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# Justice Ngcobo's Rich Legacy at the Intersection of Federalism and Democracy

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## ABSTRACT

This article aims to make a connection between the *Tongoane* judgment, which deals with 'tagging' legislation, and Justice Ngcobo's innovative thinking in the Matatiele Municipality cases, which are about the demarcation of provincial boundaries. These cases are bound together by Justice Ngcobo's powerful commitment to democracy at the sub-national level. The judgments build accountability at grassroots level and constrain authoritarian impulses. This article examines the political issues behind provincial demarcation disputes, including ethnic impulses. It argues that current democratic concepts in South African Constitutional law can never meet the popular sovereignty, self-determinative type claims of communities who wish to determine their own futures in boundary disputes. These disputes raise specific democratic problems that need to be named, seen for what they are and theorised on their own terms.

**Keywords:** federalism; *Tongoane*; *Matatiele*; democracy; tagging; public participation; provincial boundaries

## Introduction

Justice Ngcobo stands out as one of the architects of our federalism jurisprudence.[1] I have previously argued that his most important federalism judgment was *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others*[2] (hereinafter

1 See the discussion of *DVB Behuising (Pty) Limited v North West Provincial Government* 2001 (1) SA 500 (CC) ('*DVB Behuising*') in Victoria Bronstein, 'Competence' in Stu Woolman and others (eds), *Constitutional Law of South Africa* (2 edn, Juta 2006) Chapter 15 at 8–10 and 14–20 and Victoria Bronstein, 'Envisaging Provincial Powers: A Curious Journey with the Constitutional Court' 2014 (30) SA Journal on Human Rights 24.

2 2010 (6) SA 214 (CC).

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*Tongoane*). *Tongoane* illustrates a deep appreciation of the constitutional design at the national and provincial levels. The case also shows the retired Chief Justice's preoccupation with facilitating democratic accountability at the appropriate level. In this article I aim to make a connection between the *Tongoane* judgment and Justice Ngcobo's truly innovative thinking in the *Matatiele Municipality* cases.[3] The latter are about provincial demarcation. *Tongoane* and the *Matatiele* cases are bound together by Justice Ngcobo's powerful commitment to democracy at the sub-national level. A disinterested observer would probably see the *Matatiele* cases as having unconventional or unexpected results, but the cases illustrate the capacity of Justice Ngcobo to integrate unanticipated outcomes into the deep texture of South African law. All these cases build democracy and accountability at the grassroots level and serve to constrain authoritarian impulses.

*Tongoane* and the *Matatiele* cases continue to have very interesting and far-reaching implications. That is the nature of Constitutional Court precedent. The *Tongoane* judgment puts a procedural break on hasty government action. For instance, when President Zuma wished to respond to the demands of traditional leaders by extending the land claims deadline in the Restitution of Land Rights Act[4] urgently before elections, the *Tongoane* precedent prevented him from doing so.[5] At that point there was a risk that the interests of up to 30 000 existing land claimants would be adversely affected. In *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces*[6] the new deadline was invalidated on the ground that the public consultation processes were woefully inadequate in the provinces.[7]

The enclave of Matatiele became part of the Eastern Cape despite the wishes of the vast majority of local residents, who wanted to remain in KwaZulu-Natal. The *Matatiele* Court required national and provincial legislatures to engage in proper consultation with communities when making alterations to provincial boundaries. The Court's approach did not turn out to be a panacea. Although the *Matatiele* judgments support the voices of communities faced with adverse demarcation decisions, they stop short of rescuing

3 *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) ('*Matatiele I*') and Matatiele *Municipality & Others v President of the Republic of South Africa & Others* ('*Matatiele II*') [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006).

4 Act 22 of 1994.

5 Brendan Boyle, 'Land Rights Bill Must Go Back to Parliament' (Legal Resources Centre) <http://lrc.org.za/lrcarchive/lrc-in-the-news/3098-land-rights-amendment-bill-must-go-back-to-parliament> accessed 16 November 2017.

6 2016 (5) SA 635 (CC) ('*Land Access Movement*').

7 Boyle (n 5). The Traditional Courts Bill was also profoundly affected by public participation in the provinces. Despite ANC control of eight provinces in 2013, it was not possible for the government to achieve an outright majority in the National Council of Provinces in support of the Bill. For a full discussion of the process see Thuto Thipe, Monica De Souza and Nolundi Luwaya, 'The Advert Was Put Up Yesterday: Public Participation in the Traditional Courts Bill Legislative Process' (2015–2016) 60 New York Law School LR 519.

them. The demarcation cases are salient expressions of the way that the Court has defined the limits of its power in our Constitutional environment.

## Constitutional Structure

Justice O'Regan has written that the early Constitutional Court developed a specific approach to constitutional structures which

> recognises that a primary purpose of the Constitution is to establish a coherent system of government capable of performing the complex tasks that a modern state must perform. The task of interpretation is thus first to ensure that the structures and relationships created by the Constitution work as a coherent whole and any particular text must contribute to this whole.[8]

When writing federalism judgments, judges actively consider how different levels of government can function most effectively within the framework of the Constitutional scheme. Judges should be 'guided by ... beliefs about the optimal balance of power between' national and provincial governments.[9] They should 'assist in the democratic process' by allowing legislators 'who have the best claim to make the decision' to regulate the contested area of competence.[10] This enables 'democratic accountability' to be facilitated 'at the most appropriate level'.[11] Successful federalism judgments manage to keep these axiomatic principles within their line of vision.

Justice Ngcobo articulates these ideas in the *Matatiele II* judgment, where he says:

> Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit our Constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate. Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole. [12]

It is at the intersection of federalism and democracy that Justice Ngcobo leaves a rich legacy.

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8 Kate O'Regan, 'Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa' (2012) 75 The Modern LR 1 at 14–15.

9 Katherine Swinton, 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem and others (eds), *Canadian Constitutional Law* (E Montgomery Publications 1994) 143, 145. See also Bronstein (n 1) 10.

10 David Tucker, 'Interpretations of Federalism: The Australian Doctrine of State Immunity and the Problem of Collective Choice' in J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate Publishing 2002) 245 at 259, 261.

11 Tucker (n 10) 246–247.

12 *Matatiele II* (n 3) at para 36.

