

PERPETUATING APARTHEID SINGLE SEX HOSTELS: THE IMPLICATIONS OF PUBLIC PARTICIPATION FOR SERVICE DELIVERY*

Siyambonga Heleba*

“[Ngethembi Myaka] is stuck in Jabulani Hostel, forced to share a room with 16 other people. Couples who try to have a bit of privacy can only draw a curtain around their beds. Ngethembi shares her bed with her two young children.”¹

I. Introduction

The right to political and socio-economic participation by citizens in their government enjoys a wide recognition. At the international level, the International Covenant on Civil and Political Rights² states, among other things, that “every citizen shall have the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives”.³ The International Covenant on Economic, Social and Cultural Rights⁴ is silent on the right to public participation. This notwithstanding, the Committee on Economic, Social and Cultural Rights⁵ (the “Committee on ESCR”), as will be seen below, in its interpretations of the provisions of the Covenant has underscored the role of consultation and participation in public affairs for the realisation of socio-economic rights, particularly the right to adequate housing and the right to social security. The right to public participation has been reaffirmed in a number of regional human rights instruments. For example, the African Charter on Human and Peoples’ Rights⁶ stipulates that “every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”.⁷ The American Convention on Human Rights⁸ provides that all citizens shall enjoy the

* Siyambonga Heleba, Researcher in the Socio-Economic Rights Project of the Community Law Centre, University of the Western Cape.

¹ Isaac Mangena ‘Soweto hostel dwellers vent fury at government’ 20 July 2007. Mail&Guardian Online:http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__national/&articleid=314466, accessed on 20 July 2007.

² International Covenant on Civil and Political Rights, adopted 16 December 1966 (entered into force 23 March 1976). South Africa signed this instrument on 3 October 1994 and ratified it on 10 December 1998.

³ Article 25.

⁴ The International Covenant on Economic, Social and Cultural Rights of 1966 was adopted on 16 December 1966, and entered into force on 3 January 1976. South Africa signed the Covenant on 3 October 1994 and has not ratified it to this day.

⁵ The Committee on Economic, Social and Cultural Rights, established on 28 May 1985, monitors the implementation of the International Covenant on Economic, Social and Cultural Rights of 1966. It also interprets the provisions of the Covenant and publishes its interpretations in the form of “General Comments”.

⁶ The African Charter on Human and Peoples’ Rights, adopted 27 June 1981, and entered into force 21 October 1986, was acceded to by South Africa on 9 July 1996.

⁷ Article 13.

⁸ The American Convention on Human Rights, adopted 22 November 1969, and entered into force 18 July 1976.

right and opportunity “to take part in the conduct of public affairs, directly or through freely chosen representatives”.⁹ Furthermore, the Harare Commonwealth Declaration¹⁰ proclaims the “individual’s inalienable right to participate by means of free and democratic processes in framing the society in which he or she lives”.¹¹ The right and its importance has also been reaffirmed in the Inter-American Democratic Charter¹² which stipulates that “the participatory nature of democracy in [the American] countries in different aspects of public life contributes to the consolidation of democratic values and to freedom and solidarity in the Hemisphere”.¹³

In the context of socio-economic rights the Committee on ESCR has also addressed the issue of public participation. In General Comment No. 4,¹⁴ interpreting Article 11(1) on the right to adequate housing, and specifically emphasising the independence and interrelatedness of human rights, the Committee stated that

“...full enjoyment of other rights-such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to *participate in public decision-making*-is indispensable if the right to adequate housing is to be realized and maintained by all groups in society.”¹⁵

The Committee further stated that as States parties need to develop national housing strategy as one of the measures in order to achieve the full realisation of the to adequate housing, such a strategy

“[b]oth for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights...should reflect extensive genuine *consultation* with, and *participation* by, all of those affected, including the homeless, the inadequately housed and their representatives.”¹⁶

Furthermore, in General Comment No.19¹⁷, while delineating the states obligation (particularly the obligation to *protect*) in the provision of social security in terms of article 9 of the Covenant on Economic, Social and Cultural Rights, the Committee stated that where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties must guard against their abuse of the schemes by establishing an effective regulatory system “which includes framework legislation, independent monitoring [and] *genuine public participation*...”¹⁸

⁹ Article 23.

¹⁰ The Harare Commonwealth Declaration of 1991, issued by Heads of Government in Harare, Zimbabwe, 20 October 1991.

¹¹ Article 4.

¹² Inter-American Democratic Charter, adopted 11 September 2001.

¹³ Article 2. The Article further provides that “[r]epresentative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.”

¹⁴ At its Sixth Session on 13/12/1991, contained in UN doc. E/1992/23.

¹⁵ At para 9. Emphasis are mine.

¹⁶ At para 12.

¹⁷ During its 39th Session (5-23/11/2007), and contained in the United Nations document E/C.12/GC/19, of 4/2/2008.

¹⁸ At para 46. Emphasis are mine.

