people which had been ravaged by apartheid."¹⁹ His view demonstrates that the historical context for the inclusion of public participation in the Constitution is part of transformative constitutionalism; the correction of the injustices of the past alluded to in the Preamble to the Constitution and respect for the Bill of Rights.²⁰ Madala J further observed that public participation is "a cardinal virtue in our Constitution which should not be lightly be departed from."²¹ He held the view that the duty to consult the public does not merely mean formal consultation with no genuine intention to implement the submissions of the people. Corder²² described Justice Madala's holding as pithy. In *Doctors for Life International v President of the Republic of South Africa*,²³ the court invalidated statutes due to the failure of the National Assembly to facilitate public involvement during the legislative process.

Booyesen²⁴ observes that public participation in the formulation of policy and governance decisions is a cornerstone of the current constitutional dispensation. This is because South Africa is a constitutional democracy – a government of the people, by the people and for the people, as the court put it in *United Democratic Movement v Speaker of the National Assembly*.²⁵ It is impossible for everyone to participate in the running of state affairs, hence the people have chosen the elected members of the National Assembly and the Executive to govern on their behalf, for their benefit and in their best interests.²⁶ Public participation is enshrined in section 59 of the Constitution and is meant to ensure that the people are consulted in the making of decisions which affect them.

¹⁸ Fuo 2015 *African Human Rights Law Journal* 171.

¹⁹ *Merafong Demarcation Forum v President of RSA* 2008 5 SA 171 (CC) 208.

²⁰ For a discussion of transformative constitutionalism, see Langa 2006 *Stellenbosch L Rev* 351.

²¹ *Merafong Demarcation Forum v President of RSA* 2008 5 SA 171 (CC) para 208.

²² Corder 2009 *Courtis* 247.

²³ *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

²⁴ Booyesen 2009 *Unisa Press* 2.

²⁵ *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) para 1.

²⁶ *United Democratic Movement v Speaker of the National Assembly* 2017 5 SA 300 (CC) para 1.

McEwen²⁷ submits that public participation entails "allowing citizens within a community to take part in the formulation of policies and proposal that affect the whole community." The obligation of legislature at all the levels of government and the executive to facilitate public involvement in decision-making processes is an aspect of participatory democracy and is meant to ascertain the views and wishes of the people so as to mirror those aspirations in policy and subsequently, legislation.²⁸ This is because South Africa's constitutional democracy is founded on an open and democratic based on the will of the people.²⁹ However, Hoexter³⁰ questions whether public participation constitutes meaningful engagement between the government and the people, and whether it has any impact on policy at all. She submits that the only way that the people can meaningfully participate in legislation and policy formulation is when the government entered into partnership with them through participatory democracy.

The participation of the public in municipal demarcation is a contentious and unclear issue. This is because whereas the mission of the Municipal Demarcation Board, the state functionary charged with the demarcation of municipalities, is to "deepen democracy and to facilitate the socio-economic transformation of the country for the benefit of the citizens",³¹ it has made decisions which have seemingly ignored the will of the people. Examples include Merafong and Vuwani in which the residents consistently, vehemently and violently expressed their desires for their municipalities not to be demarcated in the ways in which they have been.

In analysing case law on demarcation and public participation, the cases of Matatiele, Merafong and Moutse relate to cross-boundary. Cross-boundary municipalities were difficult to administer as they were jointly administered by the MECs for local government in provinces whose boundaries they straddled. Consequently, the Twelfth Constitutional Amendment and the Repeal Act led to the

²⁷ McEwan 2003 *Geoforum* 470.

²⁸ Phooko 2014 *Obiter* 40.

²⁹ Phooko 2014 *Obiter* 42.

³⁰ Hoexter *Administrative Law* 83.

³¹ Board 2017 <http://www.demarcation.org.za/site/>.

abolition of cross-boundary municipalities. Cross boundary municipality was abolished over a decade ago. However, the principles of public participation expounded in the cases of Matatiele, Merafong and Moutse are still relevant.

1.4 Scope and limitations

The study is confined to the analysis of public participation in the demarcation of municipalities. As such, the study examined the statutory and constitutional requirements for municipal demarcation, particularly the duty to ensure public participation. To this end, public participation is analysed within the broader context of constitutional democracy and the role and duties of different stakeholders. The study analyses, in depth, the issues and challenges to public participation in Merafong and Vuwani and the consequences thereof. Whereas public participation in government decisions is broad and includes participation in policy formulation, legislative enactment and executive implementation, the study focused on public participation in municipal demarcation in South Africa.

1.5 Rationale and justification

The research carried out shows that there is a lack of juridical scholarship on public participation in municipal demarcation in South Africa. The study aims at filling this gap. Although articles have appeared in periodicals on public participation in constitutional democracy in South Africa, little focus has been placed on the extent to which the public participates in municipal demarcation. The study will thus provide juridical scholarship on the nexus between municipal demarcation, public participation and constitutional democracy. In this way, conclusions and recommendations will be drawn for the benefit of all stakeholders. This is particularly important because the violent public reaction to forced municipal demarcation in Merafong and Vuwani resulted in massive disturbances and destruction of valuable infrastructure. It is hoped that in the future, communities affected by forced demarcations will be able to express their opposition with respect to the rights (such as the right to education in relation to children in Vuwani after the protestors burnt their schools) and important infrastructure such as schools.

The Municipal Demarcation Board may also benefit from the study by ensuring the participation and willingness of affected communities for demarcation.

1.6 Assumptions and hypothesis

1.6.1 Assumptions

- a) The demarcation of municipal boundaries has significant social, political and economic effects on the affected communities.
- b) Economic and political gains and losses determine the reaction of communities to municipal boundary demarcations.
- c) There is a constitutional duty for ensuring public participation in the demarcation of municipalities.

1.6.2 Hypothesis

The meaning, nature and extent of public participation in the demarcation of municipal boundaries in South Africa is not clear. This makes it difficult for relevant government functionaries to ensure effective participation and to avert the catastrophes caused by protests against municipal boundary demarcation.

1.7 Aims and Objectives

1.7.1 Aims

The aim of the study is to analyse the ambit of public participation in the demarcation of municipal boundaries in South Africa and the contemporary issues and challenges relating to it.

1.7.2 Objectives

- a) To examine the concept of public participation in the current dispensation of constitutional democracy and its application in the configuration of municipal boundaries.
- b) To highlight selected cases in which public participation in the demarcation of municipal boundaries was ineffective.

- c) To analyse the constitutional and legislative framework dealing with the demarcation of municipal boundaries.
- d) To investigate the extent to which the law provides for public involvement in the decision-making process of municipal boundary.
- e) To discuss challenges that are inherent during public participation processes in municipal boundary demarcation.
- f) To conclude and make recommendations on how public participation can be effective in a constitutional democracy during the demarcation of municipal boundaries.

1.8 Framework of the proposed study

1.8.1 Chapter 1: Introduction

This chapter gives a brief background of public participation in the demarcation of municipal boundaries in South Africa. The chapter also provides a problem statement encapsulating some problems facing public participation in the demarcation of municipal boundaries. Further, this chapter also provides the assumptions and hypothesis of the research study and finally, the aims and objectives of the research study and the research method that was used to achieve these objectives.

1.8.2 Chapter 2 Framework for public participation in decision-making processes

Chapter 2 highlights the importance of public participation in a constitutional democracy. It further defines what is meant by public participation for the people, the different forms of public participation, areas where public participation is required and also provide the platforms in which ordinary citizens can participate. This chapter also provides the principles, benefits and the rationale of public participation.

1.8.3 Chapter 3 The legal framework for the demarcation of municipal boundaries

This chapter outlines the legislative framework that governs the demarcation of municipal boundaries.

1.8.4 Chapter 4 Contemporary challenges to public participation in the demarcation of municipal boundaries.

Chapter 4 focuses on the contemporary challenges to public participation in the demarcation of municipal boundaries

1.8.5 Chapter 5 Conclusion and recommendations

This chapter provides conclusion and recommendations regarding public participation in the demarcation of municipal boundaries.

1.9 Research Methodology

The doctrinal or theoretical research method was used to undertake the study.³² This research methodology is defined as research which asks what the law is in a particular area of the law in this case the demarcation of municipal boundaries. This research study is based on the analysis of primary and secondary sources. The primary sources are the Constitution, legislation and case law. Secondary sources encompass books, journals and newspaper articles.

The aim of the research is to describe a body of law and how it applies. In this regard the research is purely theoretical.

³² For a synopsis of this research method, and others, Dobinson and Johns "Legal Research as Qualitative Research".

Chapter 2 **Framework for Public Participation in Decision-making Processes in the Local Government**

2.1 Introduction

The pre-1994 history of South Africa is distinguished between colonial times and apartheid rule.³³ From 1994, South Africa adopted a representative government. Strong social movements surfaced against the apartheid state as most of the population, mainly black South African, were excluded from participation in the crafting of legislation and other important decision-making processes under the apartheid state.³⁴ The strong social movements against the apartheid state signified the era of 'People's Power'. The nature and focus of public participation changed dramatically after the adoption of the Constitution in 1996. This Constitution affirms the recognition of a participatory democracy which champions the active involvement and the participation of citizens in the making of important decisions which affect their lives.³⁵

The Constitution provides for public participation in law-making, oversight and other processes of Parliament.³⁶ The democratic system in South Africa does not only provide for citizens to elect their representatives, but it also allows the citizens to contribute in matters that affect them daily. The processes of public participation serve to strengthen institutions of representative democracy by democratising those institutions. As such, public participation is one of the most important aspects for the protection of democratic values. This chapter provides an overview of the theoretical framework for public participation in South Africa by examining public participation under constitutional democracy.

³³ Maloka "The Postapartheid State in South Africa " 233.

³⁴ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) para 208.

³⁵ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf.

³⁶ See S 72 of the Constitution.

2.2 Overview of Constitutional Democracy

2.2.1 Constitutional Democracy defined

The apartheid regime was characterised by racial segregation. The regime deprived black South Africans, who constituted the majority of the population, the opportunity to participate in governance, public affairs and to contribute in the law-making processes. It also prevented them from participation in the development of policies that affected them.³⁷ The end of the apartheid regime in 1993 saw the introduction of a new constitutional dispensation which championed the concept of participation of all stakeholders in the formulation of policies and solutions to the problems affecting the people. The preamble of the interim Constitution identified the 'new' state as a "democratic constitutional state in which there is equality between men and women and people of all races in which they enjoy and exercise their fundamental rights and freedoms."³⁸ South Africa's constitutional democracy is anchored on the notion of "a government of the people, by the people and for the people through the Constitution."³⁹ A Constitutional democracy is a system of governance which "we the people" consciously and purposefully chose to create a truly free, just and united nation.⁴⁰

Public participation in South Africa is crucial for the sustenance of democracy. One of the essential outcomes of public participation is the improvement of the capacity of the state to solve problems affecting the citizens. The powers of ordinary people to have a say and the ability of government, civil society and other institutions to unleash that capacity is the key to economic and social progress in a constitutional democracy.⁴¹ Public participation ensures justice, equality and the protection of the rights of citizens, thus improving the quality of their lives. Thus, public participation is the interaction that makes democracy work.⁴²

³⁷ Masango 2002 *Politeia* 52.

³⁸ Preamble of the Constitution.

³⁹ *United Democratic Movement vs Speaker of the National Assembly and others* 2017 ZACC 21 para 1. See also the founding values in section 1 of the Constitution.

⁴⁰ Preamble of The Constitution.

⁴¹ Nabatchi and Leighninger *Public Participation For 21st Century Democracy* 3.

⁴² Nabatchi and Leighninger *Public Participation For 21st Century Democracy* 4.

2.2.2 Features of constitutional democracy

2.2.2.1 Democracy

The term 'democracy' originated from the Greek word *demokratia*, which in turn came from the combination of two "Greek words; *demos* (meaning the people) and *kratos* (meaning to rule)."⁴³ In the early 18th century, political ideas in Europe became centralised on democratic beliefs and institutions.⁴⁴ The notion of equality stimulated the creation of local assemblies in which free men participated (to some extent) in the government of their communities.⁴⁵ The central theme in a democracy is that the governments need the consent of the governed.⁴⁶ A democratic state requires the free consent of citizens, acting directly or through elected representative. The representatives of the people can be provincial legislatures, parliaments and local assemblies in municipal councils.⁴⁷ In contrast to Athenian practice, representation in ancient Greece was secured by election, not by a lot or random selection.⁴⁸

The history of South Africa as a state conveniently started in 1910 when the Union of South Africa, consisting of a central government, provincial governments, and local governments, was established.⁴⁹ The most important feature of the central government of the Union of South Africa was parliamentary sovereignty. Parliamentary supremacy was based on the Westminster system. However, the Union of South Africa gave only the minority of the population democratic rights to participate in elections and government of the Union. In *Harris v Minister of the Interior*⁵⁰, the question was whether the entrenched clauses of the *South Africa Act*⁵¹, which created the Union of South Africa, in view of the of the Statute of Westminster, was still entrenched. The appellants were coloureds and were, prior

⁴³ Dahl *On Democracy* 11.

⁴⁴ Dahl *On Democracy* 22.

⁴⁵ Dahl *On Democracy* 40.

⁴⁶ Dahl *On Democracy* 22.

⁴⁷ Dahl *On Democracy* 22.

⁴⁸ Dahl *On Democracy* 22.

⁴⁹ Cameron "Local Government Boundary Reorganisation " 48.

⁵⁰ *Harris v Minister of the Interior* 1952 2 SA 428.

⁵¹ *South Africa Act* of 1909.

to the passing of the *Separate Representation of Voters Act*,⁵² entitled to vote in the same constituencies as white voters.⁵³ The *Separate Representation of Voters Act*⁵⁴ was not passed in conformity with section 35(1) and 152 of the *South Africa Act*.⁵⁵ Therefore, the Act was passed unconstitutionally.

In 1948, South Africa entered a radical phase when the National Party won the elections. The white minority, under the guise of a policy of 'separate development of the races,' termed apartheid, began to entrench institutionalised segregation against Africans.⁵⁶ The government of the National Party enacted many discriminatory, and out-rightly racist, laws. One of apartheid laws was the *Groups Areas Act*.⁵⁷ The *Group Areas Act* classified South Africans into whites, coloureds, Indian and Black categories. The classification based on colour determined the level of participation of the racial groups in the political, social and economic matters of the state.⁵⁸ The Act gave the state the powers to forcefully relocate Africans to the so-called locations and homelands, away from the cities. The location and homeland policies curtailed the participation of Africans on governance, social, political and economic areas.⁵⁹ The exclusion led to massive disparities in service provision to whites and Africans.⁶⁰ The gross inequalities caused by racially-discriminatory legislation placed obstacles to democracy. Differences between South Africans in relation to rights, duties, influence, and power were the hallmarks of inequality.⁶¹ The discrimination also had one other unintended consequence: it diluted democratic standards even among the minority population which found itself at the beneficial end.⁶² The House of Assembly was exclusively constituted of white male members. Africans had been removed from the voters roll as early as 1910. In the Cape, Africans were removed in 1936.⁶³ The enactment of the *Separate*

⁵² *Separate Representation of Voters Act* 46 of 1951.

⁵³ *Harris v Minister of the Interior* 1952 2 SA 428.

⁵⁴ *Separate Representation of Voters Act* 46 of 1951.

⁵⁵ *South Africa Act* of 1909.

⁵⁶ Victoria Maloka *The Post-Apartheid State in South Africa* 235.

⁵⁷ *Group Areas Act* 41 of 1950.

⁵⁸ Victoria Maloka *The Post-Apartheid State in South Africa* 236.

⁵⁹ Victoria Maloka *The Post-Apartheid State in South Africa* 236.

⁶⁰ Cameron "Local Government Boundary Reorganisation " 76.

⁶¹ Dahl *On Democracy* 17.

⁶² Dahl *On Democracy* 23.

⁶³ *Harris v Minister of the Interior* 1952 2 SA 428.

*Representation of Voters Act*⁶⁴ removed Cape coloureds from the voters' roll, leaving only whites on the national voter's roll. As such, legislative representatives and other persons elected into public office were not representing "the people", but only a small segment of the population which abused its political, financial and military might to rule.⁶⁵ In the *Merafong* case⁶⁶, Madala reasoned that the dignity of black people was ravaged by apartheid government when it refused or neglected to consult them in enacting laws which directly affected their lives.⁶⁷

The exclusion of Africans from political participation caused problems for the apartheid government. The African National Congress (ANC), formed in 1912, started a liberation movement. The primary focus of the ANC was to end racial oppression and to give Africans a rightful place in the governance of the nation. In 1955, the ANC adopted the Freedom Charter. The Freedom Charter declared that "the people shall govern." During the apartheid era, African movements were widely condemned by the white population and were considered undesirable. White South Africans who were opposed to African political movements subscribed to a perverted form of democracy which was based on the discrimination against a huge part of the population. In the 1990s, drastic political changes occurred. The government lifted bans on liberation movements, released political prisoners and repealed apartheid laws, such as the *Group Areas Act*.⁶⁸ The government was forced by internal and external factors to commit to a free and democratic political order. The government commenced formal constitutional negotiations during the Convention for a Democratic South Africa (CODESA) on 20 December 1991 at Kempton Park.⁶⁹ The CODESA negotiations marked a transitional period from apartheid to democracy.

The Interim Constitution⁷⁰ was a product of the CODESA negotiations in which the apartheid government, the ANC and other political groups negotiated a transition to

⁶⁴ *Separate Representation of Voters Act* 46 of 1951

⁶⁵ Victoria Maloka *The Post-Apartheid State in South Africa*.

