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**TOPIC: SERVICE DELIVERY PROTESTS AND ADJUDICATION: AN  
EXPRESION  
OF A RIGHT TO PARTICIPATORY DEMOCRACY**

By

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## 1. INTRODUCTION

The advent of democracy in South Africa, especially the dawn of constitutionalism, ushered in a new era in the history of South Africa concerning the manner in which those in positions of authority, in particular elected public representatives, are expected to exercise their democratic power to govern. This is an important development from a scholarly point of view and is of interest to lawyers and legal academics.

One of the important developments during the post-apartheid constitutional era is the inclusion of socio-economic rights in the 1996 Constitution of South Africa. The inclusion of socio economic rights in the 1996 Constitution opened a new page in our democracy in that it creates a platform for the enforcement of “basic needs for those who lacked access to those needs”.<sup>1</sup> In the main these are black people who were previously denied access to basic socio-economic needs through past discriminatory laws and practices under the apartheid regime.<sup>2</sup>

The 1996 Constitution of South Africa also enshrines the principle of participatory democracy among its key values, which requires that all decision-making processes of government be a product of engagement between the state and the people.<sup>3</sup> This implies that elected public representatives can no longer decide things unilaterally, but must instead create platforms for participation by the people in decision-making processes concerning the provision of socio-economic needs.<sup>4</sup>

Under the new Constitution needs have become entrenched as fundamental rights and are enforceable under the Bill of Rights, in particular sections 26 and 27 of the Constitution.<sup>5</sup> This inclusion of socio economic rights is more than just symbolic in nature but instead a watershed moment towards the realisation of what Nancy Frazer refers to as “participatory parity”.<sup>6</sup> Frazer’s principle of participatory parity recognises the right of everyone to participate and interact with one another as

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<sup>1</sup> Liebenberg ‘Needs, rights and transformation: adjudicating social rights’ (2006) 17 (1) *Stellenbosch Law Review* 5- 36.

<sup>2</sup> Id.

<sup>3</sup> Fraser, N & Honneth, A ‘*Redistribution or Recognition?*’ A political-philosophical exchange (2003) Verso 228.

<sup>4</sup> Id at 228.

<sup>5</sup> Section 26 and 27, Constitution.

<sup>6</sup> Fraser N & Honneth A ‘*Redistribution or Recognition?*’ A political-philosophical exchange (2003).Verso 228.

peers.<sup>7</sup> This has implications for the way that government governs. According to Frazer, institutional arrangements should be put in place in a state to accord everyone the status of equal partners in social interaction.<sup>8</sup>

The participatory nature of our democracy and the effective engagement of people by government and participation by communities in decision making processes affecting them have become essential prerequisites for the success of democracy in South Africa. This basically implies that the people can no longer just be passive recipients or subjects but they should instead be active role players and participants in government.

Furthermore, if, as stated above, socio economic rights impose certain duties and obligations on the State as a guarantor and provider of such rights, their inclusion in the 1996 Constitution also has the effect of elevating the “basic needs” of people into fundamental rights and creates platforms for the legal enforcement of these rights by courts – that is, they are among the institutional arrangements for participatory parity that Fraser refers to.

This should be seen against the background of “the Constitution’s transformative orientation which explicitly and emphatically requires the large scale transformation of South Africa’s society”.<sup>9</sup> However, what needs to be explored is what is meant by transformation and whether what is said to be a transformative orientation brought about by South Africa’s Constitution has indeed translated into actual transformation in the manner it brings changes and improves people’s lives and brings about transparency and openness in the manner in which government governs and takes decisions. In other words, the critical question here is whether the much vaunted “transformative orientation” of our Constitution has in fact resulted in the transformation and improvement of the lives of all South Africans? And: if it has not, then why is this so?

Constitutional Court Justice Sisi Khampepe maintains that “transformation is about instilling a culture of justification and experimentation, an insatiable ethical appeal to do better and be better”.<sup>10</sup>

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<sup>7</sup> Id at 229.

<sup>8</sup> Id at 229.

<sup>9</sup> Liebenberg ‘Needs, rights and transformation: adjudication social rights’ (2006) 17 (1)*Stellenbosch Law Review* 5-35.

<sup>10</sup> Khampepe ‘Meaningful Participation as Transformative Process: Challenges of Institutional Change in South

According to Pierre de Vos “a transformed society is the one that allows for dialogic views, transformative processes that build space for dialogue and constructive contestation”.<sup>11</sup>

Another important development during the first 20 years of democracy in South Africa, especially its second decade starting from 2004, has been the occurrence of a series of protests concerning service delivery and the lack thereof around different municipalities across all provinces in the country. This development seems to be in contrast to the Constitution’s “transformative orientation” mentioned above and the vision of participatory democracy that it encapsulates. Service delivery protests occurring in South Africa today, as compared to those of the pre-democratic era, can be viewed as unintended consequences associated with South Africa’s democracy.

The key background question that I seek to explore in this dissertation is why South Africa under democracy still experiences protests and to what extent such protests can be attributed to a lack of meaningful engagement and participation of people in decision-making processes of government. In other words the actual cause of protests occurring in South Africa today is the key to what I seek to investigate. This I seek to do, firstly, by drawing a comparison between the protests occurring in South Africa today- under democracy and the pre- democratic era protests;<sup>12</sup> secondly, I also examine the relationship between these protests and the right of citizens to participate in decision making processes of government;<sup>13</sup> and thirdly, I examine the contribution that courts can make in improving the quality of participatory democracy and also in the fight for social justice and change.<sup>14</sup> With all this the main point being driven home is that protests occur because there is no meaningful participation and involvement of people in decision-making processes of government and that this has to change, in part with the assistance of the judiciary.