Yet, in South Africa there is a problem of lack of public participation. This is so despite the fact that the right finds expression in the Constitution and in various pieces of legislation and policy documents (see Section IV below). This problem has manifested itself both in the legislative processes of Parliament¹⁹ as well as in service delivery projects²⁰. For some, the spate of service delivery protest which brought the country under siege as far back as 2005²¹, and again recently²², signified, among other things, the lack of proper communication and meaningful engagement between government officials and the residents or communities and also between the different spheres of government²³. This is particularly worrying as this happens at local government, which is the sphere of government that is closest to the people and where socio-economic rights in the Constitution are realised.²⁴

Current discourse on public participation often concerns the extent, nature, and, importantly, the failure of state institutions, especially local government, to involve the community in its processes, and how this is incompatible with the tenets of participatory democracy.²⁵ This paper explores a new dimension to the debate on the need for community participation in the processes of local government particularly its programmes aimed at delivering services to the community, using a particular service delivery project as a case study. It deals with the lack of community participation occasioned not by the state institution (that is, a municipality) but a handful of individuals within the community. The question is whether it is open to a municipality to abandon a service delivery programme on the pretext of lack of community participation? Or should the municipality demonstrate flexibility and find alternative ways – if possible- of delivering a service to the community? Drawing inspiration from the Constitutional Court’s jurisprudence on what constitutes a reasonable state programme, the paper concludes that the service delivery programme at issue was unreasonably implemented for its lack of flexibility and consequently the failure to deliver adequate housing to vulnerable hostel dwellers. The discussion intersects between community participation, the right of access to adequate housing and other obligations of local government, particularly the duty to protect access to adequate housing

II. The importance of public participation in South Africa

¹⁹ See *Doctors For Life International v Speaker of the National Assembly And Others* 2006 (12) BCLR 1399 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).

²⁰ See *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC)

²¹ See Lehn Todder (2005) “Protest over housing backlog” Mail&Guardian, 04 June, and Hugh Ledder (2005) “Municipalities ‘not equipped’ for housing delivery”, Mail&Guardian, 31 October.

²² Such as the violent housing delivery protests by the residents of Joe Slovo informal settlement in Langa, Cape Town in September 2007.

²³ See for instance, Annette Christmas (2007) ‘Service Delivery: Failure to deliver or failure to communicate’ *Local Government Bulletin* vol 9 No.4, p.7.

²⁴ See Christopher Mbazira (2006) *Realising Socio-Economic Rights in the South African Constitution: The obligations of Local Government: A guide for Municipalities*, Community Law Centre, p.9; Imraan Buccus et al (2007) *Public Participation and Local Governance*, Centre for Public Participation, p.4.

²⁵ See John Williams (2007) ‘Community Participation and the Democratic Practice in Post-Apartheid South Africa’ *Critical Dialogue* Vol 2 No.1 pp 19-27 at p.19; (2006) ‘Community Participation: Lessons from post-apartheid South Africa’ *Policy Studies* Vol. 27 No.3 pp 197-216 at p198.

In a country where the majority of the population suffered from political, social and economic exclusion at the hands of a minority, public participation in South Africa's public affairs by the citizens assumes a special space. The Constitutional Court in *Doctors for Life International v Speaker of the National Assembly and Others*²⁶ and *Matatiele Municipality and Others v President of the Republic of South Africa and Others*²⁷ outlined the importance of public participation. It stated that public participation in South Africa is important for the following reasons:

- (a) it provides vitality to the functioning of representative;
- (b) it encourages citizens to be actively involved in public affairs;
- (c) it encourages citizens to identify themselves with the institutions of government;
- (d) it encourages citizens to become familiar with the laws as they made;
- (e) it enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of;
- (f) it promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice;
- (g) it strengthens the legitimacy of legislation in the eyes of the people; and
- (h) it acts as a counterweight to secret lobbying and influence peddling²⁸.

III. Background

(a) *The Apartheid single sex hostels*

Owing to the apartheid architecture, a majority of black South Africans were landlocked in rural reserves designated as Bantustans and some of these later became known as homelands.²⁹ Subsistence farming, through which Blacks sustained themselves in these mostly rural areas, could no longer support large families and income was needed. Males ventured into urban towns in search of jobs (as migrants). There was no readily available accommodation in the city centres where most jobs could be found. In fact, the settlement by black migrants in the city centres was outlawed by such legislation as the Group Areas Act³⁰ which made urban cities exclusive reserves for Whites. As Sachs J puts it,

“Africans were precluded from owning and occupying land outside the areas reserved for them by...statutes. The Native Urban Areas Consolidation Act 25 of 1945, was premised on the notion of Africans living in rural reserves and coming to the towns only as migrant workers on temporary sojourn.”³¹

In Cape Town, these migrants were accommodated in hostels erected on the outskirts of the City, away from Whites. This is how townships such as Langa, Guguletu and

²⁶ Above (fn.19)

²⁷ Above (fn. 19)

²⁸ *Doctors for Life* at para 115; *Matatiele* at para 59. Further see Jaap de Visser ‘Community Participation in Local Government’, chapter 6, in Nico Steytler and Jaap de Visser (2007) *Local Government Law of South Africa*. Durban: Butterworths/LexisNexis.