## Tagging, *Tongoane* and Public Participation

*Tongoane* takes the innovative position of distinguishing the interpretation of Schedule 4 subject areas for purposes of 'tagging legislation' from those for deciding when a province has legislative competence over a matter. Schedule 4 consists of a list of subject areas of concurrent national and provincial competence. Interpretation of the schedule is necessary to determine whether a provincial legislature has legislative competence.[13] The same schedule is used to determine whether ordinary legislation affects the provinces. Section 76(3) of the Constitution requires a national Bill to be dealt with according to the section 76 procedure if, inter alia, it 'falls within a functional area listed in Schedule 4'. The process of deciding which legislative process needs to be followed to pass legislation is known colloquially as 'tagging'. When legislation is passed according to the section 76 procedure, the second house of Parliament, the National Council of Provinces needs to pass the legislation. Each province has one vote, which is cast by the head of the provincial delegation.[14] A decision by the NCOP cannot easily be overridden. Other ordinary legislation is passed according to section 75 of the Constitution, and the NCOP only has limited delaying power.

Schedule 4 also lists many of the most important functional areas in which provincial legislatures are competent to legislate. The test for establishing provincial legislative competence in a Schedule 4 area is the 'pith and substance' test. The test 'involves the determination of the subject-matter or the substance of the legislation, its essence, or true purpose and effect, that is, what the [legislation] is about'.[15] Most would have anticipated that the same test would have been used for 'tagging' section 76 Bills, but the judgment in *Tongoane* strikes out in a completely different direction. *Tongoane* develops the

> 'substantial measure test' as the test for tagging bills before they are passed by Parliament. The test 'focuses on all the provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4'.[16]

*Tongoane* gives us a more generous test for interpreting the subject areas in Schedule 4 when 'tagging' than the one used for assessing whether a provincial legislature has the competence to pass legislation.[17]

For Ngcobo J the rationale of 'tagging' is to decide how 'the Bill should be considered by the provinces and in the NCOP'.[18] If a Bill substantially affects the interests of

13 Section 104 (1)(*b*)(i) of the Constitution.
14 Section 65 of the Constitution
15 *Tongoane* (n 2) para 58.
16 ibid para 59.
17 ibid para 70. In the latter case, the Constitution expressly makes provision for the provincial legislature to deal with incidental matters. See ss 104(4) and 44(3) of the 1996 Constitution.
18 *Tongoane* (n 2) para 60.

the provinces, it must be enacted in accordance with the section 76 procedure.[19] The *Tongoane* judgment is driven by a clear concern with democratic accountability. The Court tells us that '[t]he more [the Bill] affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.'[20] The purpose of section 76(3) is 'to give more weight to the voice of the provinces in legislation affecting them.'[21] Justice Ngcobo also states that the tagging of Bills 'must be informed by the need to ensure that the provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them.'[22] It is here that Justice Ngcobo's contribution to the development of public participation in our legislative processes coalesces with his approach to 'tagging'. In the case of important Bills, public participation becomes an integral part of the legislative process in each of the provinces.

The area of land tenure is quintessentially considered a national competence: land is a residual matter not mentioned in the schedules. This is notwithstanding the fact that closely related heads like agriculture, traditional leadership and customary law do appear in Schedule 4. The Act under review in *Tongoane*, the Communal Land Rights Act (ClaRA) 11 of 2004,

> aimed to enact legislation to provide legally secure tenure or comparable redress to people or communities whose tenure of land [was] legally insecure as a result of the racist policies of apartheid.[23]

The 'pith and substance' test was originally used to characterise the Bill as a section 75 Bill because the essence of the Bill was land or land tenure.[24] But the Court found that land reform or land tenure issues substantially affect the provinces and according to the newly developed 'substantial measure' test, the Bill needed to be tagged as a section 76 Bill. The provisions of CLaRA 'in substantial measure affect indigenous and customary law and traditional leadership', which are headings that appear in Schedule 4. [25]

The judgment continues:

> … if the section 76 process were limited only to Bills involving subject-matter over which the provinces themselves had concurrent legislative competence, the need for a legislative process that took special account of their interests would hardly arise. This is because their concurrent legislative powers would enable them to enact their own preferred legislation in the same field, which would indeed enjoy some precedence, subject only to the national override provided for in section 146 of the Constitution. Yet it is where matters substantially affect them outside

19 ibid para 72.
20 ibid para 60.
21 ibid para 101.
22 ibid para 69.
23 ibid para 1.
24 ibid para 49.
25 ibid para 74; see also paras 90, 95–96.

> their concurrent legislative competence that it is important for their views to be properly heard during the legislative process. This too shows that concurrent provincial legislative competence provides no conclusory guide to the rationale behind the section 76 process.[26]

Justice Ngcobo did not develop these ideas on his own. Since the advent of the 1996 Constitution, Christina Murray had always been concerned that too many Bills were being incorrectly tagged under section 75. She wrote about tagging in the context of CLaRA with Richard Stacey.[27] The Legal Resources Centre Legal Team developed and presented the arguments.[28] The fact that their submissions fell on fertile soil in the Constitutional Court should not be underestimated: *Tongoane* is the decision of a united Court where no judge expressed any dissent.

*Tongoane* is a good example of a functional approach to federalism analysis. The judgment is also concerned with facilitating democratic processes.[29] The legacy of *Tongoane* is clearly apparent in the *Land Access Movement* matter.[30] The Restitution of Land Rights Amendment Act,[31] which aimed 'to re-open the window for the lodgement of land claims', had been passed according to the section 76 procedure. As a result of the judgment in *Tongoane*, it was uncontroversial that the Bill should be tagged as a section 76 Bill. The Legal Resources Centre voiced concerns that 'the bills were rushed through the NCOP ahead of the May 7 election as fodder for the [President Zuma led] ANC campaign to woo traditional leaders.'[32] The NCOP did not engage in proper public participation processes in each of the provinces.

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26 ibid para 63.

27 Also see Christina Murray and Richard Stacey, 'Tagging the Bill, Gagging the Provinces: The Communal Land Rights Act in Parliament' in Aninka Claassens and Ben Cousins (eds), *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (UCT Press 2008) 72.

28 See Applicants' Heads of Arguments signed by W Trengove SC, G Budlender SC, A Dodson, M Sikhakhane, N Mangcu-Lockwood, S Cowen (19 January 2010) <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/yT9Pk7BLUj/MAIN/76440007/523/10719> accessed 18 November 2017.

29 One of the strongest aspects of Justice Ngcobo's legacy was his deep commitment to democracy illustrated in *Doctors for Life International* v *Speaker of the National Assembly & Others* (*Doctors for Life*) 2006 (6) SA 416 (CC) and *Matatiele II* (n 3). In those judgments, Ngcobo J championed the right of citizens to participate in the democratic processes of the National Assembly, the NCOP and provincial legislatures. In *Matatiele II* there is a strong underlying concern that a community should have the opportunity to influence its own fate (see para 82). I have previously argued that the term 'fully and effectively' is a trademark expression of Justice Ngcobo's in federalism cases. He also believes that provincial powers should be exercised 'fully and effectively' and the phrase features prominently in *DVB Behuising* (n 1). I have also argued that he strayed from this principle in his final judgment in *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* 2011 (6) SA 396 (CC), but that argument has been fully ventilated elsewhere. See Bronstein (n 1).