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Africa’s Constitutional Democracy’ (delivered at Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 5.

<sup>11</sup> De Vos ‘A bridge too far? History as context in the interpretation of the South Africa Constitution’ ( 2001) *South African Journal for Human Rights* 17: 1-33.

<sup>12</sup> Chapter 2 below.

<sup>13</sup> Chapter 2 below.

<sup>14</sup> Chapters 3 and 4 below.

Throughout, my focus is on the courts: I explore in the first place the role of courts in relation to the entrenchment of participatory democracy through fostering engagement between the state and the poor.

My research objectives may be summarised as follows:

- To investigate the notion of protests in the South African context, their different forms and reasons why they have occurred in South Africa pre and post 1994.
- To investigate the relationship between service delivery protests and participatory democracy in South Africa.
- To investigate whether there is a relationship between the right to participatory democracy and socio economic rights litigations in South Africa.
- To investigate the role of the courts in the fight for social justice and change through advancing participatory democracy.

## **2. HISTORICAL BACKGROUND TO PROTESTS IN SOUTH AFRICA AND THE CONSTITUTION'S VISION OF PARTICIPATORY DEMOCRACY**

### **2.1 Introduction**

Democracy, in particular participatory democracy, entails that those in position of authority conceive of such positions as an obligation to serve others in a way that transforms their lives and improves their situation.

In this chapter I take a closer look at the protests that have occurred in South Africa pre and post 1994, that is, since the dawn of democracy in South Africa. For this purpose I conduct a comparative analysis of protests that had occurred in South Africa during the pre- democratic era - the Apartheid era - and those that are still occurring today, during the democratic era. As far as the democratic era protests are concerned I focus particularly on protests that occurred during the first twenty years of South Africa's democracy, that is, the second decade starting from 2004 to date. It will be shown that this period has been characterised by a series of protests concerning the delivery of socio-economic rights issues, the so called service delivery protests.

Here, as in the rest of the dissertation, the main background argument I explore is that service delivery protests are an enactment of a right to participatory democracy and that courts, through fostering engagement between the state and the people, can contribute significantly to the entrenchment of participatory democracy.

### **2.2 South Africa's Constitution and the vision of participatory democracy**

The Constitution of South Africa envisions a participatory system of governance and requires government to be based on the will of the people, to serve their interests and be accountable, responsive and open to their needs. According to Geo Quinot "participatory democracy refers to a vision of governance that allows for maximum and active public involvement in all aspects of public



decision making”.<sup>15</sup> This is the view that is also echoed by Justice Khampepe when she says South Africa’s “transformative constitution encourages active citizenship.”<sup>16</sup>

Public engagement should, however not be done as mere formality. It must be meaningful and be implied in all aspects of decision making processes of government. In her paper entitled *Meaningful Participation as Transformative Process* delivered at the Stellenbosch University Annual Human Rights lecture on 6 October 2016, Justice Sisi Khampepe prefaces her address by making reference to a lecture presented by French philosopher Jacques Derrida entitled “The Force of Law” in which he reflected on what makes a just society possible.<sup>17</sup> She makes reference to the fact that Derrida considered why it was just that despite him being a native French speaker, he must address his American audience in English and linked that to his conception of “justice as fidelity to otherness.”<sup>18</sup> The notion of “otherness”<sup>19</sup> is in sync with the vision encapsulated in the Constitution that is referred to above.

Justice Khampepe explains the notion of “otherness” by making reference to the issue of language use which she regards as “an intrinsic part of law,”<sup>20</sup> since it is a tool through which law is communicated, recorded and performed. She therefore emphasises the interaction of language, law and justice to justify her notion of “meaningful participation as transformative process.”<sup>21</sup> According to Justice Khampepe “meaningful participation and transformative process intersect.”<sup>22</sup> In other words the two must work together, since one cannot be realised without the other. This is what prompts Justice Khampepe to state that “transformation is a vessel of empty rhetoric without meaningful

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<sup>15</sup> Quinot ‘Snapshot or Participatory Democracy? Political engagement as fundamental human right’ (2009) 25 *South African Journal for Human Rights* at 397.

<sup>16</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at the Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 15.

<sup>17</sup> Derrida “Force of Law: ‘The Mystical Foundation of Authority in Cornell’”, Rosenfeld and Gray Carlson (eds). *Deconstruction and the Possibility of Justice* (1992) Routledge, London at 3.

<sup>18</sup> Id at 3.

<sup>19</sup> Id at 3.

<sup>20</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa’s Constitutional Democracy’ ( Delivered at the Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 2.

<sup>21</sup> Id at 2.

<sup>22</sup> Id at 15.

participation.”<sup>23</sup> This actually means that South Africa’s constitutional democracy without meaningful participation is meaningless.

In his work entitled “Legal Culture and Transformative Constitutionalism” Karl Klare draws a contrast between the South African Constitution and other classical liberal documents such as the United States Constitution, which conceive the law as systematically, intellectually-satisfying and inherently neat. According to Klare South Africa’s Constitution “is social, redistributive, caring, positive, horizontal, participatory, multicultural and self-conscious about its historical setting and transformative role and mission.”<sup>24</sup> According to Justice Khampepe “a process is transformative if it is sensitive to these values and builds its understanding of justification on them.”<sup>25</sup>

Within the context of this dissertation sensitivity to the above values include being responsive to the needs of the poor and the landless, and endeavouring to improve their living conditions. This is what Derrida meant in his conception of “justice as fidelity to otherness.”<sup>26</sup>

Justice Khampepe explains the meaning of the concept “transformative process” within the history and context of South Africa’s Constitution with regard to the meaning given to transformation by the late former Chief Justice Pius Langa and the recently retired Deputy Justice Dikgang Moseneke. Chief Justice Langa encapsulated “the core idea of transformative constitutionalism as a call to nonconformity, where he said we must change.”<sup>27</sup> According to Justice Khampepe a need for change is clear, based on South Africa’s shared history. In his earlier lecture on “Transformative Adjudication” the Deputy Chief Justice Moseneke illustrated the devastating deficiencies of Apartheid through the contours of Bram Fischer’s life to explain why South Africa’s society must change. According to Justice Moseneke, the approach in Fischer’s biography is authoritative in that it reaches beyond the broad

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<sup>23</sup> Khampepe ‘Meaningful Participation as Transformative Process: Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at the University of Stellenbosch Annual Human Rights Lecture. 6 October 2016) at 3.