²⁹ The infamous “TBVC” states comprising of Transkei, Bophuthatswana, Venda and Ciskei.

³⁰ No.41 of 1950, later Act 36 of 1966.

³¹ *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR 1268 CC, at 1273F-H.

Nyanga were born.³² Later, when the laws were relaxed, women could now join their husbands in the City. The numbers multiplied, resulting in up to sixteen different families living in one hostel as there were up to six rooms in a hostel with some rooms accommodating up to three families. These conditions were clearly not conducive to family life. Owing to these conditions, the Hostels to Homes Project, also dubbed Project *Dibanisa Iintsapho*, a Xhosa phrase meaning ‘unite families’ was conceived around 1995 by the City. The objective of the project was, therefore, to convert the hostel into units where men could live with their wives and children as families.

(b) *Living conditions at the hostels: are hostels ‘homes’?*

Hostels are a far cry from what a normal home should be. The Committee on ESCR in General Comment No.4, has stated that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity.

“Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost" ”.³³

In addition, in interpreting section 26 of the Constitution on the right to have access to adequate housing, the Constitutional Court in *Government of the Republic of South Africa and Others v Grootboom and Others*³⁴ stated that the phrase ‘access to adequate housing’ in subsection (1) “recognised that housing entailed more than bricks and mortar. It required available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate, housing all of these conditions needed to be met”.³⁵

³² Guguletu in particular was divided into “Native Yards”(NYs) and to this very day residents still use these NYs as their mail addresses. The City has however instituted processes of replacing NYs with proper names (fallen heroes’ names) chosen by the residents.

³³ At para 7.

³⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

³⁵ At para 24.

Furthermore, writing in the context of evictions and interpreting the purpose of section 26(3) of the Constitution, which prohibits arbitrary evictions, Sachs J describes what a home should be. According to Sachs J, section 26(3)

“acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.”³⁶

Sachs J further borrows from elsewhere the following quote to illustrate what makes a house adequate and therefore a home from an international perspective:

“To live in a place, and to have established one's own habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognise adequate housing as a basic and fundamental human right.”³⁷

Xolile Gophe, a councillor at Langa township, has recently described hostels (in Langa) as ‘characterised by neglect’ and as ‘old decaying hostels’,³⁸ hence, posing safety and health risks. While true, his description however does not fully capture the picture of hostel dwelling. A description that portrays hostel dwelling in its primitive form is that of Ngethembi Myaka in Jabulani hostels in Soweto: “[Ngethembi Myaka] is stuck in Jabulani Hostel, forced to share a room with 16 other people. Couples who try to have a bit of privacy can only draw a curtain around their beds. Ngethembi shares her bed with her two young children”.³⁹ These hostels often boast cold showers, primarily designed for men, and force women to take warmed bathing water into the toilets as they cannot bath in the occupied rooms. This often results in untold discomfort and inconvenience to fellow residents who may want to genuinely relieve themselves in the toilet. Sewerage systems are often blocked and cannot accommodate the demand. As a result, residents are often forced to use malfunctioning toilets. Perhaps, one of the humiliating experiences of hostel dwelling is that unemployed residents and those who have fallen on hard times, and depending on the kindness and generosity of their roommates, sometimes have to watch their roommates have meals while they are thinking about where they will get their next meal.

It is apparent that these hostels do not have personal security, safety and health, privacy and tranquillity and therefore are not adequate housing and can hardly be called ‘homes’. It was because of the above conditions that hostel dwellers at the Guguletu hostels in particular were overjoyed by the introduction of the project to convert hostels into family units. Unfortunately, as the hostel conversion programme

³⁶ *Port Elizabeth Municipality v. Various Occupiers*, above (fn.31) at 1278E-F.

³⁷ *Ibid.*, at 1278F-G.

³⁸ In which he contrasted hostel residence with the flagship N2 Gateway housing initiative, in Zama Feni ‘Gateway project is the pride of national housing’ 23 August 2006, Cape Argus, p.4.

³⁹ Above (fn.1)

came to a halt in 2005, more hostel residents are languishing in the dehumanising conditions described above.

(c) *The Hostels to Homes Project*

According to the mayor for the City of Cape Town, Helen Zille, there are about 600000 beds in apartheid single sex (migrant) hostels throughout South Africa.⁴⁰ In an effort to put an end to the living conditions at hostels in the Western Cape, the City of Cape Town, in 1995, began a project dubbed *Dabanisa Iintsapho* (Unite Families) or Hostels to Homes aimed at converting single sex hostels in the areas of Langa, Guguletu and Nyanga East into family units. Sadly, in Guguletu, the project has come to a halt since 2005. The reasons for the stoppage are unclear as the City did not provide any reasons.⁴¹ Hence, in this regard, the author relies on interviews conducted in the area for the purpose of understanding the delays in delivering the Hostels to Homes Project in Guguletu. With a view to ascertaining the City's reasons for stopping the Hostels to Homes Project in Guguletu, the author interviewed a few hostel residents and one local leader as well as the local councillor. One of the questions posed during the interviews was: "what problems/challenges were encountered during the implementation of the Hostels to Homes Project". It emerged during the interviews with the residents that infighting over seats in the newly elected community forum was the main reason for the suspension of the project. As one Guguletu hostel resident explains: "Their term has expired and they do not want to leave the forum and now they do not want to allow the newly elected to serve in the forum". This was partly confirmed by the local councillor: "the problems that were had was infighting and people accused of selling the units".