⁶⁶ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC).

⁶⁷ *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) para 208.

⁶⁸ Victoria Maloka *The Post-Apartheid State in South Africa* 238.

⁶⁹ Victoria Maloka *The Post-Apartheid State in South Africa* 238.

⁷⁰ Victoria Maloka *The Post-Apartheid State in South Africa* 238.

an inclusive democracy. The Interim Constitution was based on constitutionalism and accountability. The interim Constitution replaced parliamentary sovereignty with constitutional supremacy and entrenched a justiciable Bill of Rights. The Bill of Rights is the cornerstone of democracy.

The Preamble expressed the principles of the Interim Constitution as follows:

...need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

The interim Constitution established a Constitutional Assembly to draft the final Constitution. The Constitutional Assembly convened for the first time on 24 May 1994. The newly formed Constitutional Court was required to certify whether the text of the Final Constitution complied with the 34 Constitutional principles negotiated and agreed upon at the Multiparty Negotiating Process.⁷¹ The drafting of the Final Constitution followed a massive country-wide information campaign in which most people, regardless of race, gender and status, were invited to participate.⁷² In addition to representations made by political parties, two million submissions were received from members of the public.⁷³ The drafters of the Constitution understood that the legitimacy and credibility of the Final Constitution depended on public participation in the constitutional-making process. The Final Constitution had to be a people-driven process, given the history of the country.⁷⁴ Without contradiction, it can be said that the constitution-making process involved a participatory approach in which most citizens were involved in crafting the supreme law.

The Constitution envisages a government which guarantees basic political rights, free and fair elections and an independent judiciary.⁷⁵ The Constitution aspires for a society based on democratic values, social justice and fundamental human rights.⁷⁶

⁷¹ Victoria Maloka *The Post-Apartheid State in South Africa* 238.

⁷² *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 20.

⁷³ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 20.

⁷⁴ Victoria Maloka *The Post-Apartheid State in South Africa* 244.

⁷⁵ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf.

⁷⁶ Section 1 of the Constitution.

This comes down to a government based on the will of the people and in which every citizen is equal before the law.

2.2.2.2 *The rule of Law*

The rule of law is a founding constitutional value and an essential component for the reconstruction of the post-apartheid state.⁷⁷ The rule of law is fundamental to the South African constitutional dispensation. In *Economic Freedom Fighters v Speaker of the National Assembly*⁷⁸, the court held that under the rule of law, the government may not exercise public power unless the exercise of such power is sanctioned by law. The rule of law demands citizens to obey decisions made by persons vested with lawful authority to make such decisions. Individuals who are adversely affected by administrative decisions should approach the courts to set aside such decisions on one or more rights.⁷⁹ The rule of law emulates the Constitution as follows:⁸⁰

1. The absence of arbitrary power, which entails that the powers of persons in authority are limited and neither based on personal discretion or arbitrariness. In *Speaker of the National Assembly v De Lille*,⁸¹ the Supreme Court of Appeal held that the Constitution is the ultimate source of all lawful authority in South Africa and that no Parliament or President can make any law or perform any act which is not sanctioned by the Constitution. The holding of the SCA was consistent with section 44(4) of the Constitution which provides that Parliament, must act in accordance with and within the limits of the Constitution when exercising its legislative authority.⁸² In *Pharmaceutical Manufacturers Association*,⁸³ the court held that one of the requirements of the rule of law is that the exercise of public power by the

⁷⁷ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure* 179.

⁷⁸ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 ZACC 11.

⁷⁹ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 ZACC 11 para 75.

⁸⁰ Venter 2012 *McGill Law Journal* 741.

⁸¹ *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA) para 14.

⁸² S 92(2) of the Constitution.

⁸³ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC).

executive and other government functionaries should not be arbitrary.⁸⁴ Decisions must be rational to the purpose for which the power is given.⁸⁵ Therefore, the exercise of public power by the executive and other functionaries must be exercised in an objective manner which satisfies the requirements of legality. A failure to observe the requirements for legality is inconsistent with the Constitution.⁸⁶

2. Equality before the law. This hallmark of the rule of law means that every person, regardless of their position and status in life, is subject to the law and jurisdiction of the ordinary courts. Section 9 of the Constitution enshrines the right to equality. The Constitution envisages a society based on equality and respect for everyone.⁸⁷ Equality means equal concern and respect for everyone.⁸⁸

3. The legal protection of certain basic human rights. Human rights are enshrined in the Bill of Rights. The adoption of the Bill of Rights was a response to gross violations of human rights, a hallmark of the apartheid regime.⁸⁹ The Bill of Rights contains rights and freedoms which are guaranteed to all people in South Africa. Rights and freedoms are protected to prevent violations from occurring again in South Africa. The Bill of Rights is a cornerstone of democracy in South Africa.⁹⁰ It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.⁹¹ The state must respect, protect, promote and fulfil the rights in the Bill of Rights.⁹² In a constitutional and democratic state which observes the rule of law, citizens and non-citizens are entitled to rely on the state for the protection and enforcement of their rights.⁹³

⁸⁴ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 85.

⁸⁵ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 89.

⁸⁶ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 90.

⁸⁷ *Minster of Home Affairs and Another V Fourie and Another* 2006 (1) SA 524 (CC) para 59.

⁸⁸ *Minster of Home Affairs and Another V Fourie and Another* 2006 (1) SA 524 (CC) para 60.

⁸⁹ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure* 1.

⁹⁰ S 7 of the Constitution.

⁹¹ S 7(1) of the Constitution.

⁹² S 7 of the Constitution.

⁹³ S 7 of the Constitution.

2.2.2.3 Supreme and entrenched Constitution

Constitutional supremacy means that the Constitution prevails over all other legal and political actions of the government.⁹⁴ In *Pharmaceutical Manufacturers Association*,⁹⁵ the Constitutional Court held that the exercise of public power must comply with the Constitution, which is the supreme law, and the doctrine of legality.⁹⁶ The Constitutional Court reiterated constitutional democracy and the supremacy of the constitution.⁹⁷ The adoption of constitutional supremacy in the constitutional text, starting with the interim Constitution, saw the emergence of a new legal structure which consolidated and institutionalised constitutional democracy.⁹⁸ In *Economic Freedom Fighters v Speaker of the National Assembly*⁹⁹ Chief Justice Mogoeng in his judgment held that:

One of our crucial elements to our constitutional vision is to make a decisive break from the unchecked abuse of state power and resources that was virtually institutionalized during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office bearers ignore their Constitution obligations at their peril. This is because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.¹⁰⁰

The constitutional state is founded on the supremacy of the Constitution and constitutionalism.¹⁰¹ This principle is further strengthened by the entrenchment of the rule of law in the founding provisions of the Constitution.¹⁰² The Constitution is binding on all branches of the state and precedence over legislation.¹⁰³ Section 8 of

⁹⁴ S 2 of the Constitution.

⁹⁵ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC).

⁹⁶ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 20.

⁹⁷ Currie and de Waal *The New Constitutional & Administrative Law* 21.

⁹⁸ Currie and de Waal *The New Constitutional & Administrative Law* 21.

⁹⁹ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 ZACC 11.

¹⁰⁰ *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 ZACC 11 para 1.

¹⁰¹ Venter 2012 *McGill Law Journal* 736.

¹⁰² S 1(c) of the Constitution.

¹⁰³ Currie and de Waal *The New Constitutional & Administrative Law* 74.

the Constitution provides that the Bill of Rights has supremacy over all laws and that the Bill of Rights binds all branches of the state.

The judiciary oversees the protection of the Constitution.¹⁰⁴ Through the power of constitution review, section 172 of the Constitution empowers courts to declare any law or conduct inconsistent with the Constitution. An order issued by a court binds all persons and organs of the state to whom which it applies.¹⁰⁵ The Constitution is primarily enforced through litigation, although citizens may also lobby and exert pressure on the government to respect their rights.¹⁰⁶ Free press also ensures that the government keeps to its commitments and does not abuse its power.¹⁰⁷

2.2.2.4 Government accountability and probity

Public officials are primarily responsible to citizens because they exercise public powers on behalf of citizens. Accountability enables the citizens to know what the functionaries of the state are doing. Accountability binds the elected representatives and government officials to answer and to explain their actions, particularly where they have not heeded the demands of the citizens. The government accounts to the people for its actions, including the laws it passes and how the laws are implemented. Section 1(d) of the Constitution calls for an open, responsive and accountable government. Accountability gives effect to the principle of checks and balances against arbitrary use of the powers of the government and ensures efficiency in the operation of the government.¹⁰⁸ Accountability is essential to the protection of democratic values and is key to securing control of public power.¹⁰⁹ In South Africa, accountability is necessary to maintain public confidence in the government. Accountability has become the cornerstone of public governance because it informs the processes by which decisions are carried out by the government. Therefore, public administration must be accountable.¹¹⁰ The principle

¹⁰⁴ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure* 48.

¹⁰⁵ S 165 of the Constitution.

¹⁰⁶ Currie and de Waal *The New Constitutional & Administrative Law* 74.

¹⁰⁷ Currie and de Waal *The New Constitutional & Administrative Law* 74.

¹⁰⁸ Adibe 2010 *Social Research*.

¹⁰⁹ Callamard 2010 *Social Research*.

¹¹⁰ S 195(f) of the Constitution.

is that those who hold, and exercise public authority can be held responsible for their actions or inactions.¹¹¹

2.2.2.5 Transparency of the government

Transparency refers to the openness of the government in its conduct of public affairs. Policy-making will be more responsive to public demands if it is done openly to the public. The availability of information enables citizens to be informed. Transparency is essential for responsiveness. The capability to demand answers using information leads to the accountability of power holders. Two important aspects of responsibilities of the duty-bearer are to:¹¹²

- provide information and empower people with knowledge about their rights; and
- fulfil the demands that will be raised from those rights.

Transparency consists of making information such as laws and regulations available to the public and notifying concerned parties when laws change and ensuring uniform administration and application of the law.¹¹³ The right to access and receive information is central to achieving meaningful participation. It increases society's knowledge and provides a sound basis for participation within a society and it also secures checks on state accountability, thus preventing secrecy and closed political environments.¹¹⁴

2.2.2.6 Regular, free and fair elections

In South Africa, constitutional democracy is founded on a multi-party system with universal adult suffrage. Several political parties participate in elections and play a role in the government.¹¹⁵ Multi-party democracy is based on representative democracy. The central pillar of representative democracy is section 19 of the Bill

¹¹¹ Adibe 2010 *Social Research*.

¹¹² Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 29.

¹¹³ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 19.

¹¹⁴ Callamard 2010 *Social Research*.

¹¹⁵ S 1(d) of *The Constitution of the Republic of South Africa* of 1996.

of Rights. Elections are held after every five years. Importantly, elections are conducted freely and fairly. The regular elections ensure accountability, openness and responsiveness.¹¹⁶ The Constitution confers the right to vote for legislative bodies at all the levels of the government. In *New National Party v Government of the Republic of South Africa*,¹¹⁷ Yacoob J held that, “a free, fair and credible election is both essential and fundamental to the continued deepening of the new South African democracy.”¹¹⁸

Parliamentary representatives are chosen through an electoral process based on universal adult suffrage. Every citizen who is qualified to vote may participate in the election process in line with the principle of universal adult suffrage. The right to free and fair elections underlines the right to vote.¹¹⁹ The governance system in South Africa is built on the right of citizens to elect representatives who make laws on their behalf and contemplates that people will be given an opportunity to participate in the law-making process. It is also built on the premise of a dialogue between the elected representatives and the people.

There are different ways to elect representatives into government namely, the system of proportional representation and the constituency-based system.¹²⁰ The proportional representation system is an electoral system used for national and provincial elections, while the local government electoral system is partly based on proportional representation and partly constituency based.¹²¹ The system of proportional representation means that political parties get a certain number of seats in parliament according to the percentage of votes that they get in an

¹¹⁶ S 1(d) of the Constitution.

¹¹⁷ *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 2.

¹¹⁸ *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

¹¹⁹ *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 11.

¹²⁰ Colleen 2015 www.paralegaladvice.org.za/wp-content/uploads/2016/05/PLM-2015-Complete-Book-for-Print.pdf.

¹²¹ Colleen 2015 www.paralegaladvice.org.za/wp-content/uploads/2016/05/PLM-2015-Complete-Book-for-Print.pdf.

election.¹²² The proportional representation system is a cardinal pillar of the electoral system of South Africa.

2.3 Public Participation

2.3.1 Public participation defined

Public participation is one of the prerequisites for upholding democratic values. Public participation is a process by which the government consults with citizens and interested or affected individuals, organisations and public entities before making decisions which affect the relevant stakeholders. Public participation is a two-way communication, collaborative and problem-solving mechanism whose goal is to achieve representative and acceptable decisions. Public participation enables citizens to interact with the government on decisions that affect them. Effective participation manifests itself when citizens successfully exert a reasonable amount of influence on government decisions, actions or processes.¹²³ The effectiveness of public participation is measured with the number of distinct roles citizens engage in effectively.¹²⁴ Before the government adopts a policy, citizens must have equal and effective opportunities for making their views known to the government as to what the policy should be.¹²⁵ The purpose of facilitating public participation in legislative and other government processes is to ensure that the law-making process is consistent with values.¹²⁶ Since the government is by the people and for the people, it follows that the people have an overriding influence on government decisions.¹²⁷ Their influence can only be manifested when they are given a platform to participate meaningfully in the making of government decisions.

¹²² Colleen 2015 www.paralegaladvice.org.za/wp-content/uploads/2016/05/PLM-2015-Complete-Book-for-Print.pdf.

¹²³ Epstein *et al* *RESULTS THAT MATTER: Improving Communities by Engaging Citizens , Measuring Performance, and Getting Things Done*.

¹²⁴ Epstein *et al* *RESULTS THAT MATTER: Improving Communities by Engaging Citizens , Measuring Performance, and Getting Things Done*.

¹²⁵ Dahl *On Democracy* 37.

¹²⁶ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 135.

¹²⁷ *United Democratic Movement vs Speaker of the National Assembly* 2017 ZACC 21 para 1.

2.3.2 The participation of We, the People of South Africa

The Preamble to the Constitution starts with the seminal declaration "We, the people of South Africa." The role of "We, the people" lies at the heart of South African constitutional democracy. 'We, the people,' designated Parliament to represent the citizens and to ensure government by the people under the Constitution.¹²⁸ The participation of 'we the people' refers to the active participation of citizens in decision-making, implementation and also to the sharing of benefits which accrue as a result of certain policies, decisions and actions of the government.¹²⁹ Participation is where there is broad participation and no class dominating another.¹³⁰

The Constitution empowers citizens to voice their preferences in the legislative organs of the state (Parliament, provincial legislature and municipal council) not only through elected representatives, but also through their direct participation in the law-making process.¹³¹

In *Doctors for Life*¹³² Sachs J held that:

All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and that their views matter and will receive due consideration at the moments when they could possibly influence decisions in a meaningful fashion. The objective is both symbolic and practical: the persons concerned must be manifestly shown the respect due to them as concerned citizens, and the legislature must have the benefit of all inputs that will enable them to produce the best possible laws.¹³³

Sachs J highlighted that most South Africans were victims of historical silencing and that the Constitution envisages a government which will listen to the citizens and give them real opportunities to have their say. Essential to the voice of the citizens

¹²⁸ S 42(3) of the Constitution.

¹²⁹ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability*.

¹³⁰ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability*.

¹³¹ *Matatiele Municipality v President of the Republic of South* 2007 1 BCLR 47 CC para 60.

¹³² *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC).

¹³³ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 116.

is the obligation of the government to listen and take them seriously. Public participation strengthens the legitimacy of government decisions in the eyes of the citizens. Where the citizens have participated in the formulation and implementation of decisions, they are likely to own and embrace such decisions. However, where the government has imposed its will on the citizens, the citizens are likely to reject such decisions, regardless of the quality or necessity of such decisions.

2.3.3 Areas for public participation: policy-formulation and legislation

Before the adoption of legislation, there is a need for the government to engage in effective public consultation and to obtain feedback from the citizens. The feedback needs to be incorporated in policy-making before the adoption of adopting legislation. In the case of existing laws, policies that support legislation and provide further guidance on their implementation should be based on public participation.¹³⁴ The Constitution mandates Parliament to make laws for the whole of the Republic. Under the direction of Ministers, government departments draft most Bills. The Bills are formally submitted to Parliament. Parliament decides whether or not to enact Bills into legislation. Green Papers policy documents which outline the available and precede Bill. Green Papers are published for public comment. After Green Papers comes White Papers which are, essentially broader statements of government policies. A White Paper forms the basis of a Draft Bill. The public is given further opportunity to comment on a White Paper. Once all relevant inputs from members of the public and interested juristic persons have been received and considered, the Minister and departmental officials draft a Draft Bill. The Minister submit the documents to Cabinet for approval, after which the draft Bill will be introduced to Parliament.

Before a Bill is introduced to Parliament, it must be published in the Government Gazette. The notice must be accompanied by an explanatory summary of the Bill.

¹³⁴ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 33.

The notice must invite interested persons to submit written representations to the Secretary of Parliament.

The Constitution distinguishes between four categories of Bills:

1. Bills that amend the Constitution (section 74);
2. Ordinary Bill not affecting the provinces (section 75);
3. Ordinary Bill affecting the provinces (section 76); and
4. Money Bills – bills that deal with appropriations, taxes, levies and duties – (section 77).

The Constitution also prescribes parliamentary procedures for the processing of the different categories of Bills. The public can make representations to Parliament on Bills.