<sup>24</sup> Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 1 46.

<sup>25</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenge of Institutional Change in South Africa’s Constitutional Democracy’ ( Delivered at the University of Stellenbosch Annual Human Rights Lecture. 6 October 2016) at 6.

<sup>26</sup> Derrida “Force of Law: ‘The Mystical Foundation of Authority’” in Cornell, Rosenfeld and Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (1992) Routledge, London at 3.

<sup>27</sup> Langa ‘Transformative Constitutionalism’ ( Prestige Lecture delivered at the University of Stellenbosch. 9 October 2006 at 2.

stokes of antiquity into lived experience of our fissured past. It weaves the soul of human narrative into South Africa's collective past.<sup>28</sup>

Language, which is an important tool through which law is communicated, is also an intrinsic connecting factor between the state and its people. It is an important medium through which government engages and communicates its intentions to people. Like in the case of Mr Derrida, who was forced by circumstances beyond his control, that is, a need to do justice to his audience, to engage in a language other than his own, similarly the force of law compels the state to engage meaningfully with the poor prior to taking decisions that impact on them. In this way the Constitution envisages a system of participatory democracy which "creates opportunities for all member of the population to make meaningful contribution to decision making".<sup>29</sup> This is a form of democracy where government views itself as a servant of the people. In such a system government engages with people and seek their participation in decision making processes affecting them.

According to Justice Khampepe "participation has to be meaningful if it is to be transformative"<sup>30</sup>, hence the title of her paper is "Meaningful Participation as Transformative Process".<sup>31</sup> In her view, "transformation is a vessel of empty rhetoric without meaningful participation".<sup>32</sup> She argues that "the purpose of meaningful participation is to engage with disagreement in a manner that allows for resolution or at least disentanglement."<sup>33</sup>

The issue of meaningful participation as a constitutional norm was dealt with by the Constitutional Court in *Port Elizabeth Municipality* where the Court found that the parties to the dispute must "engage with each other in a proactive and honest endeavour to find mutually acceptable solutions."<sup>34</sup>

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<sup>28</sup> Moseneke 'The Fourth Bram Fischer's Memorial Lecture- Transformative Adjudication' (2002) 18 *SAJHR* 309.

<sup>29</sup> Baiocchi, Glanpaola (2005) *Militants and Citizens: The Politics of Participatory Democracy in Porto Alegre*. Stanford University Press, California, USA at 37.

<sup>30</sup> Khampepe 'Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy' (Delivered at the Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 6.

<sup>31</sup> Khampepe 'Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy' (Delivered at the Stellenbosch University Annual Human Rights lecture. 6 October 2016) at 2.

<sup>32</sup> Id at 3.

<sup>33</sup> Id at 7.

<sup>34</sup> *Port Elizabeth Municipality v Various Occupiers*[2004] ZACC 7; 2005 (1) SA 217 (CC) ; 2004 (12) BCLR 1268 (CC) at

Against this background, the notion of participatory democracy with which I work in this dissertation is one that requires participation in all aspects of decision making; where the state engages in a meaningful fashion (i.e. with full regard for the “otherness” of the “other” – an openness to radically different points of view and positions); and in which transformation is central, both in that this participation should be geared to achieving transformative outcomes and is a transformative process in itself (a radically different way of doing things, an enactment of participatory democracy).

### 2.3 Historical background to protests in South Africa

South Africa has had a long history of protests in the past, even long before the dawn of democracy in 1994. Prior to the new Constitutional dispensation different forms of protest occurred in South Africa which emanated from dissatisfaction by people, mainly blacks, with the system of apartheid government which practiced segregation and adhered to the policy of separate development. Those protests were a form of internal resistance to the Apartheid system of government and its discriminatory laws and practices.

Soon after the Nationalist Party won elections under the leadership of DF Malan as Prime Minister in 1948 and became government, it formally enacted laws to define and enforce segregation. Those laws institutionalised discrimination on racial lines: “Initially, the aim of apartheid was to maintain white domination while extending racial separation”.<sup>35</sup> These laws could be classified into three categories; namely those laws that prohibited mixed marriages between whites and other races, the so called “non-whites”; racial classification of South Africans into white, black and coloureds in terms of the Population Registration Act of 1950, based on appearance; and the reservation of land and skilled work for whites as well as pass laws and an inferior system of Bantu Education.

Under Apartheid “residential areas were segregated by means of forced removals. Blacks were stripped of their land and citizenship, legally becoming citizens of one of ten tribally based self-governing homelands or Bantustans, four of which became nominally independent states. Public

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para 39.