It therefore seems that there was no community structure in place for the City to liaise with (and co-operate) in implementing the Hostels to Homes Project in Guguletu. Another resident said that City officials informed them in a meeting that "unless the community sorted out its affairs the hostel conversion programme would not resume". This revealed that community participation (in fact, lack of it) was the reason behind the City stopping the Hostels to Homes Project in Guguletu.

IV. The Legal Framework for Community Participation

The duty to facilitate community participation at local government level finds expression both in the Constitution as well as in various pieces of legislation concerning local government.

The Constitution Act 108 of 1996

Section 152(1)(e) of the South African Constitution (the "Constitution") states that one of the objects of local government is to encourage the involvement of

⁴⁰ Helen Zille, Speech delivered at a Ceremonial Hand Over of the Langa Hostels To Homes Project, 26 June 2007, available at http://web.capetown.gov.za/eDocuments/mayor_speech_-_CEREMONIAL_HANDOVER..., accessed on 28 January 2008.

⁴¹ In April 2008, a correspondence (electronic) was sent to the City of Cape Town's Integrated Human Settlement Office (the "Office"), responsible for the Hostels to Homes Project, enquiring, among others, in relation to the Hostels to Homes Project in Guguletu. One of the question was: "what are the reasons for stopping the hostel development project". The Office declined to answer this particular question.

communities and community organisations in the matters of local government. Section 195(1) states that public administration must be governed by the democratic values and principles enshrined in the Constitution including the principle that people's needs must be responded to, and the public must be encouraged to participate in policy-making.

The Local Government Municipal Systems Act 32 of 2000

The Municipal Systems Act (the "Systems Act") is perhaps the most comprehensive piece of legislation on community participation at local government level. The long title to the Systems Act clearly sets out the purpose of the Act. It reads-

"To provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; to define the legal nature of a municipality as including the local community within the municipal area,...to provide for public participation..."

It is further provided in the preamble to the Systems Act that:

"... a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities of which they are an integral part, and in particular in planning, [and] service delivery..."

Section 4(2) of the Act states that the Council of a municipality has a duty to, among others, encourage the involvement of the local community; consult the local community about the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and the available options for service delivery. Section 5(1) states that members of the community have a right to, among others, contribute to the decision-making processes of the municipality; submit written or oral recommendations, representations and complaints to the municipal council; and to be informed of the decisions of the municipal council affecting their rights.

The Local Government: Municipal Structures Act 117 of 1998

Another piece of legislation making provision for community participation at local government is the Local Government: Municipal Structures Act (the "Structures Act"). The Structures Act requires that there be a Category A municipality with a sub-council or ward participatory system, or a Category B municipality with a ward participatory system. It further requires that there be Executive Committees or Executive Mayors who must annually report on the involvement of communities and community organisations in the affairs of the municipality. Section 19(2)(c) of the Act further provides that a municipal council must annually review its processes for involving the community.

The Housing Act 107 of 1997

Section 2 of the Housing Act sets out general principles to be adhered to when developing housing at all three spheres of government (national, provincial and local). Among other things, section 2(1)(j) states that national, provincial and local spheres of government must facilitate active participation of all relevant stake-holders in housing development. The phrase "all relevant stake holders" must be interpreted to include the communities as they are often the target recipients of social housing

programmes. In fact, participation by communities as role players in housing development processes is reaffirmed in Section 9, on functions of municipalities, of the Housing Act which provides that any municipality may participate in a national housing programme in accordance with the rules applicable to such programme by facilitating and supporting the participation of other role players in the housing development process (Section 9(2)(a)(vi)).

V. Ward Committees and community participation

A system that is seen as capable of achieving a genuine community participation in local government processes is that of Ward Committees. In the Draft National Policy Framework for Public Participation (the “Policy Framework”), the Ward Committee System (the “Ward Committees”) is hailed as an ‘important and key feature of the new local government system.’⁴² Accordingly, a ward committee is to consist of the councillor representing the ward who must also chair the committee, and no more than 10 other persons. Ward committees are seen as the vehicles for deepening local democracy and the instrument through which a vibrant and involved citizenry can be established.⁴³ It is at the local level within wards that all development issues converge. Ward committees therefore have a crucial role to play as an interface between government and communities (not just local government).⁴⁴

As laudable as the introduction of ward committees may be, there remain strong concerns about the insufficient grass-roots community participation in the affairs of local government. Communities may not even know who represents them in the ward committees as ward committees are chosen by councillors and not elected by residents.⁴⁵ According to Friedman, in certain instances ‘there is no evidence that briefing councillors [by council] went beyond ward committees...’⁴⁶, and that it has been acknowledged that ‘a majority of ward committees, those that are actually convened, are not functioning as dynamically as envisaged’.⁴⁷ Christmas also partly attributes the recent wave of service delivery protests to the ineffectiveness of existing vehicles for public participation, including ward committees. She correctly points out that if these were functioning properly, communities would have no need to take to the streets to voice their concerns.⁴⁸