2.3.4 Forms of public participation

2.3.4.1 Consultation

Consultation is one of the critical tools employed by governments to improve transparency, efficiency and effectiveness.¹³⁵ Consultation happens when the public has first been notified of the intended public participation. Notification of a public consultation involves the communication of information to citizens and relevant stakeholders, such as juristic persons. Consultation is a key building block to the rule of law.¹³⁶

Notification gives stakeholders time to prepare themselves for the scheduled consultation. After notification, the actual consultation takes place. During a consultation, the government actively seeks the opinions of interested and affected parties.¹³⁷ Consultation is a two-way relationship in which the government puts its positions before the citizens and in turn, the citizens provide feedback to the

¹³⁵ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 15.

¹³⁶ Rodrigo and Amo *Background Document on Public Consultation* 1.

¹³⁷ Rodrigo and Amo *Background Document on Public Consultation* 1.

government.¹³⁸ Consultation has clear goals and rules which define the limits of its exercise. Essentially, consultation requires the government to account for how it uses the input from the citizens. Consultation is based on a prior definition of issues on which the views of the citizens are being sought. As such, consultation requires the provision of information to citizens prior to the actual process. The government defines the issues for consultation, sets the questions and manages the process. Citizens, on the invite of the government, contribute their views and opinions on the question posed to them. Access to information is the basic precondition for engaging citizens.

Consultation is important for the open and transparent making of decisions. Appropriate and well publicised procedures ensure effective and timely inputs from interested parties. Consultation improves the quality of the outcome and enhances the compliance of citizens, thus reducing the costs of enforcing the final decision on both governments and citizens. There are different forms of consultation.

There are both informal and formal consultations. Informal consultation takes place in several forms, such as phone calls, letters to informal meetings.¹³⁹ The collection of information from interested parties is the key purpose of informal consultation. Informal consultation is less cumbersome and more flexible than standardised forms of consultation.¹⁴⁰ Informal consultations are speedy and reach wider audiences. However, informal consultations have limited transparency and accountability. Informal consultations also restrict access by interested stakeholders because they are entirely at the discretion of their officials.

The circulation of regulatory proposals for public comment is an inexpensive way to obtain views from the public and to encourage affected parties to provide information.¹⁴¹ The circulation process is generally more systematic, structured and routing. Responses are usually in written form, although officials may accept oral

¹³⁸ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 17.

¹³⁹ Rodrigo and Amo *Background Document on Public Consultation* 2.

¹⁴⁰ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making*.

¹⁴¹ Rodrigo and Amo *Background Document on Public Consultation* 3.

presentations by inviting interested parties to hearings.¹⁴² Officials retain much discretion over access and processes. In practice, important proposals are circulated widely and systematically.

In addition to the circulation of regulatory proposals, there is a form of consultation known as the public notice-and-comment. Public-notice-and-comment is more open and inclusive than the circulation-for-comment process.¹⁴³ The public notice element means all interested parties should be notified of the regulatory proposal to enable them to comment.¹⁴⁴ There is usually a standard set of background information, discussion of policy objectives and the problem being addressed. This information greatly increases the ability of the public to participate effectively in the process.

2.3.4.2 Written submissions

South African constitutional democracy empowers citizens to have a say in the making of decisions in matters that affect them. One way that members of the public can make their voices heard is by making submissions to the portfolios of the National Assembly Portfolio Committee, committees of the National Council of Provinces or joint Committees.¹⁴⁵

A submission is a presentation of the views or opinions of a person on a matter or piece of legislation under consideration by a parliamentary committee.¹⁴⁶ Submissions are usually in a written form and can be supplemented with oral representations to the committee. Oral submissions follow where the parliamentary committee invites the person or group that has made a written submission to make an oral presentation.¹⁴⁷ Submissions are opportunities for civil society to propose changes or suggest possible actions to ensure that the laws passed by Parliament serve the people concerned.¹⁴⁸

¹⁴² Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making*.

¹⁴³ Rodrigo and Amo *Background Document on Public Consultation 3*.

¹⁴⁴ Rodrigo and Amo *Background Document on Public Consultation 3*.

¹⁴⁵ Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

¹⁴⁶ Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

¹⁴⁷ Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

¹⁴⁸ Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

Rule 6 of the Joint Rules of Parliament provides for members of the public to participate in the joint business of Parliament by attending the sittings of the Houses and their committees, commenting to bills in or other matters in writing and to give evidence and make representations. Members of the public may make recommendations on any Bill before the House.¹⁴⁹

2.3.4.3 Verbal Submissions

Oral submissions give the presenters a chance to reiterate what they had said in their written submissions. Oral presentations enable members of parliamentary Committees to get clarity on points raised in the submissions. If the Committee decides to hear an oral submission, the Committee's Secretary will contact the person to notify them of the opportunity to make oral presentations.¹⁵⁰

Oral submissions are also made at Public Hearings held by Committees.¹⁵¹ The relevant Committee looks at the evidence or opinions shared at the hearing and discuss the contents thereof.¹⁵² The Committee will make the final decision about the merit of an issue.

2.3.4.4 Citizen activism

Citizen activism means that citizens themselves take a role in the exchanges on policy-making by proposing policy options. Citizen activism is essential for people's knowledge and citizenship development.¹⁵³ However, the responsibility for policy formulation and the making of final decisions rests with the government. The

¹⁴⁹ Rule 6(1) of the Joint Rules of Parliament provides:

Members of the public may participate in the joint business of the Houses by -

a) attending joint sittings of the Houses or meetings of joint committees;

(b) responding to public or specific invitations —

(i) to comment in writing on Bills or other matters before a joint committee; or

(ii) to give evidence or to make representations or recommendations before joint committees on such Bills or other matters, either in person or through a representative.

¹⁵⁰ Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

¹⁵¹ Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

¹⁵² Parliament of the Republic of South Africa www.parliament.gov.za/submissions.

¹⁵³ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability*.

engagement of the citizens in policy-making is an advanced two-way relation between government and citizens based on the principle of partnership.¹⁵⁴

2.3.4.5 Constitutional litigation

The judiciary was established to address a range of issues relating to the protection of the Constitution and the rule of law. The Constitution vests judicial authority in the courts and gives the courts powers to review administrative decisions for procedural fairness and constitutionality. The Constitution defines the role of the courts, their powers in relation to other arms of government. The powers of review flow from the constraints within which public power must be exercised.¹⁵⁵ However, the courts do not offer a free ride to enforce the Constitution. They must consider the separation of powers which regulates and exercises public power by other branches of government.¹⁵⁶ The Constitutional Court is the guardian of the Constitution. It was established to seat at the apex of the judiciary branch in respect of all constitutional matters and any matters which raise arguable points of law. The Constitutional Court has exclusive jurisdiction in respect of certain constitutional matters.¹⁵⁷ The creation of the Constitutional Court signified the justiciability of political disputes¹⁵⁸ It was created in line with section 34 of the Constitution which provides everyone with access to courts in all matters which can be decided in judicial forums. The Constitutional Court plays a highly-political role by when it decides disputes between political contestants, particularly when the issues relate to the failure of one or more parties to embrace democratic procedures and outcomes.¹⁵⁹

An important attribute of the Constitutional Court is that it was established on a clean slate, with no links to the apartheid past and its racial prejudices.¹⁶⁰ The

¹⁵⁴ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 16.

¹⁵⁵ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 45.

¹⁵⁶ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 45.

¹⁵⁷ Section 167(4) of *The Constitution of the Republic of South Africa* of 1996.

¹⁵⁸ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure*.

¹⁵⁹ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure* 14.

¹⁶⁰ *Pharmaceutical Manufacturers Association of South Africa in re: Ex Parte President of the RSA* 2000 2 SA 674 (CC) para 55.

Constitutional Court is critical to the consolidation of democracy, the maintenance of social peace and stability. Its work is more important because it must, at times, address complex problems of political and economic nature.¹⁶¹

The Constitutional Court recognises that both participation and deliberation are part of the constitutional framework in South Africa.¹⁶² In *Doctors for Life*,¹⁶³ the Court held that:

Our 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.¹⁶⁴

The Constitutional Court has been called on previous occasions to analyse and clarify the nature and extent of the obligation to facilitate public participation during the legislative process and in decision-making processes made by bodies established by the Constitution,¹⁶⁵ as was seen in the case of *Doctors for Life International*.¹⁶⁶ The issue before the court was that the National Council of Provinces, (NCOP) failed to facilitate public participation in passing of certain health Bills.¹⁶⁷ The court held that the NCOP failed to hold public hearings in relation to the *Traditional Health Practitioners Act*¹⁶⁸ and the *Choice on Termination of Pregnancy Amendment Act*.¹⁶⁹ These two Bills had generated great public interest and the majority of the provinces did not hold public hearing on these Bills because of insufficient time.

Citizens have challenged the legislative process on the basis that the final legislative enactments, on which they were consulted, did not reflect their views and preferences.¹⁷⁰ The recent court cases indicate a shift towards representative

¹⁶¹ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure* 14.

¹⁶² Bishop 2009 *Constitutional Court Review* 324.

¹⁶³ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

¹⁶⁴ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 116.

¹⁶⁵ Nyati 2008 *Law, Democracy & Development*.

¹⁶⁶ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC).

¹⁶⁷ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 2.

¹⁶⁸ *Traditional Health Practitioners Act* 22 of 2007.

¹⁶⁹ *Choice on Termination of Pregnancy Amendment Act* 1 of 2008.

¹⁷⁰ Phooko 2014 *Obiter*.

democracy rather than participatory democracy.¹⁷¹ According to Ngcobo J, the representative and participatory elements of the South African democracy do not contradict or diminish one another; they are mutually supportive.¹⁷²

When legislation is legally challenged because it has not been adopted in accordance with the Constitution, courts have the jurisdiction to determine whether in enacting the law in question, Parliament followed its constitutional obligations.¹⁷³ The duty of the Constitutional Court is to protect the Constitution.¹⁷⁴ When the Constitutional Court decides a matter, it has the power to declare the law or conduct inconsistent with the Constitution and invalid.¹⁷⁵ When interpreting the Constitution, the Court does not construe provisions in isolation but holistically, purposively and in light of the whole Constitution.¹⁷⁶

2.3.5 Platforms for public participation

2.3.5.1 Public Hearings

Platforms for public participation depend on the forms of public participation in question. Public hearings may be required in certain decision-making processes. Public hearings are also an established practice in policy-making. They are open not only to specifically invited experts and individuals likely to be affected most by the policies in question, but to all citizens who wish to attend. Access to public hearings depends on the wide circulation of invites, the location, size of the venue and timing of the hearings. Public hearings provide a face-to-face contact for dialogue to take place between the government, affected parties and interested groups.¹⁷⁷ Generally, government officials chair panels in public hearings. The government may nominate panel members. At a public hearing, the discussion can explore the issue on a

¹⁷¹ Phooko 2014 *Obiter*.

¹⁷² *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 115.

¹⁷³ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 199.

¹⁷⁴ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 200.

¹⁷⁵ Section 172 (a) of the Constitution.

¹⁷⁶ *Matatiele Municipality v President of the Republic of South* 2007 1 BCLR 47 CC para 36.

¹⁷⁷ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 59.

broader framework or focus on concrete policy proposals.¹⁷⁸ Public hearings provide citizens with a platform on which they can pose questions and defend their interests.¹⁷⁹

One disadvantage of public hearings is that they are single events, thereby excluding most members of a community who might not have access to such hearings on the chosen dates. As such, public hearings can be inaccessible to some interest groups. To counter this weakness, there is a need for more coordination and planning to ensure sufficient notice, access and attendance of affected community members. Also, the simultaneous presence of many groups and individuals can render a discussion of a complex or emotional issue impossible. For example, the Constitutional Review Committee has had public hearings on the expropriation of land which is a sensitive matter in democratic South Africa. The hearing may degenerate, limiting the generation of empirical information. A public hearing is not an independent procedure. Public hearings supplement other consultation procedures.

2.3.5.2 The mass media

The mass media is a mechanism of communicating information to a large audience within a short space of time. The mass media enables leaders to conduct effective public participation because it ensures that the public is informed of proposed government policies and muted legislation. The mass media contributes to efficacy and effective performance by ensuring that the views of the citizens are received by the government. The mass media includes both the electronic media to print media. Mass media ensures access to information for citizens to make informed decisions. Information serves as a checking function to ensure that elected representatives live up to their oaths of office.¹⁸⁰ The various forms of mass media are as follows:

¹⁷⁸ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 59.

¹⁷⁹ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 33.

¹⁸⁰ Nkuna 2007 *Journal of Public Administration* 234.

- Broadcasting
- Publishing
- Newspapers
- Films
- Video
- Cyber Space/Social Media

The broadcast media is a site for the expression of both political and public opinions. As such, the broadcast media constitutes an important arena on the contemporary public sphere.¹⁸¹ Public media is characterised by both radio and television where engagement with current issues, social and political is the primary activity.¹⁸² Viewers of the public media were traditionally defined as sole receivers of information in a one-way communication system. The contemporary public media enables the previously passive audience to assume the role of producer and to be involved in the first-level interaction in response to the primary media.¹⁸³

Traditionally, television news has devised ways to make news more interactive and closer to audiences. TV journalism is still considered as a substantial knowledge-producing institution of current times. Most of the people still get the most news from TV.¹⁸⁴ Radio broadcasting is the most accessible form of news media in rural areas.¹⁸⁵ Radio broadcasting is effective for reaching outlying and isolated rural areas.

2.3.5.3 The internet and social media

Modern technology provides citizens with significant and ever-changing platforms for public participation. It enables citizens to access textual and multi-modal information produced anywhere and at any time. Technological advances enable the transmission of messages and sharing of the same in recontextualised and modified versions with incredible ease. Internet-based social media opened many

¹⁸¹ Thornborrow *The discourse of public participation media: From talk show to Twitter*.

¹⁸² Thornborrow *The discourse of public participation media: From talk show to Twitter*.

¹⁸³ Dynel and Chovanec *Participation in Public and Social Media Interactions* 3.

¹⁸⁴ Dynel and Chovanec *Participation in Public and Social Media Interactions* 3.

¹⁸⁵ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 22.

new channels of interaction. The internet is known for its universal information repository. Organisations that have established web pages make it easier for people who have access to the internet to retrieve and share information remotely.¹⁸⁶

Morden technology subscribes to *Computer-mediated Communication (CMC)* as well as *Technology-mediated Communication (TMC)*.¹⁸⁷ CMC and TMC give a prominent role to mobile phones and other devices and acts as an interpersonal communicative encounter on the internet and elsewhere. Social media genres subscribe to TMC and CMC and encompass, among other various forums, discussion boards, blogs and leading social network sites such as Facebook, YouTube and Twitter.¹⁸⁸ Internet-based social media opened many new channels of interaction for interlocutors who are not co-present in the same physical spaces. Interactions in social media are characterised by speakers, spatial separation and provide an infinite number of potential participants at the reception end.¹⁸⁹ Social media has given contemporary audiences new participatory privileges. For example, Government officials, ministers and government departments have set up social media accounts to directly interact with citizens.

The advantages of using the internet are that citizens can access the web in their homes or offices at any time to access the relevant information and documents. The internet is also a quick way to broadcast information about meetings. It makes it easier to organise events for large numbers of people who have expressed an interest in the issue or decision under consideration. A chat room where people interested in the issue can post messages or documents for others to read or carry on a discussion of the issue is a handy internet tool. The internet also enables citizens to send and receive electronic mail, in the form of e-mails on comments and alternatives under consideration.¹⁹⁰

¹⁸⁶ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 94.

¹⁸⁷ Dynel and Chovanec *Participation in Public and Social Media Interactions* 6.

¹⁸⁸ Dynel and Chovanec *Participation in Public and Social Media Interactions* 6.

¹⁸⁹ Dynel and Chovanec *Participation in Public and Social Media Interactions* 7.

¹⁹⁰ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 93.

2.3.5.4 Elections

One of the primary manifestations of public participation in democratic South Africa is electoral participation. Participation in national, provincial and municipal elections is a benchmark for democratic legitimacy. One of the founding values of the Constitution is a multi-party system for the establishment of democratic government. The multi-party system is meant to, *inter alia*, ensure accountability, responsiveness and openness.¹⁹¹ An important feature of democratic participation develops the logic of equality. When the government decides on the policy made, every citizen must have an equal opportunity to vote, and all votes must be counted as equal.¹⁹²

As panned by Ngcobe J in *Doctors for Life*,¹⁹³

General elections, the foundation of representative democracy, would be meaningless without massive participation by the voters. The participation by the parties on a continuous base provides vitality to the function of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made.¹⁹⁴

The right to free and fair elections gives content and meaning to the right to vote.¹⁹⁵ The Independent Electoral Commission established in sections 190 and 191 of the Constitution, and section 3 of the *Electoral Commission Act*,¹⁹⁶ is one of state institution supporting democracy.¹⁹⁷ The constitutional duty of the IEC is to manage elections of national, provincial and municipal legislative bodies in accordance with national legislation¹⁹⁸ The *Electoral Act*¹⁹⁹ is the envisaged electoral legislation and

¹⁹¹ Section 1(d) of the Constitution.

¹⁹² Dahl *On Democracy* 95.

¹⁹³ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

¹⁹⁴ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 115.

¹⁹⁵ Currie and De Waal *The Bill of Rights Handbook* 427.

¹⁹⁶ *Electoral Commission Act* 51 of 1996.

¹⁹⁷ Other state institutions supporting constitution democracy are: The Public Protector, South African Human Rights Commission, Commission for the Promotion and Protection of the Rights of Culture, Religious and Linguistic Communities, Commission for Gender Equality and the Auditor General.