<sup>35</sup> *Cross Resistance and Transformation: Education, Culture Reconstruction in South Africa* (1992) Johannesburg: Skotaville Publishers, Johannesburg at 5-57

services such as education, medical care and other services were segregated on racial lines and black people were provided with greatly inferior services to those provided to whites.”<sup>36</sup>

The above resulted in widespread protests by black people. Of importance in this regard was the defiance campaign of 1952 under the banner of non- violent resistance to pass laws as well as the 1954 campaign against an inferior system of Bantu Education, leading to the adoption of the Freedom Charter at the Congress of the People held in Kliptown, Soweto on 26<sup>th</sup> June 1955, “based on the principle of human rights and non- racism.”<sup>37</sup>

However, it soon became clear that the Apartheid regime was adamant in enforcing its policy of segregation. This sparked more internal resistance as more anti-apartheid protest actions were organised. In 1960, as part of the anti- pass campaign, protests in the form of marches and demonstrations were organised, one of which was held in the township of Sharpeville in the then Transvaal, now known as Gauteng. About 67 demonstrators were massacred in a clash with police at the Sharpeville Police Station on 21 March 1960, an incident which became known as the “Sharpeville massacre”.

The state harshly dealt with those behind the protests as they were subsequently arrested and charged for several crimes, including sabotage. They were tried during the period 1963-1964 in Rivonia in the trial popularly known as the Rivonia Trial and were convicted and sentenced to life imprisonment. The eleven accused included the likes of Ahmed Kathrada and Nelson Mandela, who later became the first president of the democratic South Africa in 1994, while many others were forced to go to exile. This highlighted a conundrum faced by those opposed to the apartheid regime: “the way that justice was often at odds with legality. Protesters, while rejecting the legitimacy of the racial minority state, were forced to deal with the legal system”.<sup>38</sup>

In the Rivonia Trial, “the accused addressed the problem by using the courts as a site of the struggle. They argued that the law was drawn up without the consent of the majority; it was enforced to ensure

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<sup>36</sup> Clark *South Africa - The Rise and Fall of Apartheid* (2004) Seminar Studies in History, Longman at 13-45.

<sup>37</sup> Pillay, G *Voices of Liberation: Albert Luthuli* (2003) HSRC Press. Available at [http:// www.fixya.com/albert+john+luthuli](http://www.fixya.com/albert+john+luthuli).

<sup>38</sup> Karis & Gerhart *From Protests to Challenge: A Documentary History of South African Politics in South Africa, 1882- 1964. Volume 3, Challenge and Violence, 1953- 1964* (1977) Hoover Institute Press 6- 22

the perpetuation of an unjust system, and therefore the struggle would be waged to establish a new system, including a legal system that would embody the values of a non-racial constitution that protected human rights.”<sup>39</sup>

This clearly illustrates what has been discussed above regarding the effects of lack of participatory democracy. The determination of the oppressed people to fight an illegitimate racial minority state forced them to deal with the legal system. The courts became a site where the struggle was waged.

Another example of protests was the one held in Soweto, outside Johannesburg in 1976 in opposition to an inferior system of Bantu Education. These were a series of protests led by students, in the main being high school students that began in the morning of 16 June 1976 in Soweto and spread countrywide. It is commonly said that “the 1976 Protests changed the political landscape of South Africa.”<sup>40</sup>

It is normally believed that the 1976 protests were sparked by the introduction of Afrikaans as a compulsory medium of instruction in schools. However, various factors that militated for the so called “June 16 Uprisings” can be traced back to the Bantu Education Act introduced by the Apartheid government in 1953 which introduced the Department of Native or Bantu Affairs under Hendrik Verwoerd. As part of his policy statement Verwoerd had announced that “Natives must be taught from an early age that equality with Europeans (whites) is not for them.”<sup>41</sup> This statement set the tone for the manner in which education as a socio- economic service was to be provided by government. Although it can be said that the Bantu Education Act assisted in improving physical access to schooling by more black children than had been the case with the missionary system, “there was a great deal of discontent about the lack of facilities.”<sup>42</sup>

The lack of facilities, in the form of shortage of or lack of proper classrooms for Black children, lack of teachers as the majority of them were under qualified, high pupil: teacher ratios, “the crippling

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<sup>39</sup> Joffe *The State vs. Nelson Mandela: The Trial That Changed South Africa* (2007) One World Books 6-19.

<sup>40</sup> Alistair Boddy-Evans *Day of the African Child* (2015) Available at <http://africanhistory.about.com/od/apartheid/a/Soweto-Uprising> (accessed 16 June 2015).

<sup>41</sup> Kallaway *Apartheid and Education. The Education of Black South Africans* (1984) Ravan Press, California 45- 61.

<sup>42</sup> South African History Online.

government homeland policy<sup>43</sup> as well as the inadequate provision for education by government meant that there was no proper access to basic education as a socio-economic right.

As internal resistance to apartheid grew the Apartheid government also intensified its policy of racial segregation by introducing more repressive laws and measures with the aim of suppressing and quelling protests. Among those repressive measures was the declaration of a State of Emergency, which was one of the key instruments used by the apartheid government to neutralise political dissent.

The State of Emergency was first declared in 1960, when government was faced with widespread revolt against passes. It allowed for the bypassing of legal remedies. "This resulted in the detention of thousands of political activists within a short space of time, and an exodus of some to a life in exile."<sup>44</sup> The second State of Emergency was declared in the 1980s, in particular on 25 July 1985 as well as on 12 June 1986 by PW Botha, the then Apartheid president, resulting in the killing of many protesters, detention of many people, restriction of political funerals and the banning of certain indoor gatherings.

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<sup>43</sup> Kallaway *Apartheid and Education. The Education of Black South Africans* (1984) Ravan Press, California 45-61.

<sup>44</sup> South African History Online.

However, this did not discourage the people; instead it served to fuel and intensify the struggle for freedom as people committed themselves to resist and fight the cruelty brought in their lives by the apartheid system. As people vouched to emancipate themselves from what was viewed as an unjust system of apartheid government the struggle for freedom intensified, resulting in more protests activities. “During those days protests which usually resulted in the damage of municipal properties and loss of lives for those closely associated or working for the ‘establishment’ became a norm.”<sup>45</sup>

As stated earlier, the main aim of my research is to consider whether there is any link between service delivery protests, participatory democracy and adjudication. As part of this, I seek to investigate the notion of protests in the context of South Africa, the different forms of those protests and the reasons why protests have occurred in South Africa pre and post 1994. I further seek to investigate the relationship between service delivery protests and participatory democracy or the lack thereof and the contribution that courts can make in entrenching participatory democracy, through fostering engagement between the state and the people.