30 *Land Access Movement* (n 6).

31 Act 15 of 2014.

32 Boyle (n 5). The Legal Resources Centre lists some of the major concerns with the Bill, which are that 'existing claims have not been ring-fenced to ensure they are neither torpedoed nor delayed by the expected flood of new claims. With existing funds and capacity already overstretched and no new

The Bill was passed and the parliamentary procedure was challenged in the Constitutional Court. The public participation processes in the provinces had been extremely tight:

> First, from start to finish, the provinces had less than one calendar month to process fully a complex piece of legislation with profound social, economic and legal consequences for the public. The timeline gave the provinces a mere three to five calendar days to notify the public of the hearings, from the date the Provincial Legislatures were briefed until the date the public hearings commenced. The provinces had only eight calendar days to conduct the hearings, consider public comments and confer appropriate negotiating mandates, from the start of the hearings until the negotiating mandate meeting.[33]

The Court systematically analysed the opportunity for public participation in each province and found that the entire process was hopelessly unreasonable and insufficient. The Amendment Act was accordingly invalidated. The power of the *Tongoane* judgment lies in the combination of the approach the Court takes to tagging along with its attitude to public participation. It is to the issue of democratic participation in the provinces that the *Matatiele* judgments speak.

## Battles over Provincial Boundaries

The current nine provinces may have started off as an 'abstract concept'[34] but this changed rapidly after their creation in 1994. The earliest indication of this shift was a number of highly politicised struggles to prevent changes to provincial boundaries. The results of the 2004 elections showed that the ANC was overwhelmingly popular. The party won 69,68% of the national ballot, with stunning performances in the provinces. The ANC controlled the Western Cape in coalition with the NP. The ANC also did well in KwaZulu-Natal, but it chose to remain in coalition with Inkatha. The ruling party became highly centralised under President Mbeki. A measure of ANC arrogance and authoritarianism showed itself in provincial border disputes, most notably in Matatiele and Khutsong.[35] In 2005 the ANC used its majorities in all the relevant provinces and in the National

budget in the pipeline, up to 30 000 existing claims could be stalled by overwhelming pressure on available funds and administrative capacity; traditional leaders are likely to use the renewed claim period to seize control of communal land in rural areas at the expense of communities who prefer to control their own land either individually or through communal property associations independent of chiefs and headmen.'

33 *Land Access Movement* (n 6) para 17.

34 Richard A Griggs, 'The Boundaries of a New South Africa' (1995) 85 International Boundaries Research Unit Boundary and Security Bulletin <https://www.dur.ac.uk/resources/ibru/publications/full/bsb2-4_griggs.pdf> accessed 16 November 2017 at 87.

35 Authoritarianism showed itself in a lack of candour on the part of the government about why it chose to place cross-boundary areas in particular provinces. See, for example, *Matatiele I* (n 3) para 84 and the concerns of Justice Sachs in Matatiele *I* generally, but particularly paras 105–110. Also see Eddy Mazembo Mavungu, 'Frontiers of Prosperity and Power: Explaining Provincial Boundary Disputes in Post-apartheid South Africa' (DPhil, University of the Witwatersrand 2012) at 95.

Legislature (National Assembly and NCOP) to pass constitutional amendments which forced some communities into provinces against their will (Eastern Cape rather than KwaZulu-Natal in the case of Matatiele and North West rather than Gauteng in the case of Khutsong). The government's rationale for the provincial boundary changes was the desirability of eliminating cross-boundary municipalities.[36] The communities were assured that the provinces to which they were assigned really made no difference in our unitary state. But violence in the affected areas was a clear indication that ordinary people attach great importance to the particular provincial administration with which they are required to interact.

Joshua Kirshner and Comfort Phokela have done detailed ethnographic research in Khutsong.[37] They argue that

> the ANC government overlooked a strong grass-roots sense of identity and belonging in Khutsong, in which provincial borders were not viewed merely as a technocratic issue, but were believed to make a crucial difference for living conditions and livelihoods.'[38]

The writers continue:

> From 2005 through to 2007, Khutsong residents were embroiled in protests over the right to remain within Gauteng Province. The unrest gradually grew into a movement of mass resistance against the state ... In October 2006, fewer than 5 percent of Khutsong's registered voters cast ballots in the municipal elections ... The sight of police armoured cars and helicopters patrolling the streets of Khutsong reminded one of the apartheid era...[39]

Alex Park describes the demarcation in the Constitution Twelfth Amendment Act of 2005 as 'the single greatest political calamity in Khutsong since the Apartheid era.' He continues:

> Its effect on the political consciousness of the township's natives was total, and was the foremost consideration in every aspect of their political workings … The demarcation divided the ANC against itself, its supporters, and its historic allies, most notably COSATU. One statement issued by the local branch of COSATU accused the government of not caring 'about the views of our

36 See generally Bertus de Villiers (ed), *Crossing the Line: Dealing with Cross-border Communities* (Konrad Adenauer Stiftung Occasional Papers, Johannesburg 2009). There was also a provincial boundary dispute in Bushbuckridge near the Kruger National Park, which was resolved before these disputes took place: see Mavungu (n 35). The Court was approached about a similar dispute in *Moutse Demarcation Forum & Others v President of the Republic of South Africa & Others* 2011 (11) BCLR 1158 (CC) ('*Moutse*').

37 Joshua Kirshner and Comfort Phokela, 'Khutsong and Xenophobic Violence: Exploring the Case of the Dog that Didn't Bark' (Centre for Sociological Research, University of Johannesburg, 2010) <http://www.s-and-t.co.za/downloads/2010/xenophobia/case_studies/5_Khutsong.pdf> accessed 16 November 2017.

38 ibid 11.

39 ibid 7–8.