¹⁹⁸ Section 190(1)(a) of *The Constitution of the Republic of South Africa* of 1996.

¹⁹⁹ *Electoral Act* 73 of 1998.

further regulates the IEC and the conduct of elections. The duty of the IEC is to strengthen constitutional democracy and promote democratic electoral processes.²⁰⁰ In *August v Electoral Commission*²⁰¹, Sachs J referred to the right to vote of every citizen as a "badge of dignity and personhood" and that "everybody counts."²⁰² Further, Sachs J held that the right to vote is a symbol of South African citizenship.²⁰³ In *Richter v Minister of Home Affairs*,²⁰⁴ the court noted that democracy is strengthened and invigorated by each cast and that when citizens mark their ballots they "remind those elected that their position is based on the will of the people and will remain subject to their will."²⁰⁵

2.3.6 Principles for public participation

2.3.6.1 Government commitment to public participation

One of the principles for public participation is a strong commitment of the government to information, consultation and active participation of citizens in policy-making at all levels. Generally, politicians, senior managers and other public officials must be committed to public participation.²⁰⁶

2.3.6.2 Respect for human rights

Public participation, on its own, raises constitutional and human rights issues. Citizens have a right to access information in terms of section 16(1)(b) the Constitution the provision of feedback through active participation and consultation in policy-making. Public consultations are not acts of benevolence from public officials and government departments, but they are processes firmly grounded in law and policy.²⁰⁷ As part of its responsiveness envisaged in section 1(d) of the Constitution, the government is obliged to respond to citizens in matters which

²⁰⁰ Section 4 of the *Electoral Commission Act* 51 of 1996

²⁰¹ *August v Electoral Commission* 1993 3 SA 1 (CC).

²⁰² *August v Electoral Commission* 1993 3 SA 1 (CC) para 17.

²⁰³ *August v Electoral Commission* 1993 3 SA 1 (CC) para 17.

²⁰⁴ *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC) para 153.

²⁰⁵ *Richter v Minister of Home Affairs* 2009 3 SA 615 (CC).

²⁰⁶ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 84.

²⁰⁷ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 84.

potentially threaten their rights and must be clear about how its actions will affect the citizens. To ensure respect for the rights of citizens, the Constitution established independent oversight institutions.

2.3.6.3 Clarity of issues

Before policy-making, objectives for, limits to and information provided to citizens must be defined from the onset.²⁰⁸ The respective roles and responsibilities of citizens in providing input and government in making decisions for which they are accountable for must always be clear from the beginning.

2.3.6.4 Timely public management

Public participation should commence as early in the policy process as possible to allow a greater range of policy solutions to emerge and to raise the chances of successful implementation.²⁰⁹ Adequate time must be available for consultation and participation to be effective. In *Doctors for Life*²¹⁰ it was held that "interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions; and that it would be unreasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are about to be made."²¹¹

2.3.6.5 Objectivity in the provision of information and engagement of the public

Information provided by government during policy-making should be objective, complete and accessible. All citizens should have equal treatment when exercising their rights of access to information and participation.²¹²

²⁰⁸ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 85.

²⁰⁹ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 85.

²¹⁰ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

²¹¹ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 171

²¹² Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 86.

2.3.6.6 Provision of adequate resources for the public

Adequate financial and human resources are needed if public participation in policy-making is going to be effective. Government officials must have access to appropriate skills, guidance and training as well as an organisational culture that supports their efforts.²¹³

2.3.6.7 Co-ordination

Feedback received from public participation with citizens should be coordinated across government units to ensure information management, coherence, avoidance of duplication and reduce the risk of “consultation fatigue” amongst citizens and civil society organisations.²¹⁴ The provision of feedback to citizens is essential for institutional coordination.²¹⁵ Feedback is necessary to close any loopholes between the initial public participation opportunity, and the final action taken on the that input.²¹⁶

2.3.6.8 Accountability

One of the key issues in modern governance and democracy is accountability. Governments must account for their use of the input of citizens and feedback received during public consultation and active participation. Governments must put measures in place to ensure the openness, transparency and amenability of policy-making processes to external scrutiny. Review is essential to increasing government accountability overall.²¹⁷

2.3.6.9 Evaluation and implementation

Government must evaluate their performance in providing information, conducting consultations and engaging citizens. Tools such as information and capacity are

²¹³ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 86.

²¹⁴ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 87.

²¹⁵ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf.

²¹⁶ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf.

²¹⁷ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 88.

necessary for the governments to adapt to new requirements and changing conditions for policy-making.²¹⁸

2.3.7 The rationale for public participation

One of the requirements of democracy is to give citizens power over choices made by their governments.²¹⁹ In a participatory democracy, the public is actively involved in the decision-making processes of the government.²²⁰ Democracy and public participation nurture the conditions for a meaningful exchange between the citizens and government.²²¹ A push towards democratic participation develops equality. The active participation of civil society, both in the formulation of government policies and their implementation is a requirement for meaningful public participation.²²² The purpose of public participation is to enable the decision makers to learn about the preferences of the public to improve decisions with local knowledge, and to advance fairness and justice.²²³

2.3.8 Benefits of public participation

2.3.8.1 Consensus building

A public participation program may build a substantial, long-term commitment between deviating parties. It builds an understanding between the parties and reduces political controversy by giving legitimacy to government decisions.²²⁴

²¹⁸ Gramberger *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* 88.

²¹⁹ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 17.

²²⁰ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf.

²²¹ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf

²²² Nealer 2005 *Journal of Public Administration*.

²²³ Mautjana and Makombe 2014 *Africa Insight*.

²²⁴ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 19.

2.3.8.2 Developed civil society

One of the benefits of public participation is that it results in a better-educated public. Participants not only learn about the subject matter, but they also learn how their government makes decisions and why.²²⁵

2.3.8.3 Improved quality of decisions

Public participation improves the quality and legitimacy of decisions made by governments on policy programmes and projects that affect communities.²²⁶

2.3.8.4 Minimising cost and delay

Public participation reduces polarisation between public agencies and citizens, thereby preventing conflict which sometimes results in violent protests.²²⁷ This can reduce the chances of violent protests which often lead to the destruction of property and costs money to fix. If decisions making is quick and isolates interested individuals and groups, it is often tied up in delays and litigation which in the long run are often at an expense.²²⁸ Even if the decision is implemented, if a court rules it invalid the process will start afresh and cause delay.

2.3.8.5 Enhancement of transparency and accountability

Public participation enhances transparency and accountability in public institutions by entrenching a culture of openness which promotes a high quality of democratic governance.²²⁹

²²⁵ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 19.

²²⁶ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 18.

²²⁷ Department of Public Service and Administration 2014 www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf

²²⁸ Creighton *The Public Participation Handbook: Making Better Decisions Through Citizen Involvement* 18.

²²⁹ Department of Public Service and Administration 2014 www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf

2.3.8.6 *Broader support and trust*

Public participation builds a broader support, trust and confidence for government decisions, programmes and initiatives.²³⁰

2.4 **Chapter summary**

In summary, South Africa's transition from the apartheid regime witnessed the demise of traditional parliamentary sovereignty and its replacement with a supreme Constitution, a Constitutional Court and broad political support for democracy and constitutionalism, making South Africa a constitutional democracy.²³¹ The historical experience demonstrates that the will of the people was no more than illusory hopes. Democracy rests on the consent of citizens to be governed by individuals they have chosen. The notion of public participation in government decisions lies at the heart of South African constitutional democracy.

Meaningful public participation requires the government to inform, consult, involve and collaborate with citizens for their input on the relevant processes out of which ultimately binding decisions are made. An adequate understanding and appreciation of the requirements of democracy and the will to meet its requirements would help the government to preserve and advance democratic ideas and practices to foster public participation.²³² The following chapter focusses on the legislative framework of public participation in the demarcation of municipal boundaries in South Africa.

²³⁰ Department of Public Service and Administration 2014
www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf

²³¹ Klug *Constituting Democracy: Law, Globalism and South Africa's Political Restructure*.

²³² Dahl *On Democracy*

Chapter 3 The Legal Framework for the Demarcation of Municipal Boundaries

3.1 Introduction

The choice for the decentralisation of powers and functions to local governments in South Africa should be understood against the background of the politics that prevailed before and during the Constitution-making process.²³³ The transformation of South Africa from a society entrenched in discrimination and inequality in material wealth to a constitutional democracy founded upon freedom, dignity and equality posed profound challenges at the local government level. The reason for this is that it is the local spheres of government that has severe imbalances in personal wealth, physical infrastructure and provision of services are most blatant.²³⁴

The apartheid system led to the total reorganisation of towns and cities, leading to spatial segregation and political-administrative fragmentation.²³⁵ The *Groups Areas Act*²³⁶ restricted Africans from urban areas and reserved a viable municipality revenue base for white areas by separating townships and industrial and commercial developments. Historically, municipalities in African areas were deprived of the means to meet the needs of residents.²³⁷ Until the early 1990s, local government in South Africa was characterised by segregation and apartheid. The transition from the apartheid era to the new constitutional dispensation led to the restructuring of the state to create a system of government that ensures participation of all stakeholders in all areas of life.²³⁸ New institutions were created to enable the implementation of democratic order.²³⁹

The Local Government Negotiating Forum (LGNF) was established in 1993 with the

²³³ Fuo 2015 *African Human Rights Law Journal* 168.

²³⁴ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 para 2.

²³⁵ *Reservation of Separate Amenities Act* 49 of 1953.

²³⁶ *Group Areas Act* 41 of 1950.

²³⁷ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 para 2.

²³⁸ Fuo 2015 *African Human Rights Law Journal* 168.

²³⁹ Mathekga and Buccus 2006 *Critical Dialogue-Public Participation in Review* 11.

primary mandate to guide the transition of local government.²⁴⁰ The recommendations of the LGNF were included in the interim Constitution and the *Local Government Transition Act* (LGTA) of 1993. The LGTA became the centre-piece of seven years of local government transition.²⁴¹ Due to the numerous existing local government structures that needed to be restructured into one national model, the LGTA became an extremely complex piece of legislation.²⁴² Nevertheless, the LGTA provided a clear overall model for transition in three phases.

The interim Constitution, which recognised local government, came into effect after the commencement of the LGTA. It stipulated that "local government shall be autonomous, and within limits prescribed by law, shall be entitled to regulate its affairs".²⁴³ The interim Constitution further stipulated that the "powers, functions and structures of local government shall be determined by law of a competent authority."²⁴⁴ In the case of local government, the powers were subject to definition and regulation by either the national or provincial governments.²⁴⁵ On the one hand, the autonomy of local government was recognised. On the other hand, local government was made subservient to the provincial and national governments. The inconsistency caused many problems.²⁴⁶

The two main negotiators in CODESA, the National Party (NP) and the ANC, had different approaches to local government.²⁴⁷ The NP's approach favoured strong provincial governments. The perspective of the NP was that decentralisation and strong provinces were ideal to break the excesses of a large central government.²⁴⁸ The approach of the ANC was guided by the vision expressed in the Freedom Charter.²⁴⁹ The Freedom Charter envisaged a democratic state which embraces the

²⁴⁰ Cameron "Local Government Boundry Reorganisation " 76.

²⁴¹ De Visser *Developmental Local Government: A case study of South Africa* 62.

²⁴² De Visser *Developmental Local Government: A case study of South Africa* 62.

²⁴³ Section 174(3) of the *Constitution of the Republic of South Africa* 200 of 1993.

²⁴⁴ Section 175(1) 1993 *Constitution of the Republic of South Africa* 200 of 1993.

²⁴⁵ De Visser *Developmental Local Government: A case study of South Africa* 63.

²⁴⁶ De Visser *Developmental Local Government: A case study of South Africa* 63.

²⁴⁷ De Visser *Developmental Local Government: A case study of South Africa* 66.

²⁴⁸ De Visser *Developmental Local Government: A case study of South Africa* 66.

²⁴⁹ The Freedom Charter was adopted at the Congress of the people at Kliptown, Johannesburg on June 25 and 26, 1955.

notion of self-government,²⁵⁰ and thus necessitated decentralisation of power to local governments.²⁵¹

The final Constitution introduced the notion of cooperative governance. Section 40 and 41 of the Constitution provides for cooperative governance and the related principles. There are three spheres of government, which are "distinctive, interdependent, and interrelated."²⁵² This provision is significant because it uplifts local government from a subordinate level of government to an equal and coordinated sphere of government. This chapter focusses on the legal framework for the demarcation of municipal boundaries. It examines the pre-interim phase leading up to the 1995 elections; the interim phase which introduced the interim Constitution and the demarcation process for the 1995 elections; and finally, the final phase under the final Constitution. The chapter also looks at important pieces of legislation designed to implement the new local government dispensation as envisaged by Chapter 7 of the Constitution.

3.2 The concept of a municipality

A municipality is the smallest governance structure at the local sphere of government.²⁵³ Local government consists of municipalities which are established for each demarcated area or municipal area for the whole territory of South Africa.²⁵⁴ The *Local Government: Municipal Structures Act*²⁵⁵ defines a municipality as "an organ of state within the local sphere of government consisting of political structures, office bearers and administration of the municipality, or a geographic area as determined by the *Local Government: Municipal Demarcation Act*." According to section 2 of the *Local Government: Municipal systems Act*, a municipality, "as an entity, exercises legislative and executive authority within a specific demarcated area."²⁵⁶ A municipality, when referred to as a geographical

²⁵⁰ The Freedom Charter declared that: "All bodies of minority rule, advisory boards, councils and authorities shall be replaced by democratic organs of self-government."

²⁵¹ De Visser *Developmental Local Government: A case study of South Africa* 66.

²⁵² S 40(1) of the Constitution.

²⁵³ Van der Waldt *Municipal Management: Serving the People* 5.

²⁵⁴ Section 151(1) of the Constitution.

²⁵⁵ The Local Government Municipal: Structures Act 117 of 1998.

²⁵⁶ The Local Government Municipal: Systems Act 32 of 2000.

area, means a municipal area determined in terms of the *Municipal Demarcation Act*²⁵⁷

The Constitution categorises municipalities as follows:²⁵⁸

- a) Category A: A municipality that has exclusive municipal executive and legislative authority in its area.²⁵⁹
- b) Category B: A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls.²⁶⁰
- c) Category C: A municipality that has municipal executive and legislative authority in an area that includes more than one municipality.²⁶¹

Municipalities have a responsibility to eradicate the political, social and economic exclusions created by the apartheid era.²⁶² Section 5(1)(a) of the *Local Government: Municipal Systems Act*²⁶³ provides that members of local communities have a right and a duty to contribute to the decision-making process of their municipalities. This implies that municipalities have obligations to consult, through public participation, members of the communities they serve during the decision-making processes.²⁶⁴ Chapter 4 of the *Municipal Systems Act*²⁶⁵ requires municipalities to afford their communities opportunities to participate in the affairs of the municipality. Thus, public participation is a legislative requirement for planning in the local sphere of government.²⁶⁶

²⁵⁷ *Local Government: Municipal Demarcation Act* 27 of 1998.

²⁵⁸ The Constitution.

²⁵⁹ S 155(1)(a) of the Constitution.

²⁶⁰ S 155(1)(b) of the Constitution.

²⁶¹ S 155(1)(c) of the Constitution.

²⁶² Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 345.

²⁶³ *Local Government: Municipal Systems Act* 32 of 2000.

²⁶⁴ Molepo, Maleka and Khalo 2015 *Journal of Public Administration*.

²⁶⁵ *Local Government: Municipal Systems Act* 32 of 2000.

²⁶⁶ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 347

3.3 The Local Government Transition Act 209 of 1993

The *Local Government Transition Act*²⁶⁷ (LGTA) was the first post-apartheid legislation to be introduced to regulate the local level of government. The LGTA provided a comprehensive framework for the transformation of local government in preparation for the new democratic dispensation introduced by the interim Constitution.²⁶⁸ The LGTA outlined a three-phase transition for local government. The first phase, the pre-interim phase, was defined as the period which lasted from the publication of the LGTA to the date of the elections for transitional councils. The second phase, the interim phase, was the period between the elections of transitional councils and the legislation and implementation of final arrangements for local government. The LGTA did not explicitly define the final phase. It merely envisaged a period of change as municipalities or municipal structures were re-established and restructured in accordance with the final legislative arrangements.²⁶⁹

3.3.1 The pre-interim phase

The pre-interim phase started on the 2nd day of February 1994 when LGTA was promulgated.²⁷⁰ The LGTA disbanded race-based municipalities and established transitional councils.²⁷¹ The LGTA also established negotiating forums in all municipal areas. The negotiating forums comprised of statutory representatives and non-statutory representatives.²⁷² The negotiating forums nominated members of transitional councils. The locally negotiated transitional councils governed the local authorities from 1994 to 1997.²⁷³ The pre-interim phase was a preparation for the 1995 local government elections. The elections were the first democratic local government elections and took place after the first democratic national and provincial elections held in April 1994. The electoral system had to first integrate apartheid local government structures by demarcating the outer boundaries. This

²⁶⁷ *The Local Government Transition Act 209 of 1993.*

²⁶⁸ Mathekga and Buccus 2006 *Critical Dialogue-Public Participation in Review* 13.