Perhaps a more scathing and general attack on the inefficiency of interface structures between communities and municipalities, including ward committees, resulting in lack of community participation, is that by Williams. He attributes the failure to achieve grass-roots community participation in local government affairs, to “...bureaucratic elites of officials and councillors [who] are determined to impose

⁴² See ‘Draft National Policy Framework for Public Participation’ (2007) Department of Provincial and Local Government (RSA), Chapter Three, p.8.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ See Steven Friedman ‘Participatory Governance and Citizen Action in Post Apartheid South Africa’, International Institute of Labour Studies, Geneva, Discussion paper, 164/2006, p.9.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Annette Christmas (2007) ‘Service Delivery: Failure to deliver or failure to communicate’ *Local Government Bulletin* vol 9 No.4, p.7.

their own truncated version and understanding of “community participation” on particular communities.”⁴⁹ According to Williams,

“such a limited form of democracy gives rise to an administered society, not a democratic society, as the consent for governance is not earned through rigorous policy debates about the merits and demerits of specific social programmes, but political acquiescence is manufactured through political manipulation by a host of think-tanks, self-styled experts, opinion polls and media pundits.”⁵⁰

From the above criticism, one draws the conclusion that the concept, if not the practice, of ward committees has been overly institutionalised or formalised at the expense of grassroots participation. There still remains a need to foster genuine community participation, and to seriously evaluate the effectiveness of ward committees as an interface between municipalities and communities. It should however be borne in mind that ward committees are but one vehicle for community participation in the affairs of municipalities.⁵¹ One should therefore guard against over-emphasizing their role.

VI. Justiciability of community participation

Two major judgments by the Constitutional Court on public participation are *Doctors for Life International v Speaker of the National Assembly and Others*⁵² and *Matatiele Municipality and Others v President of the Republic of South Africa and Others*.⁵³ Both cases concerned public involvement in the legislative processes of Parliament.

The first case concerned a constitutional complaint by an organisation called Doctors for Life, alleging that Parliament failed to facilitate public participation when it passed four Statutes on health related matters.⁵⁴ It was argued that prior to the enactment of the Statutes, the National Council of Provinces (NCOP) and the provincial legislatures did not comply with their constitutional obligations to facilitate public involvement as required by sections 72(1)(a) and 118(1)(a) of the Constitution, respectively. The Court held that the NCOP and the provincial legislatures had failed to facilitate public involvement in respect of two Statutes⁵⁵, and accordingly found the Statutes to be invalid but suspended its order of invalidity for 18 months.

⁴⁹ Above (fn. 25) at p.19. Williams further states that “[t]his highly atrophied form of “participation” seems to be working precisely because in the South African version of democracy, the party is everything and the constituency is nothing (except every four years when it is required to vote for a specific party)” (ibid).

⁵⁰ Ibid, pp.9-10.

⁵¹ For examples of various vehicles for community participation see Section 17(1)(a) of The Local Government: Municipal Systems Act 32 of 2000; Section 7 of the The Local Government Municipal Structures Act 117 of 1998; Further see Jaap de Visser above (fn.28).

⁵² Above (fn. 19)

⁵³ Above (fn.19)

⁵⁴ The Statutes were the Choice on Termination of Pregnancy Amendment Act 38 of 2004, the Sterilisation Amendment Act 3 of 2005, the Traditional Health Practitioners Act 35 of 2004, and the Dental Technicians Amendment Act 24 of 2004.

⁵⁵ These were the Choice on Termination of Pregnancy Amendment Act and the Traditional Health Practitioners Act. The two pieces of legislation have since been re-enacted, the Choice on Termination of Pregnancy Amendment Act as Act No.1 of 2008 and signed into law on 12/2/2008, and the Traditional Health Practitioners Act as Act No.22 of 2007 and signed into law on 7/1/2008.

In the latter case, the issue was whether the provincial legislatures of KwaZulu-Natal and the Eastern Cape, in redrawing their boundaries, acted reasonably in complying with its duty to facilitate public participation. The Court found that the provincial legislature of the Eastern Cape had complied with its duty to facilitate public involvement by holding public hearings. However, the provincial legislature of KwaZulu-Natal did not hold any public hearings or invite written submissions. The Court held that failure to conduct public hearings or invite written submissions was a “clear and unmistakable violation of section 118(1)(a) of the Constitution”.⁵⁶ The Court ruled that the Amendment Act was invalid but suspended the order of invalidity for 18 months.