So far, the above examination on the forms and causes of pre 1994 protests has clearly demonstrated that there is a link between protests and participatory democracy or lack thereof. Although the pre 1994 protests were not mainly about service delivery, such protests were mainly about the form of government or state system which was imposed by the minority on the lives of the majority of people of South Africa and which had discriminatory practices, laws and policies that impacted negatively on the majority of people without their involvement. This was clearly articulated by the accused during the Rivonia Trial whom when addressing the court, argued that the law against which they were charged “was drawn up without the consent of the majority,”<sup>46</sup> which implied that the law making process never followed any consultative or participative process. The apartheid regime imposed itself and its laws on the majority of people and this was the reason for protests at that time.

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<sup>45</sup> Lodge ‘Action against Apartheid in South Africa, 1982- 94’, in Adam Roberts and Timothy Gordon Ash (eds)

<sup>46</sup> Joffe *The State vs. Nelson Mandela: The Trial that Changed South Africa* (2007), Oneworld Publications, London 6-19



What has been illustrated in the above analysis is that when people protested against or resisted the above form of apartheid government on the basis of its illegitimacy the state introduced a lot of repressive laws and measures resulting in the infliction of lot of atrocities against innocent people so as to quell and suppress those protests. As stated above, during the Rivonia Trial the accused, while addressing the court maintained that “the law was enforced to ensure the perpetuation of an unjust system.”<sup>47</sup>

I argue that the pre-democratic protests were aimed at bringing about change or transformation, which is what Justice Langa refers to as “a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible.”<sup>48</sup> I further argue that it would not have been necessary and there would have been no need for the state to introduce those repressive laws and measures leading to the inflicting of those atrocities on people had the authorities done an honourable thing, that is, to engage people in decision making processes.

A conclusion to be drawn from the above discussion in regard to the protests that occurred in South Africa during the Apartheid era, is that this discussion has illustrated and supported the claim of this dissertation that service delivery protests are an enactment of a right to participatory democracy. This conclusion is in keeping with one of the objective of this study, namely, to investigate the link between service delivery protests and participatory democracy.

In the discussion that follows, the existing literature on the topic will be explored to support the claim as stated above.

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<sup>47</sup> Joffe (2007) *The State vs. Nelson Mandela: The Trial that Changed South Africa*. One World Books 6-19.

<sup>48</sup> Langa ‘Transformative Constitutionalism’ (Prestige Lecture delivered at the University of Stellenbosch, 9 October 2006) at 2.

## 2.4 LITERATURE OVERVIEW

### 2.4.1 Literature review on the causes of service delivery protests in South Africa Pre and Post 1994

It has been argued that there is a link between service deficit and protests. Booyesen remarks that “it is sometimes disputed whether there is a direct causal link between service deficits and protests.”<sup>49</sup> Nleya makes reference to the qualitative studies by Atkinson and Marais on the causes of protests, where it is reported that “inadequate service delivery is at the centre of protests in South Africa today.”<sup>50</sup> According to Sindane and Nambalirwa “failure of the government to deliver services to all may automatically ignite protests.”<sup>51</sup>

According to Nleya “the existing body of literature in most industrial democracies on the causes of protest activity have emphasised the important role played by existing political and economic conditions in the generation of protests.”<sup>52</sup> In terms of the theory developed by Gurr, relative deprivation is viewed as the key driver of protests and it is argued that poverty, economic want and poor living conditions rouse feelings of resentment that are responsible for protest generation.<sup>53</sup> However, Gurr’s theory has drawn considerable criticisms on several grounds: “On the one hand, considerable deprivation has not always been followed by protests. On the other hand, many protests, particularly in industrialised democracies, show considerable association with privilege.”<sup>54</sup>

#### (i) *Protests activity in South Africa Pre 1994*

In South Africa, particularly during apartheid days, protests were motivated by a number of reasons or factors which included, among others, under- and lack of proper representation in government and the non-existence of democratic systems.<sup>55</sup> People, in the main, black people, engaged in protests activity in opposition to racial discrimination. This resulted,

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<sup>49</sup> Booyesen ‘With the ballot and the brick; the politics of attaining service delivery’: *Progress in Development Studies* (2007) 7 (123) 21-32.

<sup>50</sup> Sindane & Nambalirwa *Governance and public leadership: the missing links in service delivery* (2012), *Journal of Public Administration* 47 (3) 695-705.

<sup>51</sup> Id.

<sup>52</sup> Nleya *Linking service delivery and protests in South Africa: An exploration of evidence from Khayelitsha* (2011) *Africanus* 50(1) 3-13.

<sup>53</sup> Gurr, TR ‘*Why men rebel*’ (1970) Paradigm Publishers, NJ: Princeton University 240- 323.

<sup>54</sup> Id.

<sup>55</sup> Netswera *The underlying factors behind violent municipal service delivery protest in South Africa* (2014), *Journal of Public Administration* 49 (1) 261-273.

among others, in the adoption of the Freedom Charter during the People's Congress held in Kliptown in Johannesburg in 1955. Later on, several civic movements were formed with the sole aim of resisting the apartheid regime, and to struggle against the regime for better services and equality for all.<sup>56</sup>

It can be concluded that the pre-democratic era protests were directed at fighting the apartheid system of government which was perceived as illegitimate and unrepresentative and all protests that accompanied its existence could be rationalised on moral, human rights and democratic grounds.<sup>57</sup> The pre 1994 protests were seen as forms of resistance to repressive apartheid laws and were aimed at defeating minority rule.