> people, including our children', and calls the ANC 'dictatorial' . Such strong language from a historic ally is illustrative of the severity of conflict between the two groups over Khutsong.[40]

The Khutsong community unsuccessfully challenged its provincial demarcation in court in *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*.[41] There were also a series of three cases about the fate of Matatiele, which was a cross-boundary jurisdictional enclave similar to the other cross-boundary municipalities that were affected by the Constitution Twelfth Amendment Act.[42]
In August 2005 the Minister of Provincial and Local Government asked the Municipal Demarcation Board to exclude the Matatiele Municipality from the Sisonke District Municipality in KwaZulu-Natal and incorporate it in the Alfred Nzo District Municipality in the Eastern Cape. The Board invited comments on the proposal and received '3 248 individual petititions and a petition of 10 000 signatures from the Matatiele/Maluti Mass Action Committee, a coalition of organisations in the Matatiele/Maluti area.'[43] The community expressed intense resistance to being relocated in the Eastern Cape. Consequently, the Board proposed that a newly established Municipality of Matatiele be located in the Sisonke District Municipality in KwaZulu-Natal. The Minister responded to this decision by submitting a new redetermination proposal which incorporated Matatiele into Alfred Nzo District Municipality in the Eastern Cape. The latter proposal was also incorporated into the Constitution Twelfth Amendment Act. When the Constitutional amendment was passed, the new Matatiele Municipality became part of the Eastern Cape.[44]

Justice Ngcobo could not have made his views about the situation clearer when he stated: 'the people who lived in Matatiele were removed to the Eastern Cape by Constitutional amendment.'[45]

The first *Matatiele* case came to the Constitutional Court in February 2006. The main constitutional issues revolved around the necessity for public participation in the making of legislation. The judgment foreshadows the position taken in *Doctors for Life*[46] and the second *Matatiele* judgment. (Those judgments were handed down only months later

40 Alex Park, 'A Tale of Two Townships: Political Opportunity and Violent and Non-violent Local Control in South Africa' (2009) <http://digitalcommons.macalester.edu/soci_award/1/?utm_source=digitalcommons.macalester.edu%2Fsoci_award%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 16 November 2017.

41 2008 (5) SA 171 (CC) ('*Merafong*').

42 The final case in the series is *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* 2010 (6) BCLR 520 (CC), discussed below. There was also an unsuccessful challenge to the Constitution Twelfth Amendment Act of 2005 by the people of Moutse, who were moved from the province of Mpumalanga when they were demarcated into the Province of Limpopo: *Moutse* (n 36).

43 *Matatiele I* (n 3) para 19.

44 ibid para 25.

45 ibid para 29.

46 *Doctors for Life* (n 29).

in August 2006.) The ideas that underpin Justice Ngcobo's judgment in *Matatiele I* do not appear to have been percolating in South African constitutional thinking for a long time. Coincidentally, I attended the first *Matatiele* hearing in the Constitutional Court on 14 February 2006. Busloads of citizens from Matatiele had arrived and were singing and dancing in front of the Court building. They had driven for many hours at great expense. I knew one of the junior members of the legal team and the festive atmosphere was disconcerting for her. She shared her reservations with me, saying 'I don't know what we are going to be able to do. We are flying in the face of a Constitutional Amendment.' We soon filed into Court and within a short time Justice Ngcobo raised questions about the public participation processes behind the Bill. Although counsel adapted to the tenor of the questions, it was clear that things had taken an unexpected turn.

Counsel for the Matatiele community had made a concession in written argument that the Constitution Twelfth Amendment Act had been properly passed in accordance with the procedures in the Constitution.[47] In order to change provincial boundaries it was necessary for the amendment to be passed through the National Assembly and the NCOP with the concurrence of the legislatures concerned.[48] On the surface this appeared to have taken place. Despite this, the Court raised the question of whether there had been compliance with section 118(1)(*a*) of the Constitution, which provides for public involvement in the legislative and other processes of the provincial legislatures. It transpired that there had been no opportunity for public participation in the processes of the KwaZulu-Natal legislature.[49] Justice Ngcobo posed the question of whether this rendered the approval by that legislature invalid as it pertained to KwaZulu-Natal.[50] Although *Matatiele I* did not finally resolve these issues, the Court stated that these are matters of 'grave importance' which 'lie at the very heartland of our participatory democracy and the power of the provinces to protect their territorial integrity.'[51]

When the community returned for the hearing in *Matatiele II*, Adrian Bellengere describes the crowd dynamics:

> Many members of the Matatiele community made the long, and for them expensive trip to the Constitutional Court in Johannesburg …. They were met by a police presence which is reminiscent of the policing attitude and force used habitually by the apartheid regime against such communities over a number of decades and theoretically no longer possible in the 'New South Africa'. There were more police vehicles parked outside the Court than any private vehicles from Matatiele. The community felt criminalised – and this prior to the commencement of their hearing. In the Court things were a little different. The Court was the fullest that it had ever been, extra seating had had to be brought in. However, during the course of the entire day it became apparent, and impressively so, that the crowd had been very quiet throughout the

47 *Matatiele I* (n 3) para 37.
48 See s 74, especially s 74(8), of the Constitution.
49 *Matatiele I* (n 3) para 72.
50 ibid para 72.
51 ibid.

> court proceeding. This was commented upon by a visibly moved Chief Justice, who expressed his respect and gratitude to the people of Matatiele for their patience and interest, especially as he noted, that proceeding had not at any stage been conducted in their mother tongue, or translated.[52]

The judgments in *Matatiele I* and *II* indicate that the justices were concerned about the plight of the residents of Matatiele/Maluti. They were uncomfortable with the fact that the wishes of the Matatiele community were being disregarded.[53] Justice Ngcobo wrote

> This legislation had a direct and profound impact on a discrete and identifiable section of the population – the people of Matatiele. By a stroke of a pen, they were relocated from the province of KwaZulu-Natal into the province of the Eastern Cape. It is true, they were not physically relocated; they remain in the same homes, in the same streets for those who live in towns, in the same neighbourhoods and retain the same neighbours. But the difference is this: they now live in another province, which is not their choice. The attachment of individuals to the provinces in which they live should not be underestimated. Indeed, there are 'natural sentiments and affections which grow up for places [in] which persons have long resided; the attachments to [province], to home and to family, on which is based all that is dearest and most valuable in life'.[54]

The judges' attitudes were not unrelated to general public sentiment in favour of the people of Matatiele:

> This case attracted an enormous media attention for a number of reasons. First, it was a challenge to a Constitutional amendment. Secondly, it was a small community pitted against the might of the government. Thirdly, it was a tale of the poor and uneducated facing up against the resources of the state. Fourthly, it touched on the government's abandonment of the principles of protection of the populace in the light of political expediency. Fifthly, it raised the apartheid era issue of gerrymandering. Sixthly, it hinted at simmering IFP versus ANC conflict, and lastly, it dealt with the lives of simple everyday folk – not politicians on the make, arms dealers or big business crime.[55]

The Matatiele community was initially successful in Court. It was held that the Constitution Twelfth Amendment Act had not been properly passed in respect of the boundaries of KwaZulu-Natal. This was because there had not been proper public consultation by the KwaZulu-Natal Legislature.

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52 See Adrian Bellengere, 'A Community Speaks – David and Goliath Revisited, or, a Tale of Two Municipalities' (2009) 1 African Journal of Rhetoric 108 at 125.