Two important principles emerging from the two judgments are that Parliament (a State organ) has a broad discretion regarding the nature, scope and manner of involving the public in its affairs.⁵⁷ In reviewing the conduct of the legislature, the ultimate consideration for the Court will be whether the legislature acted reasonably in discharging its obligation to facilitate public participation.⁵⁸ An inquiry into the reasonableness of the conduct of the legislature will take into account the following factors:

- (a) Nature and importance of the decision
- (b) Efficiency of decision-making
- (c) Intensity of its impact on the public
- (d) What the legislature itself considers as appropriate
- (e) Urgency
- (f) Meaningful opportunity⁵⁹

In *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others*⁶⁰ one of the complaints by the appellants before the Constitutional Court was that the City of Johannesburg had failed to adequately consult the residents over its decision to evict them from “bad buildings”. The Court stated that engaging with people who might become homeless because of an eviction was in line with the constitutional obligations of the municipalities to provide services to the people in a sustainable manner, promote social and economic development and “encourage the involvement of communities and community organisations in matters of local government”⁶¹. The Court made some important remarks about the nature of this engagement. It stated that engagement is a two-way process in which the municipality and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives.⁶² The engagement has to be

⁵⁶ At para 84.

⁵⁷ *Doctors for Life*, paras 145-6; *Matatiele*, para 50.

⁵⁸ *Doctors for Life*, paras 145-6; *Matatiele*, para 50.

⁵⁹ For an excellent analysis of the judgments and these factors, see Jaap de Visser above (fn.28).

⁶⁰ Above (fn. 20).

⁶¹ At para 16.

⁶² At para 14. According to the Court, in the context of an eviction, engagement between the occupiers and the authorities would help determine:

- (a) what the consequences of the eviction might be;
- (b) whether the city could help in alleviating those dire consequences;
- (c) whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period;

tailored to the particular circumstances of each situation and the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement.⁶³ The Court added that the engagement process should not be shrouded in secrecy.⁶⁴ In addition, the Court also affirmed that local authorities are obliged to consider the availability of suitable alternative accommodation or land in deciding whether to proceed with an eviction.⁶⁵

VII. Evaluating the implementation of the City's Hostels to Homes Project

In keeping with its constitutional obligation to facilitate community participation, the City had decided to involve the community in carrying out its Hostel to Homes Project. The method of community participation was through the community forum (leadership structure). The forum acted as the liaison between the City and the community. It played an important role in the execution of the programme. The forum assisted with the evacuation of residents from the hostel about to be developed. The residents are temporarily accommodated in makeshift structures erected in open spaces in the area. The new family units (converted hostel) are then allocated, ideally, according to the waiting list.⁶⁶ The forum is very active in this respect.

Whose participation was necessary?

As it has been established above, the City suspended its Hostels to Homes project due to lack of community participation, occasioned by the absence of a community forum. A question that arises then, and a difficult one, is: whose participation or cooperation was required in order to carry forward the Hostels to Homes project: that of the few individuals serving in the forum or that of the wider community members? By halting the programme, the City seems to have decided that the participation required was that of the few individuals serving in the community forum. However, it must be noted that the forum represented the community. When the infighting broke out over seats in the newly elected forum, those fighting were no longer serving the interests of the community but their own. What was required in the absence of a standing community forum was the participation and cooperation of the wider community. This was possible for reasons set out below. There is no evidence that the City had attempted to deliver the hostel conversion programme by approaching the community directly.

It is suggested here that this was a misunderstanding by the City of the nature and extent of its service delivery obligations. The City's obligations continue well beyond

(d) whether the city had any obligations to the occupiers in the prevailing circumstances; and
(e) when and how the city could or would fulfil these obligations.

⁶³ At para 19.

⁶⁴ At para 21.

⁶⁵ At para 46.

⁶⁶ There are over 8 blocks of hostels being converted, including the so-called National Meat Supply and Gory Hostels, in Guguletu. The original agreement between the resident and the City was that residents of a particular block are the ones who benefit first from the new family units in their block. However, according to locals, some community leaders together with City officials responsible for allocating new units have been taking bribes and giving units to residents of other blocks and dropping the legitimate beneficiaries down the waiting list: "Look at block 5 [converted hostels] for example, some people did not get houses there, but there are people from other blocks staying there". (Hostel resident).

the artificial hurdle posed by the absence of a community forum. This approach is inspired by the guidelines emerging from the Constitutional Court's interpretation of what constitutes a reasonable state programme in the cases of *Government of the Republic of South Africa and Others v Grootboom and Others*⁶⁷ and *Minister of Health v Treatment Action Campaign*.⁶⁸

Guidelines for implementing social programmes

In *Grootboom*, the Constitutional Court provided guidelines for reviewing social programmes under the Constitution. The Court held that a programme had to be measured against a review standard of reasonableness, which requires a programme to be reasonable both in its conception (design) and in its implementation.⁶⁹ The Court held that in order to pass the constitutional muster, the programme “must be balanced and “flexible” and make appropriate provision for attention to housing crisis and to short, medium and long term needs.”⁷⁰

Inspired by the reasonableness standard developed by the Constitutional Court in *Grootboom*, Mbazira has simplified this test by providing a checklist for what constitutes a reasonable programme for local government.⁷¹ On ‘flexibility’, for instance, he says it should be asked whether the programme is flexible enough to respond to ‘unforeseen circumstances?’⁷² “In other words, does the programme make provision for adjustments should the need to do so arise?”⁷³ At the implementation level, he says it should be asked whether the programme is on time, and if not, whether all the obstacles causing the delay been identified and attended. Furthermore, that it should also be asked whether adjustments have been made to the programme to accommodate the delays and avoid any further delays.⁷⁴