(ii) *Protest activity in South Africa post 1994*

There has however, been a new wave of protests that started to resurface and gained momentum post 1994, particularly during the second decade of South Africa's democracy in 2004. These protests are viewed as emanating partly, "from grievances by communities associated with deficits in service delivery – housing, water, sanitation and electricity."<sup>58</sup> "Other grievances include dissatisfaction by communities with local councils and administration that are accused of being unresponsive to the needs of the citizens, with councillors in particular standing accused of, among other things, corruption and nepotism. In addition, inequality and unemployment- especially among the youth have also featured prominently".<sup>59</sup> According to the resource model developed by McCathy and Zaid as well as Tilly it is argued that protest is facilitated by the existence of skills and resources held by individuals, like income, education and organisational membership, which are crucial in the organising of protests.<sup>60</sup>

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<sup>56</sup> Sindane & Nambalirwa *Governance and public leadership: The missing links in service delivery in South Africa* (2012) *Journal of Public Administration* 47 (3) 695-705.

<sup>57</sup> Netswera *The underlying factor behind violent municipal service delivery protests in South Africa* (2014) *Journal of Public Administration* 49 (1) 261-271.

<sup>58</sup> Booysen *With the ballot and the brick: the politics of attaining service delivery*. *Progress in Development Studies* 7 (123) 21-32.

<sup>59</sup> Nleya *Linking Service delivery and protests in South Africa: an exploration of evidence from Khayelitsha* (2011) *Africanus* 50 (1) 3-13.

<sup>60</sup> McCathy & Zaid *Resource mobilization and social movements: Partial theory* (1977) *American Journal of Sociology* 82 (6) 1212-1241.

According to Thompson and Nleya “protests are associated with a number of other factors beyond service delivery such as multiple membership of organisations operating both within and out of contexts, higher interpersonal trust, and higher trusts in national institutions.”<sup>61</sup>

In the context of South Africa different other forms of protests have been encountered since the advent of democracy. There has been protests activity associated with issues such as lesbian and gay rights, people living with HIV/Aids, opposition to urban tolling, opposition to unlawful evictions, municipal demarcations, labour protests, as well as the resent protests by students in higher education institutions against the increase in study fees, the so called “fees must fall” campaign. All these seem to confirm that factors other than simply poor service delivery are at play as causes of protest activity. Hence other commentators have maintained that protests are a form of a rebellion by the poor.<sup>62</sup>

#### **2.4.2 The relationship between service delivery protests and participatory democracy**

The question explored here is the meaning of service delivery and whether there is any relationship between service delivery, protests and the whole notion of participatory democracy. Service delivery is defined as a “systematic arrangement for satisfactorily fulfilling the various demands for services by undertaking purposeful activities with optimum use of resources to delivering effective, efficient, and economic services resulting in measurable and acceptable benefits to the customer.”<sup>63</sup> According to Friedman “in a democracy, various demands for services are made upon the would-be service providers by means of public participation and consultation processes.”<sup>64</sup> Nleya states that “purposeful activities are also ensured through these processes by transparency.”<sup>65</sup>

As encapsulated in the White Paper for Transforming Public Service Delivery of 1997, popularly known as the Batho Pele Principles, measurable and acceptable benefits to the customer are ensured by means of service standards, value for money as well as the

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<sup>61</sup> Nleya *Linking service delivery and protests in South Africa: an exploration of evidence from Khayelitsha* (2011). *Africanus* 50 (1) 3-13.

<sup>62</sup> Alexander *Rebellion of South Africa's service delivery protests- a preliminary analysis* (2010) *Review of African Political Economy* 37 (123): 25-40.

<sup>63</sup> South African Management and Development Institute: *Strategic Plan (2007/08- 2009/10)* 4-5. Available at <http://www.samdi.gov.za>.

<sup>64</sup> Friedman *People are demanding public service, not service delivery*. Available at [http:// www.dairlynews.co.za](http://www.dairlynews.co.za) (Accessed 1 September 2012)

<sup>65</sup> Nleya *Linking service delivery and protests in South Africa: An exploration of evidence from Khayelitsha* (2011) *Africanus* 50 (1) 3-13.

dissemination of accurate and timely information, as principles underpinning service delivery in the South African context.<sup>66</sup> From the above exploration it can be deduced that there is a close relationship between service delivery and protests as well as participatory democracy. It can therefore, be inferred that service delivery protests occurring in South Africa are caused by lack of consultation or engagement of the governed or communities by those in position of authority when taking decisions affecting them.

#### **2.4.3 The relationship between service delivery, public participation and democracy.**

Participatory democracy implies that people play a central role in governance and government is more people oriented and takes its tune in deciding about services to be delivered to the people from the people themselves. Hence democracy has always been defined to mean the “government of the people by the people for the people”. Service delivery on the other hand entails that public representatives know exactly what the citizen’s wants and needs are so that attempts to satisfy those needs are taken from a well-informed point of view: “Assumptions about citizen’s needs may lead to satisfaction of assumed needs.”<sup>67</sup>

According to Nleya, “the refusal by elected officials to allow the collective groups or communities the opportunity to express needs, deciding without their input what the needs are, is what fuels service delivery protests.”<sup>68</sup> Therefore according to him, “as long as these collective groups are denied the opportunity to express their need and decisions continue to be made without their input, public representatives will continue to be perceived as masters instead of servants of the people and this results in the treatment of citizens at grassroots level as mere recipients of products devised by greater powers that be, rather than intelligent contributors to the product”.<sup>69</sup>

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<sup>66</sup> Nleya *Linking service delivery and protests in South Africa: An exploration of evidence from Khayelitsha* (2011) *Africanus* 50 (1) 3-13.