53 Justice O'Regan, *Matatiele II* (n 3) para 89 also stresses the seriousness and the importance of the matter. She writes: 'It is quite plain that the redrawing of provincial boundaries is an intensely controversial matter upon which communities feel strongly and which has the potential to undermine the stability of our democracy and the legitimacy of local and provincial government in the areas where boundaries have been moved …'

54 *Matatiele II* (n 3) para 79.

55 Bellengere (n 52) 124.

The situation was different in Marafong/Khutsong, where the amendment as it applied to Gauteng and North West survived constitutional scrutiny. This was despite the fact that the Gauteng delegation in the NCOP had suddenly changed their vote and approved the Amendment Act without re-consulting with the community. (The Gauteng delegation had previously announced a decision to veto the Act.) In the *Merafong* case, Justice Ncgobo said the following:

> [T]he fact that the majority of the people of Merafong supported the inclusion of Merafong into the Gauteng Province is not decisive. The purpose of facilitating public involvement under section 118(1) of the Constitution is not to have the views of the public dictate to the elected representatives what position they should take on a bill. The purpose of facilitating public involvement is to enable the legislature to inform itself of the fears and the concerns of the people affected. The decision as to how to address those concerns and fears is, by our Constitution, that of the elected representatives.[56]

## The Aftermath of the Cases

By October 2008 President Zuma's faction had been victorious at Polokwane and the balance of political forces had changed. A constitutional amendment was passed reversing the 2005 amendment in accordance with the wishes of the community in Khutsong.[57] Political forces took a different direction in Matatiele, however. After the Constitutional Court decided that the Twelfth Amendment to the Constitution had not been validly affected, the central and regional ANC proceeded to correct the defect. The Constitution Thirteenth Amendment Act of 2007 confirmed that the area of Matatiele would be located in Eastern Cape. This time there was an extensive consultation process. When the matter came to court in *Poverty Alleviation Network & Others v President of the Republic of South Africa & Others*[58] the court refused to entertain the argument that the public hearings had been a 'formalistic sham' that had formed part of a 'pre-determined' decision to relocate Matatiele.[59] Eddy Mazembo Mavungu writes:

> In the end, the application [in the third *Matatiele* case] was dismissed with the Court declaring its inability to enquire on one of the central complaints namely that the legislation pursued partisan political objectives to the detriment of the affected population.[60]

56 *Merafong* (n 41) para 262.
57 Mavungu (n 35) 79 and 102 argues that this was done urgently before local government elections in an attempt to fend off the threat from the new breakaway party, the Congress of the People (COPE).
58 (n 42).
59 ibid para 59.
60 Mavungu (n 35) 50.

## Politics behind inclusion of Matatiele in Eastern Cape

In 2009 the Minister of Co-operative and Traditional Affairs had conducted a type of mini-referendum in Matatiele: 89% of voters supported KwaZulu-Natal, whereas only 11% were in favour of the Eastern Cape. Mavungu tries to get to grips with the real reasons for the government's decision to locate Matatiele in the Eastern Cape. He examines the question of ethnicity and explains:

> The residents in and around Matatiele, as in most of the Northern Transkei region, are generally bilingual in isiXhosa and seSotho. Many speak some English. Some also speak as a home language (or as a language of heritage) Phuthi, especially residents in Tsitsong and Tšepisong. Amahlubi is the majority ethnic group in the area.[61]

Mavungu explains that there was a significant traditional leader's lobby to stay in the Eastern Cape:

> Proponents for Eastern Cape [placed] a great deal of emphasis on their cultural differences from the Zulu culture and [expressed] fears of falling victims of Zulu cultural and political hegemony in KZN. Among pro-Eastern Cape residents, it [was] common to hear utterances such as these: 'Circumcision is very important to us. Zulu don't practise it. We may not be free to exercise this cultural practice as we are used to in the Eastern Cape.'[62]

There was also a concern that traditional chiefs would not be remunerated in KwaZulu-Natal, which is the domain of King Zwelithini. The people pursuing these arguments were a small minority of the residents of Matatiele affected by the demarcation change. Most people were influenced by the perception that service delivery is superior in KwaZulu-Natal. (Pietermaritzburg is three hours from Matatiele while Bisho is nine hours from the region.)

## Democracy

At the time of constitutional negotiations, the intention was expressed that disputes about cross-boundary municipalities would be resolved by referenda.[63] During the boundary dispute in Matatiele/Maluti the people believed that they should determine where they would be located. When their wishes were overridden in the Constitutional Twelfth and Thirteenth Amendment Acts, '[d]issenting residents rejected the idea that their regional preferences could be overruled by legislators'.[64] In Mavungu's view: 'Communities' insistence that the majority regional preference should have prevailed showed a strong

61 ibid 113.

62 ibid 131.

63 See *Moutse* (n 36) para 17. On government refusal to conduct a referendum in Bushbuckridge see Mavungu (n 35) 13, 54.

64 Mazembo E Mavungu, 'Ideological Clashes behind Provincial Boundary Disputes in Post-apartheid South Africa' (2012) 94(1) SA Geographical Journal 60 at 71.

commitment to popular sovereignty or direct democracy.'[65] Mavungu sees a similar trend in Khutsong/Merafong, about which he writes:

> in the affected community's eyes, all that mattered was the interests of Merafong and its right to determine its provincial identity. For this reason, they expected politicians to deliberate in a way that did not override local preferences.[66]

The demands of the communities involved in the boundary disputes are pleas for self-determination, although not in a secessionist sense. Any attempt to theorise or understand democracy in the context of these boundary disputes needs to grapple with the 'self-determination' or popular sovereignty issue.

The idea that communities should have a real say over their futures is becoming more and more important in the context of demarcation disputes about municipal boundaries. For South Africans, any idea of self-determination or popular sovereignty raises thorny problems. The fact that South Africa does not have major problems with ethnic conflict is a profound achievement of the National Democratic Movement.[67] There is, however, always reason to be wary in the face of ethnic mobalisation. The recent demarcation of the Vhembe District Municipality in Limpopo (which affected Vuwani) highlighted the ethnic issues between Tsonga- and Venda-speaking people. In this case, there was insufficient timely engagement with the community about municipal boundaries. The argument that public participation processes had been insufficient was unsuccessful in court.[68] At the time of writing, violent conflict continues in the area. A discussion of this and similar cases is beyond the scope of this article, but hasty demarcation decisions cause chaos in the countryside.

However, ethnic mobalisation does not appear to be an important factor in the provincial demarcation battles under review in this article. The region of Matatiele wanted to choose a provincial home that cut against traditional notions of ethnic identity politics. The same is true of a previous demarcation battle in Bushbuckridge, where the community wanted to be incorporated into Mpumalanga despite the fact that it was viewed as having a better 'ethnic fit' in Limpopo.[69] Khutsong is thoroughly cosmopolitan and

65 ibid.