It is on “flexibility” and in its “implementation” that the Hostels to Homes project fails the test for a reasonable state programme. The fact that the Hostels to Homes project had stalled since 2005, shows that the programme was not “flexible” enough to respond to unforeseen circumstances (infighting among a handful of community members resulting in a lack of co-operation/participation). It is argued here that “flexibility” on the part of the City would have included approaching the community directly, identifying the next block of hostel to be converted, placing dwellers in temporary shelters, and later, placing them back in the completed family units. This was not impossible for the City to do, as all that was required was the co-operation of the wider community. Based on the interviews with hostel dwellers in Guguletu, it was clear that the community is eager to give co-operation to the City as long as it would bring an end to their dehumanizing conditions in the hostels. It is needless to point out that the programme is not on time, and that the obstacles causing delay have not been removed, if identified.

⁶⁷ Above (fn.34)

⁶⁸ *Minister of Health v Treatment Action Campaign* (1) 2002 (10) BCLR 1033 (CC).

⁶⁹ At para 42.

⁷⁰ At para 43.

⁷¹ Mbazira above (fn. 24) at p.28. Besides ‘flexibility’ and ‘implementation’, the ‘allocation of responsibilities’, ‘identification and consideration of needs’, ‘allocation of resources’ and ‘publication’ of the program must be taken into account.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid, at p.29.

Obligation to protect access to adequate to adequate housing

One of the questions posed above is whether the municipality can sit back and allow a handful of individuals to hold its social programme to ransom? Does the Constitution permit this conduct? The answer to this question is in the negative. Over and above the duty to make hostel adequate housing, Section 7(2) of the Constitution imposes an obligation on local government to protect against third parties (other citizens) interfering with the realisation of the rights in the Constitution.⁷⁵ This underscores the principle that the rights in the constitution are enforceable not only as between organs of state and citizens but are equally enforceable between citizens themselves.⁷⁶ In the present case, this means that there is a duty on the City to ensure that the infighting among community leaders does not hamper the delivery of adequate housing to the wider community. It is argued here that by indefinitely halting the Hostels to Homes project in the area of Guguletu, the City allowed third parties to interfere with the realisation of the wider community's right of access to adequate housing. It is therefore difficult to see how the conduct of the municipality could be constitutionally defensible when it has clearly failed to meet its obligation in terms of section 7(2) of the Constitution.

Interrelatedness and interdependence of rights

The Committee on ESCR in General Comment No.4⁷⁷ stated that the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants⁷⁸ and other applicable international instruments. That the concept of human dignity and the principle of non-discrimination are central to the right to adequate housing:

“In addition, the full enjoyment of other rights - such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making - is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing”.⁷⁹

This interrelatedness and interdependence of human rights has been affirmed by the Constitutional Court. In *Grootboom*, the Constitutional Court stated that

⁷⁵ See Geoff Budlender (2004) 'Justiciability of Socio-Economic Rights: Some South African Experiences' in Yash Ghai and Jill Cottrell, *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights*, Interights: London, p.33 at p.34; Marius Pieterse (2007) 'Socio-economic rights and private law: The next frontier', *ESR Review*, vol 8 No.3, p.3; Mbazira above (fn.24) at p.4;

⁷⁶ Marius Pieterse above (fn.75) at p.2.

⁷⁷ Above (fn.5)

⁷⁸ Referring to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966.

⁷⁹ At para 9.

“The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The State is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or *intolerable housing*. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of them.”⁸⁰

Emphasizing the role of human dignity as one of the underlying values in a court’s enquiry into the reasonableness of state action in the provision of housing, the Court stated that:

“It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings.”⁸¹

In *Port Elizabeth Municipality*, the Court said that “as with all determination about the reach of constitutionally protected rights, the starting and ending point of the analysis must be to affirm the values of *human dignity*, equality and freedom.”⁸² Furthermore, in *Occupiers of 51 Olivia Road*, the Court stated that a local authority’s decision to evict, and which rendered those evicted homeless, violated not just the right of access to adequate housing, but most importantly, it infringed their right to *human dignity* and threatened their right to life.⁸³

Similarly, the decision to suspend the Hostels to Homes Project in Guguletu indefinitely, and as such perpetuating the intolerable conditions at the hostels, violated not only the wider community’s rights of access to adequate housing and protection from interference by third parties in terms of sections 26(1) and 7(2) of the Constitution respectively, but also one of the founding values of the Constitution, namely the right to human dignity (section 10).⁸⁴ In suspending the Hostels to Homes Project in Guguletu indefinitely, the City had condemned hostel dwellers to wallow in the intrusive and dehumanizing conditions in the hostels.

VIII. Conclusion

⁸⁰ Above (fn.34) at para 24. Emphasis are mine.

⁸¹ Ibid, at para 83. Further see Sandra Liebenberg (2005) ‘The Value of Human Dignity Interpreting Socio-Economic Rights’ 21 *SAJHR* 1-31 at p.3.