²⁶⁹ Mathekga and Buccus 2006 *Critical Dialogue-Public Participation in Review.*

²⁷⁰ *The Local Government Transition Act 209 of 1993.*

²⁷¹ De Visser *Developmental Local Government: A case study of South Africa.*

²⁷² Section 3(1)(a) of *The Local Government Transition Act 209 of 1993.*

²⁷³ De Visser *Developmental Local Government: A case study of South Africa.*

necessitated a revision of the voters' rolls to accommodate previously excluded persons. For this purpose, the LGTA established a Local Government Demarcation Board in all the nine provinces. The Demarcation Boards had advisory powers. Their duties were to advise provincial Ministers of Local Government on the boundaries and wards of local government jurisdictions.

3.3.2 The interim phase

The interim phase began with the first local government elections and ended with the implementation of the final constitutional model at the local government level. The 1995 elections ushered in the interim phase with elected councils based on the incorporation of previously white, black and coloured areas.²⁷⁴ In the local councils, half of all councillors came from wards where they were directly elected. The local government legislative framework developed during the interim phase. The interim phase ended on 5 December 2000 when the local government elections were held under the 1996 Constitution. New municipalities were established based on local government legislation.²⁷⁵ The LGTA was the centrepiece of seven years of local government legislation.

3.3.3 The final phase

The final phase began with the adoption of the final Constitution model in 1997. However, some provisions of the Constitution only took effect after the 2000 local government elections.²⁷⁶ The Constitution defined the mode of engagement and outlined objectives for local government structures.²⁷⁷

3.4 The White Paper on Local Government

The 1996 Constitution envisaged a complete transformation of the local government system. The White Paper on Local Government was developed to chart a way forward for local government from a non-developmental and subordinate level of

²⁷⁴ De Visser *Developmental Local Government: A case study of South Africa*.

²⁷⁵ De Visser *Developmental Local Government: A case study of South Africa* 61.

²⁷⁶ Cameron "Local Government Boundry Reorganisation " 77.

²⁷⁷ Mathekga and Buccus 2006 *Critical Dialogue-Public Participation in Review* 13.

government to a developmental, legitimate and democratic sphere of government.²⁷⁸ The White Paper on Local Government laid the framework for the process to facilitate the transformation of local government and the rectification of social and economic imbalances of the past. The White Paper was regarded as the "mini-constitution" for local government due to its wide implications.²⁷⁹ The White Paper was duped a "mini-constitution" for local government because it was unique. It did not only deal with sectoral policies, but also with the entire sphere of local government.²⁸⁰ The White Paper symbolised an overhaul of local government in South Africa.²⁸¹

The White Paper noted the spatial separation and the inequalities between town and townships. The system of apartheid made cities very difficult to manage.²⁸² The White Paper proposed a future developmental orientation of municipalities, a vision and leadership to coordinate the activities of public and private agencies. It also encouraged the community to participate in policymaking.²⁸³

3.4.1 Developmental Local Government

Clause B of the White Paper defined developmental local government as

...local government that is committed to working with citizens and groups to establish sustainable ways to meet their social, economic and material needs to improve their quality of life.²⁸⁴

Developmental local government places development at the centre of governmental effort.²⁸⁵ The facilitation of public participation is dependent on the mobilisation and empowerment of civil society and a citizen-oriented management approach in government institutions.²⁸⁶ It will be recalled that the involvement of communities and community organisations in local government and the facilitation of public

²⁷⁸ *The White Paper on Local Government of 1998.*

²⁷⁹ *The White Paper on Local Government of 1998.*

²⁸⁰ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 350.

²⁸¹ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 351.

²⁸² Van der Waldt *Municipal Management: Serving the People* 15.

²⁸³ Van der Waldt *Municipal Management: Serving the People* 15.

²⁸⁴ The White Paper on Local Government, 1998.

²⁸⁵ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 348.

²⁸⁶ McEwan 2003 *Geoforum* 469.

participation by local government is part of democracy.²⁸⁷ Development requires citizens to embrace change and be informed of the benefits of such change.²⁸⁸ In relation to the democratisation of development, the White Paper prescribed the obligation of municipal councillors to promote the involvement of citizens and interest groups in the design and delivery of municipal programmes. Therefore, developmental local government hinges on public participation.²⁸⁹

The White Paper required municipalities to adopt measures to ensure the active participation of citizens in four areas. First, the White required the participation of citizens voters to ensure the maximum accountability of the elected officials and the policies they promote. Second, the White Paper required the participation citizens as stakeholders, thereby giving citizens the right to express their views before, during and after the policy development processes. This was intended to ensure that policies reflect citizen preferences as far as possible.

Third, the White Paper prescribed the participation of citizens as consumers and end-users with a right to value for money, affordable services and courteous and responsive service. Lastly, the White Paper prescribed the participation of citizens in local government as organised partners involved in the mobilisation of resources for development for profit business, non-governmental organisations and institutions.²⁹⁰

3.5 Objectives of local government

Section 152(1) of the Constitution outlines the mandate of local government as follows:

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;

²⁸⁷ De Visser *Developmental Local Government: A case study of South Africa* 68.

²⁸⁸ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 345.

²⁸⁹ Draai and Taylor 2009 *Journal of Public Administration* 115.

²⁹⁰ Clause B at 3.3 of *The White Paper on Local Government* of 1998.

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

Both sections 152(1)(a) and (e) are informed by the establishment of a democratic dispensation for local government and public participation of local communities.²⁹¹

The involvement of communities and community organisations in the local government and the facilitation of public participation by local government is part of democracy.

3.6 Co-operative government

In the Constitution, co-operative government is a distinct feature. Co-operative government lays down the ground rules for the interaction between the three spheres of government. The notion of cooperative governance was introduced by the Constitution to make the national, provincial and local spheres of government "distinctive, interdependent, and interrelated."²⁹² The reference to spheres of government represents a paradigm shift from a hierarchical view of levels or tiers of government to equality in the government.²⁹³ The different spheres are obliged to observe and conduct their activities within constitutional parameters.²⁹⁴ The principles set in the Constitution require of all organs of state to:

- a) Preserve the peace, national unity and indivisibility of the Republic thus securing the wellbeing of the people of the Republic;²⁹⁵
- b) Ensure as well as provide an effectual, transparent, accountable and coherent government;²⁹⁶
- c) Respect the constitutional status, institutions, powers and functions of government in other spheres;²⁹⁷

²⁹¹ De Visser *Developmental Local Government: A case study of South Africa* 68.

²⁹² S 40(1) of the Constitution.

²⁹³ Mathebula, Mafunisa and Makobe *Mulayotewa: Understanding the Constitution* 11.

²⁹⁴ S 40(2) of the Constitution.

²⁹⁵ S 41(1)(a) of the Constitution.

²⁹⁶ S 41(1)(c) of the Constitution.

²⁹⁷ S 41(1)(e) of the Constitution.

- d) Avoid encroachment into the geographical, functional and institutional integrity of another sphere when exercising their powers and functions;²⁹⁸
- e) Assume power or function only in those matters conferred by the Constitution;²⁹⁹
- f) Co-operate in mutual trust and good faith through fostering friendly relations, supporting and assisting one another, consulting one another in matters of common interest;³⁰⁰ and
- g) Co-ordinate their actions and legislation with one another and adhere to agreed procedures thereby avoiding legal proceedings.³⁰¹

Section 3(d) of the *Municipal Systems Act* provides that for the effective co-operative government, organised local government must:

- a) develop common approaches for local government as a distinct sphere of government;³⁰²
- b) enhance co-operation, mutual assistance and sharing of resources among municipalities;³⁰³
- c) find solutions for problems relating to local government generally;³⁰⁴ and
- d) facilitate compliance with the principles of co-operative government and intergovernmental relation.³⁰⁵

The principle of co-operative government deals directly with the issue of development that is sustained by the citizens.³⁰⁶ It aims to ensure that the social contract between the people and the government is given constitutional incentive and backing.³⁰⁷ The division of government into three spheres of government is a recognition of the weakness of a centralised state. A centralised state is bound to struggle to meet the basic needs of citizens, hence the need for decentralisation of power and sharing of responsibilities by the three spheres of government.³⁰⁸ The principles governing co-operative government clarify the role of each sphere of government, conflict resolution and the constitutional responsibility to ensure a strong, united and democratic South Africa.

²⁹⁸ S 41(1)(g) of the Constitution.

²⁹⁹ S 41(1)(f) of the Constitution.

³⁰⁰ S 41(1)(h) of the Constitution.

³⁰¹ S 41(1)(h)(vi) of the Constitution.

³⁰² S 3(a) of the *Local Government: Municipal Systems Act 32 of 2000*.

³⁰³ S 3(b) of the *Local Government: Municipal Systems Act 32 of 2000*.

³⁰⁴ S 3(b) of the *Local Government: Municipal Systems Act 32 of 2000*.

³⁰⁵ S 3(d) of the *Local Government: Municipal Systems Act 32 of 2000*.

³⁰⁶ De Visser *Developmental Local Government: A case study of South Africa*.

³⁰⁷ Mathebula, Mafunisa and Makobe *Mulayotewa: Understanding the Constitution 12*.

³⁰⁸ Mathebula, Mafunisa and Makobe *Mulayotewa: Understanding the Constitution 12*.

Municipalities are instrumental for co-operative governance. National and provincial spheres of government are required to support and strengthen the capacity of municipalities to manage their own affairs and to exercise their powers and to perform their functions.³⁰⁹ The national and provincial government can achieve this through legislative and administrative measures.

National and provincial spheres are required to ensure that whenever they come up with draft legislation that affects the status, institutions, powers or functions of local government, they must publish such legislation for public comment before it is introduced in Parliament or a provincial legislature.³¹⁰ The reason for this is to allow organised local governments, represented by the South African Local Government Association (SALGA) in the national sphere and the nine provincial affiliates of SALGA, municipalities and other interested persons opportunities to make representations regarding draft legislation. Legislation also allows municipalities and traditional councils to achieve cooperative governance.³¹¹ The *Traditional Leadership Governance Framework Act*³¹² (herein after referred to the *TLGF Act*) requires the government to establish institutional mechanisms for co-operation. It has given traditional councils a loud voice in developmental matters. Under this Act, traditional councils may enter into partnerships and service level agreements with all spheres of the government.

3.7 The Local Government: Municipal Demarcation Act

Before 1994, spatial arrangements in South Africa were characterised by the fragmentation of communities along racial, social and economic lines. The fragmentation had disastrous effects on social cohesion and access to services.³¹³ The promulgation of the *Municipal Demarcation Act*,³¹⁴ and the subsequent establishment of the Municipal Demarcation Board (MDB) in 1999 were essential in

³⁰⁹ S 154(1) of *The Constitution*.

³¹⁰ S 154(2) of *The Constitution*.

³¹¹ Poswayo 2013 *Transformer* 30.

³¹² *Traditional Leadership and Governance Framework Act* 41 of 2003.

³¹³ Municipal Demarcation Board Annual Report 2013/14.

³¹⁴ *Local Government: Municipal Demarcation Act* 27 of 1998.

transforming the spatial configuration of the local government environment in South Africa.

The MDB mandate is to dissolve the spatial layout of the apartheid legacy and demarcate boundaries to create new non-racial municipal areas of jurisdiction.³¹⁵ The municipal restructuring aims to assist in redressing the imbalances of the past and the inequalities in access to public services.³¹⁶ Also, the new municipal areas should be designed to help address the rural-urban divide and integrate economic and social development.³¹⁷ The vantage point of rebuilding developmental local government is financial.³¹⁸

3.7.1 The Municipal Demarcation Board

Sections 155(3)(b) and section 157 (4)(a) of the Constitution mandate the MDB to determine municipal boundaries and to delimit wards independently. The MDB is an independent juristic person created by the Constitution which performs its functions without fear, favour or prejudice.³¹⁹ The main function of the MDB is to determine municipal boundaries³²⁰ and to render an advisory service in respect of matters provided for in the Act and other appropriate legislation.³²¹ The MDB is accountable to Parliament.³²²

Unlike the provincial Boards, the MDB is the final decision-making body when it comes to the demarcation of boundaries. The system in which provincial advisory Boards made recommendations to provincial ministers of local government and provincial committees turned cumbersome because of deadlocks which had to be decided by special electoral courts. The system contributed to the delay of the 1996 local government elections.³²³

³¹⁵ *Local Government: Municipal Demarcation Act 27 of 1998.*

³¹⁶ Nxumalo and Whittal 2013 *South African Journal of Geomatics* 325.

³¹⁷ Nxumalo and Whittal 2013 *South African Journal of Geomatics* 325.

³¹⁸ Parnell *et al Democratising Local Government: The South African Experiment*

³¹⁹ S 3 of the *Local Government: Municipal Demarcation Act 27 of 1998.*

³²⁰ S 4(a) of the *Local Government: Municipal Demarcation Act 27 of 1998.*

³²¹ S 4(b) of the *Local Government: Municipal Demarcation Act 27 of 1998.*

³²² S 39 of the *Local Government: Municipal Demarcation Act 27 of 1998.*

³²³ Cameron "Local Government Boundary Reorganisation " 84.

3.7.2 Determination of municipal boundaries

The MDB has powers to determine and re-determine municipal boundaries across South Africa.³²⁴ The Board must publish its determination or re-determination of a municipal boundary in the relevant Provincial Gazette.³²⁵ If a determination of a municipal boundary aggrieves any person, the affected person must submit written objections to the Board.³²⁶ The Board must consider all objections, relook at its decision and publish its decision in the Provincial Gazette.

During the performance of its functions, the MDB determines municipal boundaries on its own initiative, on request by the Minister or a MEC for local government, or on request by a municipality with the concurrence of any other municipality affected by the proposed determination or re-determination.

During 2014 the Minister and his department embarked on a review of the country's 278 municipalities.³²⁷ The 2014 review of municipalities revealed that certain municipalities were dysfunctional and needed urgent intervention to get them to function properly.³²⁸ They faced challenges of corruption, dysfunctional councils and poor financial management. In dealing with these challenges the Minister resolved that provinces should provide a list of municipalities to be considered for determination or re-determination in order to make them more functional and viable.³²⁹ Limpopo was one of the provinces which responded. In response to this, the Minister had sent a request in terms of section 22 of the MDB Act to the MDB for a re-determination of some municipalities in the Limpopo Province.³³⁰ The Minister's request was for the disestablishment of Mutale Local Municipality which fell under the Vhembe District Municipality.³³¹

The crux of this application is that the applicant's main complaint is the alleged failure by the MDB to consult them in the delimitation of a new municipality and the

³²⁴ S 21(a) and (b) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³²⁵ S 21(3) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³²⁶ S 21(4) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³²⁷ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 8.

³²⁸ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 8.

³²⁹ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 10.

³³⁰ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 11.

³³¹ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 13.

failure to consult them properly in respect of its decision to delimit the communities of Mashau and Masakhona into the new municipality and out of the Makhado Local Municipality.³³² In performing its functions, the MDB is subject to the requirements, criteria and reasons set out in the MDB Act

3.7.3 Objectives for Demarcation

3.7.3.1 Constitutional obligation

When the MDB determines a municipal boundary, its objective must be to establish an area that meets the demarcation objectives which will enable a municipality for that area to fulfil its constitutional obligations to:³³³

- a) provide a democratic and accountable government for local communities;
- b) ensure the provision of services to communities in a sustainable manner;
- c) promote social and economic development and
- d) promote a safe and healthy environment.

This criterion is a restatement of the local government objectives as stated in section 152(1) of the Constitution.

3.7.3.2 Effective local governance³³⁴

Governance is the most important aspect in the relationship between democracy and development. Governance serves the citizens through the utilisation of public resources and the exercise of regulatory powers.³³⁵ Good governance hinges on transparency and accountability. Good governance is based on the ability of the MDB to manage resources efficiently and to regulate the extent of the participation of citizens in its affairs. The accountability of the MDB and the participation of

³³² *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 Para 44.

³³³ S 24(a) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³³⁴ S 24(b) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³³⁵ Bishop 2009 *Constitutional Court Review* 87.

citizens in its processes are significant aspects of governance and lie at the core of both democracy and human development.

3.7.3.3 Integrated development

The enquiry into integrated development³³⁶ involves ascertaining whether the municipality has, or will be able to, obtain the skills, expertise and human and other resources to undertake integrated development.³³⁷

3.7.3.4 Inclusive tax base

The term tax base refers to persons liable to pay tax.³³⁸ In the local context, the tax base comprises of property owners who pay property rates. However, under the policy of apartheid, it was not a norm for residents of townships to pay property rates and that situation is likely to continue for some time.³³⁹ The demarcation objectives provide a basic guideline for everything done by the MDB.

3.7.4 Factors considered in the demarcation process

The prescribed factors to be considered when a decision to demarcate a municipal boundary is considered enable the MDB, to attain the demarcation objectives. There are twelve factors to consider:

3.7.4.1 Interdependence of people, communities and economics

This factor requires the MDB to establish the potential for growth in an area.³⁴⁰ Boundaries influence the access of communities to local government services. For example, the Merafong City Local Municipality fell in both Gauteng and North West provinces. The larger part of Merafong fell in Gauteng province and the smaller part in the North West Province.³⁴¹ The community of Merafong wanted the boundary of the Merafong municipality to be demarcated to Gauteng because Merafong is close

³³⁶ S 24(c) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³³⁷ Craythorne *Municipal Administration: The Handbook* 52.

³³⁸ S 24(d) of the *Local Government: Municipal Demarcation Act 27 of 1998*

³³⁹ Craythorne *Municipal Administration: The Handbook* 52.

³⁴⁰ Craythorne *Municipal Administration: The Handbook* 52.