66 Mavungu (n 35) 90.

67 See generally Daryl Glaser, *Politics and Society in South Africa* (Sage 2001).

68 *Masia Traditional Council & Others v Municipal Demarcation Board & Others* (1256/2016) [2016] ZALMPPHC 1 (29 April 2016).

69 'For negotiators at CODESA, it made sense for Northern Sotho and Shangaans, who form the majority group in Bushbuckridge, to be associated with their ethnic counterparts in Limpopo. Such thinking did not take into account the fact that ethnicity had been artificially constructed and politically instrumentalised by the apartheid regime over several years (Ritchken 1995; Delius 1996; Mamdani 1996). A non-ethnicised line of justification considered that Bushbuckridge had been administered from Giyani and Lebowakgomo during the homelands period and that it made sense for the area to continue being administered from Northern Province (Limpopo), which was formed out of three former homelands, namely Venda, Lebowa and Gazankulu' Mavungu (n 35) 53–54. 'The people of Bushbuckridge did not rely on ethnic considerations. Rather, they wanted to share a province with

there was nothing chauvinistic about the parties' demarcation arguments. At the time of xenophobic violence in 2008, Khutsong's residents 'broadly opposed xenophobia' and protected foreigners:[70] 'Khutsong residents practiced a new politics in which inhabitance rather than nationality, [formed] the basis of political community and decision-making authority.'[71] Although concerns about ethnic identity politics are real, they have not been a major driver of the provincial demarcation disputes that we have seen in South Africa.

## The Legal Side of the Disputes

The judges in both *Matatiele* matters displayed discomfort with the fact that a powerful ANC government was riding roughshod over the wishes of the Matatiele community. The same view is very obviously present in the discourse about Khutsong. Commentators argue that the boundary decision in the *Merafong* case should have been invalidated on the basis that the decision to relocate Khutsong in North West province was irrational.[72] I would, however, argue that the decision was not irrational on any test. On the contrary, it appears to have been completely cynical. There is an underlying principled issue here which is not related to the question of irrationality: When is it legitimate to thwart the will of a community which is making a claim to popular sovereignty? Is it justified to do so for instrumental reasons that take no account of the community's interests?

There is a case to be made that legislators should not pursue 'partisan political objectives to the detriment of the affected population'.[73] This is because the democratic claims of communities need to be treated respectfully. This does not mean that claims of self-determination or popular sovereignty should always be allowed to trump other considerations. Rather, the Court should have fashioned a principle which could be used to discern the types of consideration that can legitimately override the democratic will

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their closest towns and the nearest provincial administration headquarters' Mavungu (n 35) 55. The same pattern of people rejecting ethnic considerations in favour of others seems to emerge from *Moutse* (n 36).

70 Joshua Kirshner, 'Reconceptualising Xenophobia, Urban Governance and Inclusion: The Case of Khutsong' *Urban Governance in Post-Apartheid Cities: Modes of Engagement in South Africa's Metropoles* (Borntraeger Science Publishers 2014) 117–134 at 130. On the same topic see Park (n 40).

71 Kirshner (n 70) 128, quoting Mark Purcell, 'Citizenship and the Right to the Global City: Re-imagining the Capitalist World Order' (2003) 27.3 International Journal of Urban and Regional Research 564 at 126.

72 See particularly the dissenting judgment in *Merafong* (n 41) by Moseneke DCJ. Much of the discussion of the *Merafong* case has been about the subject of rationality: see Max du Plessis and Stuart Scott, 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 SALJ 597 at 612–613; Henk Botha, 'Democratic Participation and the Separation of Powers' in Henk Botha, Nils Schaks and Dominik Steiger (eds), *Das Ende des repräsentativen Staates? Demokratie am Scheideweg – The End of the Representative State? Democracy at the Crossroads* (Nomos Verlagsgesellschaft mbH & Co KG 2016) 385 at 392. Also see Justice O'Regan in *Matatiele II* para 89.

73 Mavungu (n 35) 150.

of communities in demarcation cases. Some considerations are clearly illegitimate. For instance, if the legislature had embarked on naked gerrymandering, the Court would not have adopted the attitude that the ruling party was entitled to pursue those ends as long as it had at some stage listened patiently to the will of the relevant communities.

## Representative, Deliberative and Self-Determinative Democracy

It is worth distinguishing two concepts which have been conflated by the Court. The first is the claim to representative democracy that emerges from *Doctors for Life*. The second is the claim to self-determinative popular sovereignty that emerges from demarcation cases such as *Matatiele*. Our jurisprudence is progressive in acknowledging the need for deliberative democracy in both cases. However, in the case of *Matatiele II* and *Merafong* the work of the Court does not go far enough. When it comes to ordinary legislation it is appropriate that citizens have an opportunity to intervene in decision-making. As Sandra Liebenberg writes:

> [D]eliberative democracy enriches and deepens representative democracy by expanding the opportunities for people's active participation in a broad range of decision-making processes …. Through creating multiple sites of dialogue and avenues of participation, the aim is to encourage greater participation in the public and private institutions which affect various aspects of people's lives.[74]

In these cases, Justice Ngcobo is correct in stressing the need for legislators to listen to the people, because the act of listening both improves the deliberative process and fortifies a sense of civic dignity.[75]

In the case of important legislative decision-making, citizens get an opportunity to put their concerns to legislators. It is appropriate that when constituencies lose out, they accept this loss as being part of the fabric of our constitutional democracy. One needs to

74 Sandra Liebenberg, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "Meaningful Engagement"' (2012) 12 African Human Rights LJ 1 at 10. On participatory democracy see also Geo Quinot, 'Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right' (2009) 25 SA Journal on Human Rights 392 at 397–399.