⁸² Above (fn.31) at para 15. Emphasis are mine.

⁸³ Above (fn.20) at para 16. Emphasis are mine.

⁸⁴ Further see on the premium placed by the Constitutional Court on the value of human dignity (see *S v Makwanyane* 1995 (3) SA 391 (CC), para 26; *Government of the Republic of South Africa and Others v Grootboom and Others*, above (fn.34), para 23; *Minister of Health v Treatment Action Campaign*, above (fn.68), para 28; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC), para 40); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others*, above (fn.20) para 16).

It is in the nature of government that it has to meet many and varied obligations in relation to its citizens. At times, the government may have to meet these sometimes-competing obligations as well, as evidenced in the implementation of the House to Homes project in Guguletu. On the one hand, the City is obligated to facilitate community involvement in its processes, including in its projects. On the other hand, the City has an obligation to ensure reasonable implementation of its social delivery programme. In addition, there is the obligation on the City to protect the right of the wider community members to access adequate housing against hindrance by third parties. While the City has a prerogative to prioritise certain needs, this does not mean that it can pick and choose which obligations to comply with and which to abdicate. This seems to be what the City has done with regard to the Hostels to Homes project in Guguletu. The City complied with its obligation to facilitate community involvement through the use of the community forum, but when there was no cooperation forthcoming from the forum, it suspended its social programme indefinitely (for three years and counting), as though that was the end of its obligations. It is argued here that service delivery obligations on the City continued. The City had to demonstrate flexibility in the implementation of its programme so as to deliver decent family units to the poor and vulnerable hostel dwellers in Guguletu. This is especially so since these obligations have socio-economic development of communities as their object. The interviews conducted revealed that the obstacles hampering the Hostels to Homes project in Guguletu were not insurmountable. Instead, by suspending the Hostels to Homes project without genuine attempts to find alternative ways of delivering family units in the hostels, the City appears to have treated the hostel community in Guguletu as ungrateful charity cases.

References

- Imraan Buccus et al (2007) 'Public Participation and Local Governance', Centre for Public Participation, p.4.
- Jaap de Visser J 'Community Participation in Local Government'(chapter 6) in Nico Steytler and Jaap de Visser (2007) *Local Government Law of South Africa*, Durban: Butterworths/LexisNexis.
- Jaap de Visser and Annette Christmas (2007) 'The Housing Dilemma: Reviewing Local Government Functions' *Local Government Bulletin* vol 9 No.3, p.15;
- Annette Christmas (2007) 'Service Delivery: Failure to deliver or failure to communicate' *Local Government Bulletin* vol 9 No.4, p.7.
- John Williams (2007) 'Community Participation and the Democratic Practice in Post-Apartheid South Africa' *Critical Dialogue* Vol 2 No.1 pp 19-27 at p.19;
- John Williams (2006) 'Community Participation: Lessons from post-apartheid South Africa' *Policy Studies* Vol. 27 No.3 pp 197-216 at p198.
- Steven Friedman 'Participatory Governance and Citizen Action in Post Apartheid South Africa', International Institute of Labour Studies, Geneva, Discussion paper, 164/2006, p.9.
- Christopher Mbazira (2006) *Realising Socio-Economic Rights in the South African Constitution: The obligations of Local Government: A guide for Municipalities*, Community Law Centre, p.9.
- Geoff Budlender (2004) 'Justiciability of Socio-Economic Rights: Some South African Experiences' in Yash Ghai and Jill Cottrell, *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights*, Interights: London, p.33;
- Marius Pieterse (2007) 'Socio-economic rights and private law: The next frontier', *ESR Review*, vol 8 No.3, p.3.
- Sandra Liebenberg (2005) 'The Value of Human Dignity Interpreting Socio-Economic Rights' 21 *SAJHR* 1-31.
- Albie Sachs 'Concluding comments on the panel discussion' at the occasion of the 10th Anniversary of the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape, appearing in the *ESR Review* (2007) vol 8 no.1, p 18.
- *Doctors For Life International v Speaker Of The National Assembly And Others* 2006 (12) BCLR 1399 (CC).
- *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC).
- *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR 1268.
- *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (2001 (1) SA 46) (CC).
- *Minister of Health v Treatment Action Campaign* (1) 2002 (10) BCLR 1033 (CC).
- *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC).

- *City of Johannesburg v Rand Properties (Pty) Ltd and Others* (2007) 6 BCLR 643 (SCA).
- *S v Makwanyane* 1995 (3) SA 391 (CC).
- *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 BCLR 569 (CC) .
- General Comment No.4, 13/12/1991, UN doc. E/1992/23.
- General Comments No.9, 5-23/11/2007, UN doc. E/C.12/GC/19, of 4/2/2008.
- Zama Feni 'Gateway project is the pride of national housing' 23 August 2006, *Cape Argus*, p.4.
- Isaac Mangena 'Soweto hostel dwellers vent fury at government' 20 July 2007. *Mail&Guardian*
Online:[http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__national/&article id=314466](http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__national/&article%20id=314466), accessed on 20 July 2007.