³⁴¹ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 29.

to Gauteng's economic hub. In addition, Gauteng has superior service delivery and a bigger share of revenue from the National Revenue Fund.³⁴² However, the MDB proceeded to demarcate the Merafong boundary wholly into the North-West Province. The excision of Merafong from Gauteng was heavily opposed by the people of Merafong. Members of the community argued that their economic and social livelihoods depended on the Gauteng province.³⁴³

3.7.4.2 Cohesion and integration

When determining whether or not to demarcate the boundaries of a municipality, the MDB must investigate the need for cohesive, integrated and unfragmented areas, including metropolitan areas.³⁴⁴ In South Africa, spatial fragmentation was aggravated by the racially-biased local government, which led to massive disparities in levels of service provision.³⁴⁵ Thus the demarcation of local government boundaries has become a key instrument in the transformation of the urban apartheid system. This requires the MDB to establish feasible municipalities capable of existing on their own.³⁴⁶

3.7.4.3 Viability and capacity of the municipality

The MDB must consider the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively.³⁴⁷ Previously, South Africa had 850 municipalities.³⁴⁸ They were considered too many and financially unsustainable. In *Masia Traditional Council*,³⁴⁹ the Minister and his department had reviewed 278 municipalities.³⁵⁰ The review revealed that certain municipalities were dysfunctional and faced challenges of corruption and poor fiscal

³⁴² *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 66.

³⁴³ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 204.

³⁴⁴ S 25(b) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁴⁵ Cameron "Local Government Boundary Reorganisation " 76.

³⁴⁶ Craythorne *Municipal Administration: The Handbook* 52.

³⁴⁷ S 25(c) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁴⁸ Parnell *et al Democratising Local Government: The South African Experiment*.

³⁴⁹ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1.

³⁵⁰ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 8.

management, among others. The Minister sent a request to the MDB in terms of section 22 (2) of the *Local Government: Municipal Demarcation Act*³⁵¹ for a redetermination of municipalities in Limpopo. The request of the Minister hinged on the disestablishment of the Mutale Municipality to optimise the financial viability of the Vhembe District Municipality.³⁵² The MDB acceded to the request and destablished the Mutale Municipality. It created a new municipality, the Thulamela Municipality, composed of some wards from the old Mutale and Makhado municipalities.³⁵³

3.7.4.4 Sharing and redistribution of financial and administrative resources

The MDB must consider the need to share and redistribute financial and administrative resources.³⁵⁴ Larger municipalities should combine viable areas, in terms of their revenue base, with unviable areas. The combination would undoubtedly lead to efficient and effective service delivery.³⁵⁵

3.7.4.5 Provincial and municipal boundaries

Changes of provincial boundaries require amendments to the Constitution. A Bill amending the Constitution must be passed by Parliament, composed of the National Assembly and the National Council of Provinces.³⁵⁶ In 2005, Parliament adopted the Constitution Twelfth Amendment Act³⁵⁷ which altered the basis for determining provincial boundaries. The Amendment also dealt with aspect of the *Cross-boundary Municipalities Laws Repeal and Related Matters*³⁵⁸ (herein referred to as the Repeal Act). The Repeal Act was enacted to abolish cross-boundary municipalities and the establishment of a new method of defining provincial boundaries to municipal boundaries.

³⁵¹ *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁵² *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 13.

³⁵³ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 30(2).

³⁵⁴ S 25(d) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁵⁵ Parnell *et al Democratising Local Government: The South African Experiment*.

³⁵⁶ See Section 42(1) of the *The Constitution of the Republic of South Africa* of 1996.

³⁵⁷ *Constitution Twelfth Amendment Act* of 2005.

³⁵⁸ *Cross-boundary Municipalities Laws Repeal and Related Matters Act* 23 of 2005.

Consequently, the Twelfth Constitutional Amendment and the Repeal Act led to the abolition of the cross-boundary municipalities of Merafong, Matatiele and Moutse. The changes in municipal boundaries brought by the legislation and the change in provincial boundaries sparked litigation.³⁵⁹

It is common cause that the Merafong, Matatiele and Moutse communities supported the phasing out of cross-boundary municipalities. However, they opposed the relocation of their communities to other provinces. As was held in *Matatiele*,³⁶⁰ "the consequences of the amendment are of considerable symbolic importance."³⁶¹ "The attachment of individuals to the province they live in should not be underestimated."³⁶²

3.7.4.6 Traditional rural communities

Chapter 12 of the Constitution recognises the institution of traditional leadership and its place in the system under the current constitutional dispensation. However, the role of traditional leaders in democratic South Africa is not completely clear. The introduction of the *Traditional Leadership and Governance Framework Act*³⁶³ (herein TLGF Act) aimed to give the role of traditional leaders in South Africa greater clarity and substance. An essential objective of the TLGF Act, 2003 was the establishment and recognition of traditional councils at the local level. In addition to creating traditional councils, the TLGF also specifies functions that these institutions, as well as individual traditional leaders, could perform. Seven of these functions explicitly refer to co-operation with local government on development issues.³⁶⁴ For example, traditional councils are required to "support municipalities in the identification of

³⁵⁹ See *Matatiele Municipality v President of the Republic of South Africa* 2007 1 BCLR 47 CC; *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 5 SA 171 (CC) & *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC).

³⁶⁰ *Matatiele Municipality & others v President of the Republic of South & others* 2007 (1) BCLR 47 CC.

³⁶¹ *Matatiele Municipality & others v President of the Republic of South & others* 2007 (1) BCLR 47 CC para 81.

³⁶² *Matatiele Municipality & others v President of the Republic of South & others* 2007 (1) BCLR 47 CC Para 79.

³⁶³ *Traditional Leadership and Governance Framework Act* 41 of 2003.

³⁶⁴ Williams 2009 *Journal of Southern African Studies* 203.

community needs”³⁶⁵ and “participate in the development of policy and legislation at the local sphere.”³⁶⁶

The rights and duties of the traditional land administration systems are to make decisions over land development, service delivery overlap with those of municipal government land administration.³⁶⁷ There is thus a complex duality of authority in these areas. The MDB must consider the areas of traditional rural communities.³⁶⁸ The inclusion of these areas into municipalities has led to problems between municipal authorities and traditional leaders. A case study of such complexity and conflict of duties and responsibility between municipalities and traditional leadership is Vuwani.

In *Masia Traditional Council v the MDB*,³⁶⁹ the issue arose after the MDB had held public hearings in which Chief Masia of the Masia Traditional Council attended to represent five other Traditional Councils.³⁷⁰ Chief Masia vehemently argued before the MDB that his traditional council and others wanted to remain in the Makhado Municipality. He vehemently argued against representation in a Vuwani Municipality which was proposed.³⁷¹

Poor levels of service delivery and development highlight the need to recognise the role played by traditional leaders as they are often approached first by the community when problems arise. They can resolve disputes at the local level without the involvement of formal courts.³⁷²

3.7.4.7 Existing and proposed functional boundaries

The MBD must consider existing and proposed functional boundaries³⁷³ to align service areas provided for government services and municipal boundaries.

³⁶⁵ S 4(c) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

³⁶⁶ S 4(f) of the *Traditional Leadership and Governance Framework Act* 41 of 2003.

³⁶⁷ Nxumalo and Whittal 2013 *South African Journal of Geomatics* 335.

³⁶⁸ S 25(f) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁶⁹ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1.

³⁷⁰ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 28.

³⁷¹ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 28.

³⁷² Nxumalo and Whittal 2013 *South African Journal of Geomatics* 335-336.

³⁷³ S 25(g) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

3.7.4.8 Land use and planning

The MDB must consider the existing and expected land use, as well as social, economic and transport planning.³⁷⁴

3.7.4.9 Co-ordination of programmes and services

Another factor the MDB must consider is the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care.³⁷⁵

3.7.4.10 Characteristics of an area

This factor requires the MDB to consider the topographical, environmental and physical characteristics of an area.³⁷⁶ This type of factor is universally found in demarcation systems.³⁷⁷

3.7.4.11 Administrative consequences

The MDB must consider the administrative consequences of its boundary determination on:

- i. Municipal creditworthiness;
- ii. Existing municipalities, their council members and staff; and
- iii. Any other relevant matter.

This factor is important because the municipality's creditworthiness influences the rate of interest it will pay on loans and on whether it borrows any money at all.

³⁷⁴ S 25(h) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³⁷⁵ S 25(i) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³⁷⁶ S 25(j) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³⁷⁷ Craythorne *Municipal Administration: The Handbook* 53.

3.7.4.12 Rationalisation

Rationalisation reflects on the government policy to reduce the number of municipalities.³⁷⁸ The MDB must consider the need to rationalise the total number of municipalities within different categories and different types in order to achieve the objectives of effective and sustainable service delivery, financial viability and macroeconomic stability.³⁷⁹ In other words, government policy is based on the establishment of larger and fewer municipalities to improve service delivery and lead to financial stability.³⁸⁰

3.7.5 Procedure for the demarcation of municipal boundaries

Before the MDB considers any determination of a municipal boundary, it must publish a notice which notifies the public about the intention of the Board to consider the matter. The notice must invite written representations and views from the public within a specific period.³⁸¹ The MDB must publish the notice in a newspaper circulating in the area affected by the proposed municipal boundary re-determination. Other media, such as radio, are also used for the broadcasting of the notice.

In *Baviaans Municipality v Municipal Demarcation Board*,³⁸² the applicant sought an interdict to restrain the MDB from considering a request by the Minister of Cooperation, Governance and Traditional Affairs to redraw the boundaries of the Camdeboo, Baviaans and Ikwezi municipalities pending the publication and broadcasting of a notice in terms of section 26 of the Municipal Demarcation Act.³⁸³ The Baviaans Municipality contended that the MDB did not comply with the procedural prescripts of section 26 in that it failed to publish the notice in a newspaper circulating within the municipal boundaries of the Baviaans Municipality and to broadcast the contents of the notice by radio and other appropriate means.³⁸⁴

³⁷⁸ Craythorne *Municipal Administration: The Handbook* 53.

³⁷⁹ S 25(1) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁸⁰ Craythorne *Municipal Administration: The Handbook* 53.

³⁸¹ S 26(1) of the *Local Government: Municipal Demarcation Act* 27 of 1998.

³⁸² *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 1.

³⁸³ *Local Government: Municipal Demarcation Act* 27 of 1998

³⁸⁴ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 6.

During February 2015, the Minister acted in terms of section 22(2) of the *Municipal Demarcation Act*³⁸⁵ and requested the MDB to consider the re-determination and amalgamation of the boundaries of the Camdeboo, Baviaans and Ikwezi municipalities.³⁸⁶ On the 10th of February 2015, the MDB published the section 26 notice in the EP Herald and the Daily Dispatch newspapers. The applicant's attorneys wrote to the MDB, on the 19th of February 2015, and informed them that those newspapers were not circulated within its municipal boundaries. They further provided the MDB with a list of newspapers circulated within its boundaries.³⁸⁷ From the list, the MDB chose the Die Burger newspaper and re-published the notice in that paper on 26 February 2015.³⁸⁸ The court held that the re-published notice in Die Burger complied with the requirements of section 26 of the Act.

However, section 26(2) of the *Municipal Demarcation Act*³⁸⁹ requires the MDB to use radio channels to rebroadcast the contents of the notice. The applicant contended that the radio broadcast of the notice was defective in that the broadcast did not convey the contents of section 26 notice and did not state the names of the municipalities the notice applied to, and also did not contain sufficient information to enable listeners to find the notice on the MDB's website.³⁹⁰ It was apparent from the transcript of the broadcast that the contents of the section 26 notice was not conveyed during the broadcast.³⁹¹ The Court found that the MDB failed to convey essential information and rendered the broadcast invalid, thus granting the interdict pending the radio broadcasting in terms of section 26(2) of the *Municipal Demarcation Act*.³⁹²

The MDB must send a notice of the proposals on changing municipal boundaries from different interested organisations, such as the MEC for Local Government in the province concerned, magistrates concerned and the Provincial House of

³⁸⁵ *Local Government: Municipal Demarcation Act 27 of 1998.*

³⁸⁶ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 11.

³⁸⁷ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 13.

³⁸⁸ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 14.

³⁸⁹ *Local Government: Municipal Demarcation Act 27 of 1998.*

³⁹⁰ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 18.

³⁹¹ *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 25.

³⁹² *Baviaans Municipality v Municipal Demarcation Board* 2015 ZAECGHC 65 para 33.

Traditional Leaders.³⁹³ The MDB must consider the proposals and initiate consultations with the different stakeholders to record their views.³⁹⁴ The MDB must ultimately publish the redetermination of the municipal boundary in the relevant Provincial Gazette to solicit objections in line with section 21 of the *Municipal Demarcation Act*.³⁹⁵ Objections must be made in writing to the Board within 30 days of the publication of the re-determinations. The Board must consider the submissions and make final re-determinations to be published in the relevant Provincial Gazette.³⁹⁶

3.8 The Local Government: Municipal Structures Act

*The Local Government Structures Act*³⁹⁷ was enacted to provide for the establishment of municipalities in accordance with the requirements relating to the categories and types of municipalities. It was also enacted to establish the criteria for the determination of the category of the municipality to be established in an area. The *Local Government Municipal Structures Act*³⁹⁸ provides insight for the regulation of the internal systems, structures and office bearers of municipalities.

3.8.1 Categories and types of municipalities

In determining whether a municipality is a category A municipality, the MDB must use the following criteria:

- 1) A category A municipality can be reasonably be regarded as
 - a) An urban area featuring-
 - i) Areas of high population density;
 - ii) An extensive movement of people, goods, and services;

³⁹³ S 26(3) of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³⁹⁴ S 27 of the *Local Government: Municipal Demarcation Act 27 of 1998*.

³⁹⁵ *Local Government: Municipal Demarcation Act 27 of 1998*.

³⁹⁶ S 21(5) of the *Municipal Demarcation Act 27 of 1998*.

³⁹⁷ *Local Government: Municipal Structures Act 117 of 1998*

³⁹⁸ *Local Government: Municipal Structures Act 117 of 1998*.

- iii) Extensive development; and
 - iv) Multiple business districts and industrial areas.
- b) A centre of economic activity with a complex and diverse activity;
 - c) A single area for which integrated development planning is desirable; and
 - d) Having strong inter-dependent social and economic linkages between its constituent units.

An area that does not comply with the criteria mentioned above must have municipalities of both category C and category B.³⁹⁹ The MDB may only determine that an area is a category A municipality after the consultation with the Minister, the MEC for Local Government in the province concerned and SALGA.⁴⁰⁰

3.8.2 Establishment of municipalities

The MEC for Local Government in a province must, by notice in a Provincial Gazette, establish a municipality in terms of the *Local Government: Municipal Demarcation Act*.⁴⁰¹ A notice which establishes a municipality must set out the category of the municipality that is established;⁴⁰² the type of municipality that is established;⁴⁰³ the boundaries of the municipal area;⁴⁰⁴ the name of the municipality;⁴⁰⁵ the number of wards in a municipality⁴⁰⁶ and finally, the number of councillors.⁴⁰⁷

During 2011 and 2013 the MDB embarked on a boundary review programme to deal with potential changes to municipal boundaries in anticipation of the 2016 local elections.⁴⁰⁸ At the culmination of the process the MDB decided to proceed with

³⁹⁹ S 3 of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰⁰ S 4(2) of the *Local Government: Municipal Structures Act* 117 of 1998

⁴⁰¹ S 12 of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰² S 12(3)(a) of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰³ S 12(3)(b) of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰⁴ S 12(3)(c) of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰⁵ S 12(3)(d) of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰⁶ S 12(3)(dA) of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰⁷ S 12(3)(e) of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴⁰⁸ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 8.

some determinations and re-determinations and re-determinations of boundaries and decide in some 49 cases not to pursue the proposed changes.⁴⁰⁹

In December 2014 the Minister of Cooperative Governance & Traditional Affairs wrote to the MDB with a request in terms of section 22 of the Local Government: Municipal Demarcation Act for proposed boundary re-determination.⁴¹⁰ This request was later withdrawn and replaced with another one the 13th of January 2015 and a further request of other municipalities submitted on the 28th of January 2015 and the 4th February 2015.⁴¹¹

On the 5th of February 2015 the MDB issued a circular in terms of section 26 of the MDB Act to all affected municipalities, national Ministers and other stakeholders advising the of the Minister's request.⁴¹²

After the circular of the 5th of February 2015, the DA requested additional information from the MDB pertaining to the request of the Minister.⁴¹³ It sought details *inter alia* of meetings held between the second respondent and the various MEC's, the rationale for each determination request, details of how the Department carried out the functionality exercise, and the factors that were considered in doing so, as well as the reasons as to why some municipalities were chosen and others not. This information was not supplied, and it is the stance of the DA that the failure to do so resulted in a fatally flawed process by the MDB in making the decisions it did.⁴¹⁴

The DA argued that the MDB failed, through the circulars and notices that it issued, to make available sufficient information on the proposed determinations so as to create meaningful public engagement and that when the MDB published its decisions it did not provide the reasons for it, nor the factors that it considered as relevant in coming to the decisions it took. In addition, the DA is of the position that the radio adverts failed to comply with section 26(2) of the MDB and therefore did not result in proper communication to the public.⁴¹⁵

⁴⁰⁹ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 8.

⁴¹⁰ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 12.

⁴¹¹ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 12.

⁴¹² *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 15.

⁴¹³ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 18.

⁴¹⁴ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 18.

⁴¹⁵ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 24.