75 BC Mubangizi and MO Dassah, 'Public Participation in South Africa: Is Intervention by the Courts the Answer? 2014 Journal of Social Sciences 275 at 281. See also Barbara E Loots, 'Civic Dignity as the Basis for Public Participation in the Legislative Process' in Botha (n 72) 257 at 265. Bellengere (n 52) 125 agrees with the Court that the experience of being heard is valuable in itself. He describes the Matatiele community at the end of the Court hearing in *Matatiele II*: 'Although judgment was not delivered on the day of the hearing (in fact only five months later), there was a discernable sense of victory amongst some of the applicants, a sense which stemmed less from a confidence in the outcome and more from that fact that they had been heard. They were no longer marginalised, their concerns had been treated with respect and they had had the opportunity to present their version of events. Given the political history of South Africa, this itself was not an intangible victory.'

remember that the legislation will be invalidated if it infringes fundamental rights. But the situation is quite different when communities make claims based on self-determinative popular sovereignty. Commentators remain concerned when a community loses out, even when it has had a proper opportunity to be heard. In this regard, Bishop writes:

> In sum, while the Court wants participatory democracy to supplement and enhance the democratic nature of general elections and majority rule, the effect of *Merafong* is to subordinate participation to representation. Participation is only relevant if and when representatives want it to be.[76]

Moses Retselisitsoe Phooko expresses similar frustration, saying that 'the right to participation in the legislative process exists in theory but … it has no substantial reality. It provokes the emotions of people and consumes their time.'[77] The participation processes which took place in Merafong when the Constitution Twelfth Amendment Act was passed and in Matatiele when the Constitution Thirteenth Amendment Act was approved almost appear to have aggravated the situations and heightened the sense of disregard that the communities were feeling.[78] This was despite the fact that the legislators had listened and the judges detected a real attempt to examine and address the service-delivery concerns of the respective communities.[79] There should be a principle in place in demarcation cases that legislators cannot pursue 'partisan political objectives to the detriment of the affected population'.[80] This is because the will of the community should not be thwarted for instrumental reasons. This is a principled claim that has its basis in a conception of democracy rather than in rationality.

The Court's idea of deliberative democracy which is set out in *Doctors for Life* has a superficial resemblance to the concept of meaningful engagement as it is used in socio-economic rights cases. In eviction cases the State is required to engage meaningfully with residents to find the best possible solution to their housing problems. On this point, Sandra Liebenberg writes:

> Although meaningful engagement does not … require the parties to agree on every issue, it does require good faith and reasonableness on both sides and the willingness to listen and understand

76 Michael Bishop, '"Vampire or Prince?" The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 Constitutional Court Review 313 at 343.

77 MR Phooko, 'What Should Be the Form of Public Participation in the Law-making Process? An Analysis of the South African Cases' (2014) 1 Obiter 39 at 54; see also generally *Merafong* (n 41) para 50 and *Moutse* (n 36) para 54. See also Tshepo Madlingozi, 'The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, "Interpretive Charity" and the Citizenry as Sangomas: Lead Essay/Response' (2008) 1 Constitutional Court Review 63 at 64–65; and Matebesi Sethulego and Lucius Botes, 'Khutsong Cross-boundary Protests: The Triumph and Failure of Participatory Governance?' (2011) 30 Politeia 4.

78 A point clearly made by Sachs in *Merafong* (n 41) para 292: Mavungu (n 35) 100.

79 *Merafong* (n 41) para 262.

80 Mavungu (n 35) 150.

> the concerns of the other side. There should be a serious and sustained effort to reach mutual accommodations in relation to the disputed issues.[81]

For Liebenberg the process must include 'an exchange of public reason-giving, mutual listening, and a joint exploration of solutions to accommodate the concerns of the other.'[82] Liebenberg raises the concern that the requirement of meaningful engagement coexists with a socio-economics jurisprudence that does not have sufficient normative content. This presents special risks in the socio-economic rights context as communities who enter into talks with the government might tend to lose out in an unregulated negotiating space.[83] Despite these risks, meaningful engagement finds its roots in the idea that people should not simply be pushed around: communities need to be respectfully treated and play a real role in determining their fate.

The meaningful engagement jurisprudence tells us that communities are entitled to be taken seriously in deciding how State resources should be deployed to assist them. Ideas of deliberative democracy and meaningful engagement will always fall short in boundary disputes because they are simply unable to address the real issues at play. Accordingly, in boundary demarcation cases the type of self-determinative popular sovereignty claims made by the affected communities need to be recognised. There also needs to be an understanding of the type of consideration that can legitimately be used to decide whether communities should be forced into governance configurations against their will. It is important for South Africans consciously to identify and deal with the democratic demands of communities who face demarcation conflicts. If these cases are pushed into conceptual pigeonholes where they do not really belong, the claims of communities will not be properly dealt with. What this effecively means is that demarcation cases need to be conceptualised and dealt with on their own terms.[84] Doing so becomes more urgent as municipal demarcation disputes become more violent.

## Irony

In *Merafong* Justice Van der Westhuisen stated:

81 Liebenberg (n 74) 25.

82 ibid.

83 ibid 27.

84 Woolman develops the idea of participatory bubbles to describe how pockets of public participation break out from time to time. It is a colourful metaphor. He is, however, content to use the concept to describe public participation in the legislative process, meaningful engagement and the *Merafong* case: Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013) 208, 287 and 444–446. I disagree that *Merafong* can be satisfactorily analysed as a simple participatory bubble where a particular grouping does not win. I think that substantive standards are missing from the Court's reasoning, standards that belong in the domain of democracy rather than rationality.

> [D]iscourteous conduct does not equal unconstitutional conduct which has to result in the invalidity of the legislation. Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections.[85]

The above statement may have appeared to be far-fetched because the ANC seemed invincible at the time the judgment was handed down. But by the time of writing the story had taken an ironic turn: a political party called the African Independent Congress (AIC) was formed in the wake of the demarcation battle in Matatiele. The AIC was a small party which started off locally but then began to contest elections at various levels in different places.[86] The 2016 local government elections did not go well for the ANC in Gauteng: the party was unable to get an outright majority in Ekurhuleni (on the East Rand), and so it had to form a coalition with the AIC in order to run the city. On 24 April 2017, in return for AIC support, the ANC committed itself to a 'roadmap' for the incorporation of Matatiele/Maluti into KwaZulu-Natal.[87] Hence at the time of writing the demarcation saga continues.

## Conclusion

Justice Ngcobo has consistently fostered democratic practice throughout the country. He has set himself against authoritarian impulses and in having done so he leaves us with an important legacy. His legacy fans out into all the regions of South Africa. The previous Chief Justice pioneered the concept of public participation. The ideas of deliberative democracy and meaningful engagement are powerful and they have important implications. It is, however, necessary to recognise that these concepts can never meet the popular sovereignty, self-determinative types of claims of communities that feel that they should be entitled to determine their own futures in demarcation disputes. It may just be that the latter is simply not a claim recognised in South African constitutional law. But disquiet about the substance of government behaviour in the cross-boundary municipality cases tells a different story. There is a principled problem when legislators pursue 'partisan political objectives to the detriment of the affected population' in demarcation disputes.[88] I have argued that there is a concept that is missing from our jurisprudence. Boundary disputes, especially at the municipal level, are an important part of the South African political landscape. They raise specific democratic problems that need to be identified, seen for what they are and theorised on their own terms.

85 *Merafong* (n 41) para 60.

86 Mavungu (n 35) 144–145.

87 ANC and AIC *Joint Statement* following meeting held on 24 April 2017 <http://www.anc.org.za/content/joint-statement-anc-and-aic-following-meeting-held-24th-april-2017> accessed 16 November 2017.