<sup>67</sup> Nleya *Linking service delivery and protests in South Africa: An exploration of evidence from Khayelitsha* (2011) *Africanus* 50 (1) 3-13.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

In regard to the above the main issue is that in the whole, lack of engagement results in dissatisfaction by the people who as a result continue to air their grievances in a manner such as protests to be heard.<sup>70</sup> In Schubart Park, residents resorted to protest action about unacceptable living conditions in the residential complex known as Schubart Park. Authorities had unilaterally taken a decision to suspend the supply of water and electricity without hearing the views of the residents. Indirectly as citizens engage in protests action they actually express their right to be heard and engaged before decisions affecting them are taken by those in positions of authority, which is what is referred to in this dissertation as *an expression of a right to participatory democracy*.

## 2.5 Conclusion

The conclusion to be drawn is that the occurrence of protests, more than being reflective of lack of service delivery, importantly reflects lack of participatory democracy, which is one of the core values envisaged in the Constitution of South Africa. Hence the claim in this dissertation that service delivery protests are an enactment of a right to participatory democracy and that courts can contribute significantly to the entrenchment of participatory democracy through fostering engagement between the state and the poor people in need of service delivery.

Participatory democracy must be a connecting factor between the state and the people in a democratic system and both the judiciary, as one of the branches of government and the “people” themselves have a crucial role to play in enhancing and advancing participatory democracy. It is quite clear that service delivery protests serve to connect people with their elected representatives. Whilst there does seem to be a link between the non-delivery of socio-economic rights and protests, of paramount importance is the fact that the study seems to confirm the link between lack of participatory democracy, which is what I refer to as “participatory deficit”, and protests.

In my view it is lack of meaningful engagement, which causes protests. People are not actually angered by the lack of or the unavailability of the means to satisfy their socio-

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<sup>70</sup> Friedman *People are demanding public service, not service delivery*. Available at <http://www.dairlynews.co.za> (Accessed 1 September 2012)

economic needs. The concept of scarcity is well entrenched and known to people since it forms part of their daily lives. People are not that unreasonable so as not to appreciate the challenges that the state may be facing from time to time. But what actually angers people and makes them feel deceived is when they are left in the dark, and no one opens up and engages them whenever challenges are encountered, including exploring alternatives to overcome those challenges. People need to know what to expect through the process of participation and engagement.

The other objective of the study is to investigate notions of protests in the context of South Africa, the different forms of protests and reasons why protests occurred in South Africa pre and post 1994. This link has been confirmed in this study. The pre-1994 protests occurred mainly because of discriminatory practices of the apartheid regime, which took decisions, including the enactment of laws by the minority government affecting the majority without their involvement.

It is therefore important to state that the service delivery protests that have occurred in South Africa post 1994 more than just being concerned with grievances by communities emanating from the non-delivery of socio-economic rights by government are also a reflection of lack of participatory democracy in the so called democratic government. The tendency by government to assume what the needs of impoverished people are without hearing or engaging them about their needs is what fuels protests, since it results in the fulfilment of assumed needs.<sup>71</sup> Therefore, as long as those in positions of authority continue to take decisions or attempt to deliver services to the people without the participation of the people in decision-making, protests will never be averted. In the chapter that follows I look at how the Constitutional Court has dealt with a case(s) brought before it arising out of protests associated with living conditions and housing as a socio-economic right.

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<sup>71</sup> Nleya *Linking service delivery and protests in South Africa: An exploration of evidence from Khayelitsha* (2011) *Africanus* 50 (1) 3-13.

### 3. DISCUSSION AND EVALUATION OF THE DECISION IN *SCHUBART PARK RESIDENTS ASSOCIATION V CITY OF TSHWANE METROPOLITAN MUNICIPALITY AND OTHER RELEVANT CASES*

#### 3.1 Introduction

As stated above, the main objective of this research is to investigate the link between service delivery protests, adjudication and participatory democracy. The *Schubart Park* case to be discussed here is a classic example of a case where the link between service delivery protests, adjudication and participatory democracy was illustrated. The discussion of Schubart Park to follow here will serve to support the conclusion that I draw at the end of the study that service delivery protests are an enactment of a right to participatory democracy, and that courts, through fostering engagement between the state and the poor, can contribute significantly to the entrenchment of participatory democracy.

#### 3.2 Linking Service Delivery Protests, Adjudication and Participatory Democracy: The Case of *Schubart Park*

In the case of *Schubart Park*, residents engaged in a protest about socio-economic rights caused by deteriorating living conditions at the residential complex known as Schubart Park in Pretoria in the City of Tshwane Metropolitan Municipality. The complex is located along Schubart Street and is very close to the Pretoria City Centre. It was erected in the 1970s initially as part of a state-subsidised rental scheme to civil servants. The control of Schubart Park had been taken over by the then Pretoria Municipality in 1999. "By the time the events that led to the litigation in this matter occurred, the condition of the building had markedly deteriorated and those buildings were occupied by many persons not known to the City."<sup>72</sup>

Approximately ten days before 21 September 2011 the supply of water and electricity to the Schubart Park complex was stopped and this triggered a protest. On 21 September 2011 a number of residents embarked on a protest action about living conditions at the complex which involved the burning of tyres, the lighting of fires and the throwing of stones and objects from the buildings at oncoming vehicles and the police. Fires also broke out inside the building, burning block C. The police, with the assistance of fire brigade officers

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<sup>72</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC)* at para 3.



cordoned off the streets around Schubart Park, removing the residents of block C from the building and other residents returning from work were denied access to the building.