The Court held that the lack of inclusion of detailed motivation in the Minister's request does not and cannot have the effect of preventing the public from making submissions on the factors the Board must consider and which are set out in precise and considerable detail in the Circulars and Section 26 notice.⁴¹⁶ In terms of the application brought by the DA on the lack of information for meaningful the court held that the Circulars and the Section 26 notice published contained sufficient information to enable the public to meaningfully engage and make representations.⁴¹⁷ Further, in the complaint regarding the radio advert the DA was of the view that the radio advert was significantly deficient in that it was a general advert that informed the public about the demarcation process and then invited them to obtain further information from the website of the first respondent.⁴¹⁸ The court held that the radio advert shortcomings was not in the radio advert itself but in the accessing the information.⁴¹⁹

3.8.3 Delimitation of wards

After the redetermination of outer boundaries of municipalities, the subsequent step is to delimit the wards within the municipalities. Delimitation of wards refers to the process of determining the boundaries of areas within which citizens may exercise their constitutional right to vote for their representatives. In this case, the MDB is responsible for the delimitation of wards according to the criteria described in Schedule 1 of the *Municipal Structures Act*.⁴²⁰ The MDB must consult with the Electoral Commission before the delimitation of all metropolitan municipalities and all local municipalities into wards.⁴²¹

After consulting the Electoral Commission, the MDB must delimit a municipality into wards considering the following criteria: the norm for the number of voters in a ward;⁴²² the need to avoid the fragmentation of communities;⁴²³ and to fulfil the

⁴¹⁶ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 51.

⁴¹⁷ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 52.

⁴¹⁸ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 55 & 56.

⁴¹⁹ *Democratic Alliance v Municipal Demarcation Board 2015 ZAGPPHC 1090* para 55 & 56.

⁴²⁰ *Local Government: Municipal Structures Act* 117 of 1998.

⁴²¹ S 2 of Schedule 1 of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴²² S 4(a) of Schedule 1 of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴²³ S 4(b) of Schedule 1 of the *Local Government: Municipal Structures Act* 117 of 1998.

objective of a ward as an instrument to enhance participatory democracy in local government.⁴²⁴

Section 20(3)(b)(ii) of the *Municipal Structures Act* imposes specific duties on municipalities to disseminate information to their respective communities.

3.9 Local Government: Municipal Systems Act

Chapter 4 of the Act provides that municipalities must develop a culture of governance that complements formal representative government with a system of participatory governance. Formal systems of governance, such as elections, ensure that municipal councils are representative of the local communities that they represent. The active involvement of local communities in shaping their living environment through participation in the municipal processes is important.⁴²⁵

3.10 The Promotion of Administrative Justice Act

The *Promotion of Administrative Act* (PAJA) gives effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action. The Act seeks to promote an efficient administration and good governance. The PAJA creates a culture of accountability, openness and transparency in public administration, the exercise of public power and the performance of a public function. It gives effect to the right to just administration action in the Constitution.⁴²⁶

Section 4 of the PAJA emphasises just administrative action in matters affecting the public. It is significant that in cases where administrative action materially or adversely affects the rights of the public, an administrator must give effect to procedural fairness. An administrator must decide whether to hold a public inquiry and to follow notice and to comment or choose both. In the case of Vuwani, the issue before the court was whether there was a failure by the Demarcation Board to consult the applicants in respect of the delimitation of a new municipality, and

⁴²⁴ S 4(c) of Schedule 1 of the *Local Government: Municipal Structures Act* 117 of 1998.

⁴²⁵ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 352.

⁴²⁶ See Section 33 of The Constitution.

whether the failure to consult constituted procedural unfairness which could result in the review and setting aside of the Board's demarcation decision.⁴²⁷

The Act further states that if an administrator decides to hold a public inquiry or appoint a suitable qualified person or panel of persons to do so, the administrator or the person or panel must determine the procedure for the public inquiry, which must include a public hearing. When a public hearing is conducted, the public participation process is automatically practised.⁴²⁸ Allowing public comment shows that the views of the public are important in the inquiry. South Africa as a democratic country allows all parties to participate to show democracy in any process.

3.11 Summary

In summary, this chapter sets out the intention of legislation to ensure that public participation becomes part of the democratic culture and governance. The LGTA paved a way for the transition of local government from the former apartheid regime. It proved the three phases of transition. The White paper was introduced with the concept of developmental local government. Legislation was implemented to create sustainable local government. The *Local Government Municipal Demarcation Act*⁴²⁹ dissolved the spatial layout of municipalities caused the apartheid system. The *Local Government: Municipal Systems Act*⁴³⁰ and the *Local Government: Municipal Structures Act*⁴³¹ were introduced to provide a guideline for the upliftment of communities and provide structures for the governance of municipalities. The legislation encourages the participation of local communities in the business of municipalities. PAJA provides mechanisms for adversely affected members of communities to seek legal relief. PAJA outlines the procedure that an administrator must follow before a final administrative action that affects the public can be made, failure of which will make the administrative action procedurally unfair and invalid. The next chapter discusses contemporary challenges to public participation in the demarcation of municipal boundaries.

⁴²⁷ *Masia Traditional Council v Municipal Demarcation Board* 2016 ZALMPPHC 1 para 15.

⁴²⁸ Molepo, Maleka and Khalo 2015 *Journal of Public Administration*.

⁴²⁹ *Local Government: Municipal Demarcation Act* 27 of 1998.

⁴³⁰ *Local Government: Municipal Systems Act* 32 of 2000.

⁴³¹ *Local Government: Municipal Structures Act* 117 of 1998.

Chapter 4 **Contemporary Challenges to Public Participation in the Demarcation of Municipal Boundaries**

4.1 Introduction

The history of the demarcation of boundaries in South Africa was influenced by legislation on land and the underlying political agendas. The main political agenda was to ensure the dominance of one race group over others. Boundaries were drawn during the colonial times and redrawn under apartheid in line with the Groups Areas Act.⁴³² The creation of Bantustans was the most important legislative manoeuvre on the demarcation of local boundaries in South Africa.⁴³³ In post-apartheid South Africa, the demarcation of local government boundaries has been a highly contested issue because boundaries redistribute political power. Some organisations stand to gain power and others to lose power when local boundaries are redrawn.⁴³⁴ The protests for service delivery are a manifestation of the fact that the constitutional and legislative requirements for public participation are not being fully adhered to in the managing of the demarcation process.⁴³⁵

This chapter focuses on the contemporary challenges to public participation public participation in the demarcation of municipal boundaries, with reference to: the role of the MDB, citizens and political parties, language and cultural barriers, the constraint on resources, the lack of community by community members in the demarcation process, the lack of transparency by the MDB and the mistrust communities have towards the MDB, violent protests that erupts in the determination or the re-determination of municipal boundaries and mass media partisan.

⁴³² *Group Areas Act* 41 of 1950.

⁴³³ Tancott 2013 www.infrastructurene.ws/2013/10/29/drawing-the-line-the-politics-of-demarcation/.

⁴³⁴ Cameron "Local Government Boundary Reorganisation " 76.

⁴³⁵ Molepo, Maleka and Khalo 2015 *Journal of Public Administration*.

4.2 Limited Skills and Capacity

Dire socio-economic conditions in rural communities, such as poverty and economic inequality impede on active community participation.⁴³⁶ Most rural community members are illiterate and innumerate.⁴³⁷ Furthermore, there is a lack of education and awareness of general people about municipal boundaries demarcation processes.⁴³⁸ Education has a direct impact on the participation of citizens in the demarcation process. Education increases level of participation and allows citizens to acquire the public skills necessary to communicate their concerns to the MDB.⁴³⁹ Education is also essential for citizens to understand the information disseminated.⁴⁴⁰ In his judgment in *Doctors for Life International*,⁴⁴¹ Sachs J held that:

Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a constitutional democracy. Public involvement will also be of particular significance for members of groups that have been the victims of processes of historical silencing. It is constitutive of their dignity as citizens today that they not only have a chance to speak, but also enjoy the assurance they will be listened to. This would be of special relevance for those who may feel politically disadvantaged at present because they lack higher education, access to resources and strong political connections.⁴⁴²

Many rural communities lack one or more resources such as education, government training programmes and leadership skills. This negatively affects commitment of citizens to participate in and to effectively impact on the demarcation process.⁴⁴³ No training and capacity building programmes are provided to community members.⁴⁴⁴

⁴³⁶ Mautjana and Makombe 2014 *Africa Insight* 64.

⁴³⁷ Mautjana and Makombe 2014 *Africa Insight* 63.

⁴³⁸ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 158.

⁴³⁹ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 158.

⁴⁴⁰ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 158.

⁴⁴¹ *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC).

⁴⁴² *Doctors for Life International v The speaker of the National Assembly* 2006 4 SA 416 (CC) para 234.

⁴⁴³ Mautjana and Makombe 2014 *Africa Insight* 64.

⁴⁴⁴ Mautjana and Makombe 2014 *Africa Insight* 63.

4.3 Administrative Dislocation

The municipal elections of December 2000 have shown that a variety of painful adjustment had to be made with the administrative dislocation associated with the re-demarcation of municipal boundaries.⁴⁴⁵ The integration of the administrative, financial and information technology systems of previously autonomous municipal administrations have proven to be time consuming, complex and difficult.⁴⁴⁶

In many cases, towns with strong accumulated financial reserves fund have those reserves being eaten away by towns with huge inherited debts.⁴⁴⁷ As a result, many municipalities are still reeling from the financial impact.

4.4 Accessibility of municipalities in rural areas

In many cases, newly established municipality headquarters are not easily accessible to small urban communities and far-flung rural communities. The rural communities are located long distances from the new municipal headquarters.⁴⁴⁸ Long distances are restrictive to poorer residents and this undermines developmental initiatives and coordination. Such developmental programmes are difficult to implement from a municipal headquarters located more than 50 km distant.⁴⁴⁹

The disestablishment of the local municipalities of Ventersdrop and Tlokwe Municipalities was changed to the JB Marks Local Municipality. The headquarters of the JB Marks Local Municipality is situated in Potchefstroom, where previously the Tlokwe Local Municipality was situated. Ventersdrop is a far-flung rural community which is more than 50 km away from the headquarters of the JB Marks Local

⁴⁴⁵ Alkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 8.

⁴⁴⁶ Alkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 9.

⁴⁴⁷ Alkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 9.

⁴⁴⁸ Alkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 9.

⁴⁴⁹ Alkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 10.

Municipality. Such long distances undermine development initiative to the poorer residents of Ventersdrop.

4.5 Language and cultural barriers

Language and cultural barriers may deter the participation of citizens in some communities.⁴⁵⁰ South Africa has 11 official languages⁴⁵¹ and the Constitution guarantees every citizen the right to use their language and to participate in the cultural life of their choice.⁴⁵² Some community members may have limited English proficiency, and some communicate effectively in their mother tongue, for example Afrikaans, thus requiring the translation of materials into other languages, running public hearings in the language widely used by relevant people. Women are in most cases hampered by cultural traditions that relegate them to menial tasks in the community.⁴⁵³

Tribalism is also one issue which complicates the work of the MDB in ensuring effective public participation.⁴⁵⁴ Limpopo is a unique province in South Africa which is made up of different ethnic groups namely: Venda, Pedi and Tsonga tribes. In the *Moutse Demarcation Forum*⁴⁵⁵, the applicants challenged the relocation of Moutse 1 and Moutse 3 from the province of Mpumalanga to the province of Limpopo. The community of Moutse is predominantly Sepedi speaking community. The neighbouring community is isiNdebele speaking, which occupies the Siyabuswa area.⁴⁵⁶ In accordance with apartheid legislation, racial segregation and ethnically based homelands were established for Africans who were classified in terms of language and culture.⁴⁵⁷ Africans were later assigned citizenship to a homeland

⁴⁵⁰ Department of Public Service and Administration 2014 www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf.

⁴⁵¹ S 6 of the *Constitution*.

⁴⁵² S 30 of *The Constitution*.

⁴⁵³ Mautjana and Makombe 2014 *Africa Insight* 64.

⁴⁵⁴ Mathoho 2013 *Transformer* 25.

⁴⁵⁵ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 1.

⁴⁵⁶ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 12.

⁴⁵⁷ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 13.

established for their ethnic group under which they were classified by the Group Areas Act. Under this system, the homeland of Lebowa was established for the Sepedi speaking people and Siyabuswa became a part of the homeland of KwaNdebele which was established for the Ndebele ethnic group.⁴⁵⁸ However, the homeland of KwaNdebele occupied a small portion of the territory, hence the apartheid government sought to incorporate KwaNdebele into the homeland of Lebowa. This decision was opposed by the community of Moutse and the government of Lebowa which successfully challenged the incorporation of Moutse into KwaNdebele.⁴⁵⁹ Following the abolition of the homelands, Moutse 1, Moutse 2 and Moutse 3 formed part of the Mpumalanga Province.⁴⁶⁰ When Parliament abolished cross-boundary municipalities, Moutse 1 and Moutse 3 were incorporated into the Limpopo province.

The Moutse Demarcation Forum challenged the relocation of Moutse 1 and Moutse 3 from Mpumalanga to the Limpopo province. The applicants contended that this boundary change perpetuated the boundaries drawn under the apartheid government in furtherance of the policy of separate development.⁴⁶¹ Under the scheme of apartheid, Africans were classified in terms of language and culture. The court held that, the fact that the boundary change may coincide with the boundary drawn by the apartheid government does not render the Twelfth Amendment inconsistent with the Constitution.⁴⁶²

4.6 Lack of resources

The lack of both financial and human resources impedes on meaningful public participation. Both financial and human resources are the key inputs to the effective

⁴⁵⁸ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 14 and 15.

⁴⁵⁹ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 15.

⁴⁶⁰ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 16.

⁴⁶¹ *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 21.

⁴⁶² *Moutse Demarcation Forum v President of the Republic of South Africa* 2011 11 BCLR 1158 (CC) para 41.

implementation of public participation.⁴⁶³ This challenge is related to the poor state of revenue and the heavy dependency on government allocation.⁴⁶⁴ The MDB does not have the capacity to run public engagements processes itself, but tends to call for help from the municipalities, a process which was described as "asking the patient to help with his diagnosis."⁴⁶⁵ Ward communities are established to ensure that citizens participate in local government processes.⁴⁶⁶ Secondly, the skewed distribution of resources implies that residents do not have equal access to resources. It is for this reason that protests over the demarcation of boundaries were prevalent due to issues related to resources, access and the inequitable distribution of services.⁴⁶⁷ The demarcation of new municipal boundaries entrenched inequalities in the country's economy. For example, the municipal infrastructure is weakest in provinces such as the Eastern Cape and Limpopo which inherited a greater portion of the former Bantustans.⁴⁶⁸

4.7 Lack of commitment by community members

A lack of commitment by community members results in poor attendance or even non-attendance and late arrival at meetings.⁴⁶⁹ This can be attributed to the inaccessible location of meeting venues, particularly in disadvantaged communities. This lack of commitment is also caused by perceptions that community inputs do not find expression in the final decisions of the MDB. The demarcation process does not attempt to incorporate the voices of ordinary citizens, through submissions to

⁴⁶³ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 160.

⁴⁶⁴ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 160.

⁴⁶⁵ Colleen C 2015 *Paralegal Manual* www.paralegaladvice.org.za/wp-content/uploads/2016/05/PLM-2015-Complete-Book-for-Print.pdf accessed 5 June 2017.

⁴⁶⁶ Mathekga and Buccus 2006 *Critical Dialogue-Public Participation in Review* 13.

⁴⁶⁷ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 59.

⁴⁶⁸ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 59.

⁴⁶⁹ Mautjana and Makombe 2014 *Africa Insight* 64.

the demarcation board. Most municipal boundaries were imposed on residents as was seen in Merafong.⁴⁷⁰

The attitude pervades official responses to grassroots' demands for boundary changes and reveals that internal borders do not matter in a democratic South Africa. This has led communities to resort to assert themselves in a democratic state and a reaction to the illusion of democracy as epitomised by the demarcation process.⁴⁷¹ Most communities affected by demarcation felt that they were being marginalised by the demarcation process because most residents had not voted in support of boundary changes. Despite residents not voting in support of boundary changes, the MDB proceeded with the demarcation of municipal boundaries which was sanctioned by the courts on procedural grounds.

Community members' lack of understanding of the demarcation process is a serious barrier to their participation.⁴⁷² The lack of interest and non-participation may affect potential benefits if the intended beneficiaries choose not to take part.⁴⁷³

4.8 Lack of transparency and mistrust

Transparency is defined as the open flow of information between the government and its citizens.⁴⁷⁴ The public is often sceptical and distrustful of the planning process. scepticism and distrust often arise from the feeling that authorities have already made decisions and that the opportunity granted for public participation is merely to give that decision a semblance of credibility and respectability.⁴⁷⁵

In *Merafong*,⁴⁷⁶ the complaint revolved around public participation because the community perceived the process as not meaningful and held a view that the

⁴⁷⁰ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁴⁷¹ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁴⁷² Mautjana and Makombe 2014 *Africa Insight* 64.

⁴⁷³ Mautjana and Makombe 2014 *Africa Insight* 64.

⁴⁷⁴ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 169.

⁴⁷⁵ Department of Public Service and Administration 2014 www.dpsa.gov.za/dpsa2g/documents/cdw/2014/citizenengagement.pdf.