88 Mavungu (n 35) 150.

# References

ANC and AIC, *Joint Statement* following meeting held on 24 April 2017 <http://www.anc.org.za/content/joint-statement-anc-and-aic-following-meeting-held-24th-april-2017> accessed 16 November 2017.

Bellengere A, 'A Community Speaks – David and Goliath Revisited, or, a Tale of Two Municipalities' (2009) 1 African Journal of Rhetoric 108.

Bishop M, 'Vampire or Prince? The Listening Constitution and *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others*' (2009) 2 Constitutional Court Review 313.

Botha H, 'Democratic Participation and the Separation of Powers' in Henk Botha, Nils Schaks and Dominik Steiger (eds), *Das Ende des repräsentativen Staates? Demokratie am Scheideweg – The End of the Representative State? Democracy at the Crossroads* (Nomos Verlagsgesellschaft mbH & Co KG 2016).

Boyle B, 'Land Rights Bill Must Go Back to Parliament' (*Legal Resources Centre*) <http://lrc.org.za/lrcarchive/lrc-in-the-news/3098-land-rights-amendment-bill-must-go-back-to-parliament> accessed 16 November 2017.

Bronstein V, 'Competence' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson and M Bishop (eds), *Constitutional Law of South Africa* (2 edn, Juta 2006).

Bronstein V, 'Envisaging Provincial Powers: A Curious Journey with the Constitutional Court' (2014) 30 SA Journal on Human Rights 24.

De Villiers B (ed), *Crossing the Line: Dealing with Cross-border Communities* (Konrad Adenauer Stiftung Occasional Papers 2009).

Du Plessis M and Scott S, 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2001) 130 SALJ 597.

Glaser D, *Politics and Society in South Africa* (Sage 2001).

Griggs RA, 'The Boundaries of a New South Africa' 1995 International Boundaries Research Unit Boundary and Security Bulletin 85 <https://www.dur.ac.uk/resources/ibru/publications/full/bsb2-4_griggs.pdf> accessed 16 November 2017.

Kirshner J, 'Reconceptualising Xenophobia, Urban Governance and Inclusion: The Case of Khutsong' in M Huchzermeyer and C Haferburg (eds), *Urban Governance in Post-Apartheid Cities: Modes of Engagement in South Africa's Metropoles* (Borntraeger Science Publishers 2014).

Kirshner J and Phokela C, 'Khutsong and Xenophobic Violence: Exploring the Case of the Dog that Didn't Bark' *Centre for Sociological Research, University of Johannesburg* <http://www.s-and-t.co.za/downloads/2010/xenophobia/case_studies/5_Khutsong.pdf> accessed 16 November 2017.

Liebenberg S, 'Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of "meaningful engagement"' (2012) 12 African Human Rights LJ 1.

Madlingozi T, 'The Constitutional Court, Court Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, "Interpretive Charity" and the Citizenry as *Sangomas*: Lead Essay/Response' (2008) 1 Constitutional Court Review 63.

Mavungu ME, 'Ideological Clashes behind Provincial Boundary Disputes in Post-apartheid South Africa' (2012) 94 (1) South African Geographical Journal 60.

Mavungu EM, 'Frontiers of Prosperity and Power: Explaining Provincial Boundary Disputes in Post-apartheid South Africa' (DPhil, University of the Witwatersrand 2012).

Mubangizi BC and Dassah MO, 'Public Participation in South Africa: Is Intervention by the Courts the Answer?' 2014 Journal of Social Sciences 275.

Murray C and Stacey R, 'Tagging the Bill, Gagging the Provinces: The Communal Land Rights Act in Parliament' in B Claassens and D Cousins, *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (UCT Press 2008).

O'Regan K, 'Text Matters: Some Reflections on the Forging of a New Constitutional Jurisprudence in South Africa' (2012) 75 The Modern LR 1.

Park A, 'A Tale of Two Townships: Political Opportunity and Violent and Non-violent Local Control in South Africa' (2009) <http://digitalcommons.macalester.edu/soci_award/1/?utm_source=digitalcommons.macalester.edu%2Fsoci_award%2F1&utm_medium=PDF&utm_campaign=PDFCoverPages> accessed 16 November 2017.

Phooko MR, 'What Should Be the Form of Public Participation in the Law-making Process? An Analysis of the South African Cases' (2014) 1 Obiter 39.

Purcell M, 'Citizenship and the Right to the Global City: Re-imagining the Capitalist World Order' (2003) 27.3 International Journal of Urban and Regional Research 564.

Quinot G, 'Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right' (2009) 25 SA Journal on Human Rights 392.

Sethulego M and Botes L, 'Khutsong Cross-boundary Protests: The Triumph and Failure of Participatory Governance?' (2011) 30 Politeia 4.

Swinton K, 'The Supreme Court and Canadian Federalism: The Laskin-Dickson Years' in P Macklem, RCB Risk, CJ Rogerson, KE Swinton, LE Weinrib and JD Whyte (eds), *Canadian Constitutional Law* (E Montgomery Publications 1994).

Thipe T, De Souza M, and Luwaya N, 'The Advert Was Put Up Yesterday: Public Participation in the Traditional Courts Bill Legislative Process' (2015–2016) 60 New York Law School LR 519.

Tucker D, 'Interpretations of Federalism: The Australian Doctrine of State Immunity and the Problem of Collective Choice' in J Goldsworthy and T Campbell (eds), *Legal Interpretation in Democratic States* (Ashgate Publishing 2002).

Woolman S, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta 2013).

## Cases

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

*DVB Behuising* (*Pty) Limited v North West Provincial Government* 2001 (1) SA 500 (CC).

*Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC).

*Masia Traditional Council & Others v Municipal Demarcation Board & Others* (1256/2016) [2016] ZALMPPHC 1 (29 April 2016).

*Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2006 (5) BCLR 622 (CC) ('*Matatiele I*').

*Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 (1) BCLR 47 (CC) ('*Matatiele II*').

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

*Moutse Demarcation Forum & Others v President of the Republic of South Africa & Others* 2011 (11) BCLR 1158 (CC).

*Poverty Alleviation Network & Others v President of the Republic of South Africa & Others* 2010 (6) BCLR 520 (CC).

*Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature* 2011 (6) SA 396 (CC).

*Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (6) SA 214 (CC).

## Legislation

Communal Land Rights Act (ClaRA) 11 of 2004.

Constitution of the Republic of South Africa, 1996.

Constitution Thirteenth Amendment Act of 2007.

Constitution Twelfth Amendment Act of 2005.

Restitution of Land Rights Act 22 of 1994.

Restitution of Land Rights Amendment Act 15 of 2014.