⁴⁷⁶ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 43.

outcome was a done deal. They further submitted that the government was never open to be persuaded by the views of the community of Merafong.⁴⁷⁷ As held by Justice Van der Westhuizen in *Doctors for Life International*⁴⁷⁸

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.⁴⁷⁹

Therefore, public participation cannot be meaningful in the absence to consider all views expressed by the public.⁴⁸⁰

4.9 Violent protests

South Africa experiences many protests, credited to a maturing democracy and the freedoms which the citizens enjoy.⁴⁸¹ Section 17 of the Constitution guarantees that everyone has the right to assemble peacefully. In *South African Transport and Allied Workers Union v Garvas*⁴⁸² Chief Justice Mogoeng held that

The right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless. This includes groups that do not have political or economic power, and other vulnerable persons. It provides an outlet for their frustrations. This right will, in many cases, be the only mechanism available to them to express their legitimate concerns. Indeed, it is one of the principal means by which ordinary people can meaningfully contribute to the constitutional objective of advancing human rights and freedoms. This is only too evident from the brutal denial of this right and all the consequences flowing therefrom under apartheid. In assessing the nature and importance of the right, we cannot therefore ignore its foundational relevance to the exercise and achievement of all other rights.⁴⁸³

⁴⁷⁷ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 47.

⁴⁷⁸ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC).

⁴⁷⁹ *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) para 244(10)

⁴⁸⁰ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 51.

⁴⁸¹ Molepo, Maleka and Khalo 2015 *Journal of Public Administration* 345.

⁴⁸² *South African Transport and Allied Workers Union v Garvas* 2012 8 BCLR 840 (CC).

⁴⁸³ *South African Transport and Allied Workers Union v Garvas* 2012 8 BCLR 840 (CC) para 61.

It is becoming a norm in our country that when communities register their dissatisfaction, it is done so through violent protests which is a challenge for the MDB.⁴⁸⁴

On 19 August 2005, at the request of the Minister, the MDB published proposals for the re-determination of boundaries. The published proposals expressed an intention incorporate Merafong which partly lay in the Gauteng Province into the North West Province.⁴⁸⁵ The community of Merafong reacted by raising awareness of their concerns. It attempted to pressure the government to reverse its decision. Several attempts were made to find a peaceful solution. The community sent a delegation the MDB. The MDB informed the delegation not to panic, as a decision was still pending.⁴⁸⁶ It further provided assurance that a decision could only be taken after several consultations with the local community had taken place, as prescribed by the law. The community reacted with peaceful protests and public gatherings in Khutsong. It was clear that the people were not happy with the suggestion to incorporate Merafong into North West Province. These protests were largely supported by the Young Communist League and leaders of the local branch of the South African Communist Party.⁴⁸⁷ Some of the peaceful action included consumer boycotts and stay-aways. However, the peaceful protests turned violent in early November 2005. The violent protests gained momentum when, on 14 December 2005, the NCOP announced that Merafong would be incorporated into the North West Province. The burning of tyres, looting of shops and use of stones to block roads became daily occurrences since the start of the protests.

In the North West Province, the MDB disestablished the local municipalities of Ventersdrop and Tlokwe. The JB Marks Local Municipality was established in replacement of the Ventersdorp and Tlokwe Municipalities.⁴⁸⁸ The demarcation of

⁴⁸⁴ Mathoho 2013 *Transformer* 25.

⁴⁸⁵ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 135.

⁴⁸⁶ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 135.

⁴⁸⁷ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 135.

⁴⁸⁸ Notice 98 of 2016 in Provincial Gazette Extraordinary 7660 dated 22 June 2016.

the Tlokwe Municipality and the Ventersdrop municipalities resulted in the vandalism and arson of the Ventersdrop Local Municipal building because the residents felt that their views were neglected during the making of the decisions to demarcate.⁴⁸⁹ A municipal building and a car were burnt in Ventersdrop following the protest march against the merger. Shop were looted, and schooling disrupted in Ikageng, near Potchefstroom.

In Midvaal, the MDB was faced with backlash from the proposed merger of the Emfuleni and Midvaal local municipalities to form a new metropolitan municipality in the South of Gauteng.

4.10 The partisan of mass media

Mass media plays a crucial role in the dissemination of information to members of the public. Mass media establishes a platform for social dialogue and it contributes to the formation of political opinion and to civic education.⁴⁹⁰ Public engagement are exposed to political and economic influences through the partisan of mass media.⁴⁹¹

The access of citizens to information about the MDB and the demarcation process is available through web pages, newspapers and radios and television. However, access is often limited through the internet.⁴⁹² According to Chowdhury and Panday,⁴⁹³ in their study, most of the people have access to information through the medium of TV and radio and very few people have access to information through the internet and newspapers.

4.11 Political Interference

One of the founding values of democratic South Africa is the supremacy of the Constitution and the rule of law.⁴⁹⁴ The level of the country's democracy is determined by its adherence to the basic principles in which all people, regardless

⁴⁸⁹ McGluwe 2015 www.dampl.co.za.

⁴⁹⁰ Bozo and Hiemer 2013 *Transformer* 11.

⁴⁹¹ Bozo and Hiemer 2013 *Transformer* 13.

⁴⁹² Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 158.

⁴⁹³ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 158.

⁴⁹⁴ S 1(c) of the Constitution.

of their economic or political status, are subject to equal legal rights.⁴⁹⁵ Politics embrace the relations between the state and its citizens.⁴⁹⁶ In a democracy, it is perceived that elected representative are accountable to citizens. In authoritarian regimes elected representatives are accountable to the party leadership.⁴⁹⁷ However, in such an authoritarian state political parties lack internal democratic practice the as leaders at the local level follow only the decisions of the top-level leaders.⁴⁹⁸ In practice, the election system does not work in the internal leader selection process of political parties.⁴⁹⁹ As a result, less powerful persons accept the decisions taken by the powerful in the institutional arrangement.

South Africa's multiparty democracy is characterised by the dominance of a single political party, the African National Congress (ANC).⁵⁰⁰ The ANC remains internally undemocratic and highly centralised.⁵⁰¹ Ordinary party members and lower level party organisations, such as the ANC Youth League, are not involved in critical decision making. It is still dominated by the party leadership in the form of the National Executive Committee (NEC).⁵⁰² At times, dominant individuals such as the party president even impose decisions and policies. In 2000, Merafong was established within the West Rand District Municipality. The smaller part of Merafong fell in the North West while the larger part in Gauteng.⁵⁰³ During the public hearing, most of the community of Merafong agreed with the phasing out of cross-boundary municipalities but opposed the incorporation of Merafong into the North West Province, a minority which included the ANC Youth League, supported the inclusion of Merafong into the North West Province.⁵⁰⁴ While the demarcation process

⁴⁹⁵ Burger 2016 *ISS* 1.

⁴⁹⁶ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 162.

⁴⁹⁷ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 163.

⁴⁹⁸ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 164.

⁴⁹⁹ Chowdhury and Panday *Strengthening Local Governance in Bangladesh: Reforms, Participation and Accountability* 164.

⁵⁰⁰ Lotshwao 2009 *Journal of Southern African Studies* 901.

⁵⁰¹ Lotshwao 2009 *Journal of Southern African Studies* 902.

⁵⁰² Lotshwao 2009 *Journal of Southern African Studies* 902.

⁵⁰³ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 29.

⁵⁰⁴ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 33.

attempted to incorporate the voices of ordinary citizens through submissions to the MDB, most borders were mostly imposed on residents. The ANC-led government dismissed requests for modest border changes by residents as it amounted to destabilising the area.⁵⁰⁵

Secondly, border protests were about regional politics. Since the early 1990s boundaries have become crucial for national and political party elections and impact on the organisational structures of political parties.⁵⁰⁶ In national elections, political parties often target regions they regard as their power bases, the example of the DA in the Western Cape and IFP in KZN. Provincial elections are crucial to assenting to party leadership and the presidency of the country. In 2007, former President Thabo Mbeki failed to win more than four provinces in the run to the ANC presidential election. This is because the border protests in Khutsong had a perceivable strong anti-Mbeki sentiment.⁵⁰⁷

Thirdly, border disputes were tied up strategies for consolidating power at the local sphere of government with the hope of gaining passage to high offices.⁵⁰⁸ This is clear when boundary protests are supported by a political party or by an opposition party.⁵⁰⁹ In Merafong, the DA opposed the recommended final mandate, because it was of the opinion that the opposition of the people of Merafong to the incorporation into the North West Province had been disregarded.⁵¹⁰

In addition, many municipalities experience problems caused by poor political decisions on the part of new and inexperienced councillors.⁵¹¹

⁵⁰⁵ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁵⁰⁶ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁵⁰⁷ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁵⁰⁸ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁵⁰⁹ Harrison "Configuring the new 'regional world': On being caught between territory and networks" 60.

⁵¹⁰ *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC).

⁵¹¹ Alkinson *Local Government, Local Governance and Sustainable Development: Getting the Parameters Right* 9.

Section 22(2) of the Municipal Demarcation Act prescribes that the Minister can request the MDB to consider the amalgamation and re-determination of boundaries. The MDB is constrained to act in accordance with the Minister's request, irrespective of the reasonableness of the time periods determined by the Minister.

4.12 Summary

The demarcation of municipal boundaries poses multiple challenges such as community objections and the service demand on the new municipalities. Lack of resources, unresponsiveness of the MDB and political interference have resulted in many South African citizens losing faith in the municipal demarcation process. Public Participation cannot be meaningful in the absence of a willingness to consider all the expressed views by the public. Government must be open and responsive to the wishes of the communities, which may not necessarily be adequately represented in national elections and could find expression in localized resistance.⁵¹² Violent protests accompany these objections and demands as a way in which the people register their unhappiness with muted demarcation decisions. Demarcation problems cannot easily be resolved by the MDB alone. There is a need for collective action by all relevant stakeholders. The MDB is also struggling with the legacy of colonial and apartheid policies that are causing rifts in South African communities. Many black communities are in dire poverty and this poverty is worsen by unequal allocation of resources by the apartheid government. The next chapter concludes the study and gives recommendations.

⁵¹² *Merafong Demarcation Forum and Others v President of the Republic of South Africa & Others* 2008 (5) SA 171 (CC) para 25.

Chapter 5 Conclusions and recommendations

5.1 Conclusion

At the beginning of this research study, a brief background of public participation in the demarcation of municipal boundaries in South Africa was given. The study also provided a problem statement encapsulating some problems facing public participation in the demarcation of municipal boundaries. Further, this chapter also provided objectives of the research study and the research method to achieve those objectives.

The study provided an overview of the theoretical framework for public participation in South Africa by examining public participation under constitutional democracy. It further dealt with the forms of public participation, areas where public participation is required, and it also provided the platforms in which ordinary citizens can participate. The study has also provided the principles and benefits of public participation and the rationale of public participation. The conclusion that was reached was that public participation in government decisions lies at the heart of our constitutional democracy. Constitutional democracy rests on the consent of citizens to be governed by individuals they have chosen.

Meaningful public participation requires the government to inform, consult, involve and collaborate with citizens for their input on the relevant processes out of which ultimately binding decisions are made. An adequate understanding of the requirements of democracy and the will to meet its requirements would help the government to preserve and advance democratic ideas and practices to foster public participation.⁵¹³

The study has outlined the legislative framework that governs the demarcation of municipal boundaries. The study set out that the intention of legislation is to ensure that public participation becomes part of the democratic culture and governance. The LGTA paved a way for the transition of local government from the former

⁵¹³ Dahl *On Democracy* 25.

apartheid regime. It proved the three phases of transition. The White paper was introduced with the concept of developmental local government. Legislation was implemented to create sustainable local government. The *Local Government Municipal Demarcation Act*⁵¹⁴ dissolved the spatial layout of municipalities caused the apartheid system. The *Local Government: Municipal Systems Act*⁵¹⁵ and the *Local Government: Municipal Structures Act*⁵¹⁶ were introduced to provide a guideline for the upliftment of communities and provide structures for the governance of municipalities. The legislation encourages the participation of local communities in the business of municipalities. PAJA provides mechanisms for adversely affected members of communities to seek legal relief. PAJA outlines the procedure that an administrator must follow before a final administrative action that affects the public can be made; failure of which will make the administrative action procedurally unfair and invalid. The conclusion that was reached was that the legislative framework aimed at creating a conducive atmosphere for effective public participation, has not had any major change in practice.

The study has dealt with the contemporary challenges of public participation in the demarcation of municipal boundaries. The conclusion reached was that the demarcation of municipal boundaries poses multiple challenges such as community objections and the service delivery demand on the new municipalities. Lack of resources and the unresponsiveness of the MDB and political interference have resulted in many South African citizens losing faith in the municipal demarcation process. Public participation cannot be meaningful in the absence of a willingness to consider all the expressed views by the public. Government must be open and responsive to the wishes of the communities, which may not necessarily be adequately represented in national elections and could find resistance at the local government level. Violent protests accompany these objections and demands as they are a way in which the people register their unhappiness with muted demarcation decisions. Demarcation problems cannot easily be resolved by the MDB alone. There is a need for collective action by all relevant stakeholders. The MDB is

⁵¹⁴ *Local Government: Municipal Demarcation Act* 27 of 1998.

⁵¹⁵ *Local Government: Municipal Systems Act* 32 of 2000.

⁵¹⁶ *Local Government: Municipal Structures Act* 117 of 1998.

also struggling with the legacy of colonial and apartheid policies that are causing rifts in South African communities. Many black communities are in dire poverty and this poverty is worsen by unequal allocation of resources by the apartheid government.

The aim of the study was to assess the levels and effectiveness of public participation in the demarcation of municipal boundaries in South Africa. The study shows a lack of effective public participation. This is evident from the fact that community members expect their voices to be heard and when this fails to materialise, it causes cynicism among community members. The municipal demarcation process does not reflect the needs and aspirations of the broad spectrum of community members.

The MDB is compelled by legislative frameworks to conduct public participation processes. It is discouraging to realise that public participation is merely obtained for purposes of compliance with legislation as was evident from the various court cases to the effect that the inputs of communities were not incorporated. Participation sessions typically degenerated into talk-shops where community members were treated as passive participants.⁵¹⁷ The intention of participation is that the voice of the community should be heeded in the decision-making process.

For public participation to become truly participatory, meaningful and effective, a shared vision needs to be developed with participation by all stakeholders. Effective participation includes taking part in the decision-making process, setting the agenda for discussion and having a say in prioritisation, implementation and accountability.⁵¹⁸ There is a need for creating and maintaining a dialogue with community members and community groups so that they can play a more active role in making decisions. This will also improve the transparency and accountability of the MDB. As many of the poor are illiterate and innumerate, it is critical to

⁵¹⁷ Mautjana and Makombe 2014 *Africa Insight* 65.

⁵¹⁸ Mautjana and Makombe 2014 *Africa Insight* 65.

consider preparing and distributing information relating to the demarcation process and outputs in an appropriate manner.

5.2 Recommendations

Based on the above, the following recommendations are categorised into short term, medium term and long-term recommendations.

5.2.1 Short-term recommendations

5.2.1.1 Media and access to information

The MDB must address existing communication gaps by using local media, print or electronic media as a means of informing communities to improve attendance at meetings where decisions regarding demarcations are to be taken. In addition to these forms of media, the MDB should make posters and pamphlets and distribute them to schools, clinics, tribal offices and Post Offices in rural communities. This would ensure a larger distribution of information. Community media is a crucial platform to disseminate information to people in remote rural areas because mainstream commercial media often neglect to provide news that are relevant to citizens in remote and rural areas.⁵¹⁹ The advantage of using community media is that information is published/broadcast in indigenous languages.⁵²⁰ Community media contributes to diversity and for different views to be heard.

5.2.2 Medium term recommendations

5.2.2.1 Sufficient resources

The Treasury must ensure that sufficient funding is made available for capacity building among community members. Proponents of a system of community development through the inclusion and training of residents regard such a system as a truly effective way to liberate communities from their poverty traps and to ensure that projects established for relief purposes are sustainable.

⁵¹⁹ Bozo and Hiemer 2013 *Transformer* 11.

⁵²⁰ Bozo and Hiemer 2013 *Transformer* 11.

The MDB should have enough resources to support public participation processes. Resources should be available to respond to locally articulated needs and priorities. The MDB would be able to meet the needs of citizens more effectively by better utilization of scarce resources.

5.2.2.2 Provision of skills and capacity

The commitment and skills available to the MDB to facilitate public participation should be enhanced if meaningful participation is to be achieved. The outcomes of the public participation should be incorporated into the planning and decision making of the MDB. Building community capacity will influence their awareness of approaches to participation and of potential benefits or pitfalls.

5.2.3 Long term recommendations

5.2.3.1 Develop legislation for effective and meaningful participation

Parliament must develop a model for effective and meaningful participation by community members and designated groups so that community needs are addressed. The model should ensure the following⁵²¹:

5.2.3.1.1 Information

For public participation to be meaningful, the MDB must inform the public. Meaningful participation in decision making depends on full, accurate and up-to-date information. The dissemination of information to the public can take part in various forms, namely;

- Broadcasting,
- Publishing,
- Newspapers, and
- Social media.

⁵²¹ South African Legislative Sector 2013 www.sals.gov.za/docs/pubs/ppf.pdf.

For public participation to be effective, it relies upon the right to access information to ensure that the public can participate in an informed fashion in order to ensure that meaningful participation occurs. These forms for dissemination should be improved as mentioned in recommendation 5.2.1.1.

5.2.3.1.2 Consultation

At this point the public is given a platform to provide input or comment before a decision is taken. This is so to make an informed decision of what the community wants.

5.2.3.1.3 Involve

At this point the public is provided with an opportunity for dialogue and interact. This is also described as active public participation. Citizens actively engage in decision-making. Engaging citizens in decision-making is based on the principle of partnership.

5.2.3.1.4 Collaboration

Collaboration provides the public with to be in partnership with the MDB to identify a preferred solution. However, the final decision-maker is the MDB. Input made must be considered by the MDB when making a final decision. When partnership occurs, power is distributed through negotiations between the citizens and the holders of power.

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