The residents through their legal representatives made efforts to engage with authorities on the evening of 21 September 2011, in an attempt to reach an agreement on various matters, including temporary accommodation for the people who had been made homeless by police action. However, these proved to be in vain, and when it became apparent by late morning of 22 September 2011 that the occupants of block C would not be allowed to return to the complex, the residents brought an application before the North Gauteng High Court, Pretoria (High Court), on an urgent basis at 5 pm that evening, seeking an order allowing them back into their homes. Both the City and the Minister of Police were cited as respondents in the matter.

Even this basic description of *Schubart Park* thus far already illustrates and confirms the existence of a link between service delivery or the lack thereof and protests, as well as a link between service delivery protests and the right to participatory democracy. Whilst what actually in an immediate sense triggered protest action by residents of Schubart Park was the stoppage of the supply of water supply and electricity in the complex by authorities on 21 September 2011, the living conditions in the Schubart Park resident had been deteriorating over time and there had been no successful engagement about the problems.

It is clear from the above facts that after everything else had been tried and efforts made by the residents to bring the parties to talk with a view of reaching an amicable solution to the problem had failed, the last available option was to approach the court for intervention. Although the High Court had dismissed the resident's application for re-occupation of block C that night, the Court ordered the City and the Minister to ensure that temporary accommodation offered in terms of a tender by the City be made available. The parties were further ordered to meet at the earliest opportunity in order to propose a draft order to address the further needs of the applicants and to re-approach the Court the next day.<sup>73</sup> This in essence meant that the court had been able to foster engagement between the parties in dispute.

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<sup>73</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC) at para 4.*

On 23 September 2011 the matter was postponed to 3 October 2011, with a second order, which kept in place the temporary arrangements of the previous night's order, with a direction to parties to take further steps in an attempt to reach agreement on unresolved matters.<sup>74</sup> In this way the court again directed the parties to engage with each other. Whether the resulting engagement was meaningful and had resulted in "meaningful participation"<sup>75</sup> by the poor, as envisaged in the Constitution of South Africa as well as by Justice Khampepe in her work entitled "Meaning Participation as Transformative Process"<sup>76</sup> is another issue, as was be seen when the matter subsequently proceeded on appeal to the Constitutional Court.

The residents of block B and C who had remained in the building during the police operation were also removed from the building a week after 23 September 2011. The parties could not reach an agreement on a further order and as a result between 3000-5000 people found themselves either homeless or in temporary shelters. During its subsequent sitting on 3 October 2011 the High Court issued an order confirming some of the arrangements for immediate assistance. The court order further provided "that any resident of Schubart Park who had been affected by the dismissal of the application could accept the tender by the City and that upon acceptance, the tender would operate as an order between the City, the Minister and that person."<sup>77</sup> The applicants' leave to appeal was refused by both the High Court and the Supreme Court of Appeal, leaving the applicants will only one option, to approach the Constitutional Court for relief.

The matter was then brought before the Constitutional Court concerning the right under section 26(3) of the Constitution, that is, "the right not be evicted from one's home without an order of court, made after considering all the relevant circumstances."<sup>78</sup> This was an appeal for the Court to set aside the High Court order(s) issued on 22 and 23 September

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<sup>74</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipallty 2013 (1) SA 323 (CC) at para 7.*

<sup>75</sup> Khampepe 'Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy' ( Delivered at Stellenbosch University's Annual Human Rights Lecture. 6 October 2016) at 7.

<sup>76</sup> Khampepe 'Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy' (Delivered at the Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 2.

<sup>77</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC) at para 10.*

<sup>78</sup> Section 26(3) of the Constitution.

2011 (dismissal order) in which the High Court had dismissed the application by residents for immediate re-occupation of the building known as Schubart Park in Pretoria and also the subsequent order issued on 3 October 2011 relating to the implementation of the City's tender (tender implementation order).

In terms of the tender implementation order the City would among other things provide temporary habitable dwellings, including storage facilities to those residents who were forced to vacate the Schubart Park block of flats because of fire whilst the City is involved in the refurbishment and renovation of the building, subject to advice by the City's technical division whether the building should be refurbished or demolished. "Subsequent to the refurbishment and renovation of the Schubart Park blocks of flats the City would relocate residents to Schubart Park subject to the provision of proof of their right to occupy the property as well as the Resident's right of occupancy in the Republic of South Africa."<sup>79</sup>

Without any objection from the applicant or the City the Socio-Economic Rights Institute of South Africa (SERI) was admitted as *amicus curiae* to the proceedings. The Minister of Police opted not to be represented when the matter was subsequently brought on appeal before the Constitutional Court.

The matter concerned the right under section 26(3) of the Constitution, namely the right not to be evicted from one's home without an order of court, made after considering all the relevant circumstances.<sup>80</sup> The matter therefore, concerned a constitutional issue of major importance. Reasonable prospects of success, in the Courts view, existed on the matter. There were also no material countervailing factors that militated against a finding that it was in the interest of justice to grant leave. The Court therefore, granted leave to appeal.

### *The appeal*

Residents approached the Constitutional Court for relief that would enable them to reoccupy the building after they had been removed from it on a situation of urgency.

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<sup>79</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 12.

<sup>80</sup> Section 26(3) provides:

"No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary eviction".

On appeal applicants (residents) and SERI made common cause in the appeal. “They contended that the dismissal order was not justified in that it amounted to an order of eviction of the applicants without any lawful foundation and hence contravening section 26(3) of the Constitution”. The applicants further “attacked the factual basis relied upon for the dismissal order and sought to introduce further evidence to counter the evidence presented by the City about the state of the buildings.”<sup>81</sup> “The applicants further contended that the tender implementation order was not relief that could appropriately have been granted under section 38 of the Constitution,” hence an application to have it set aside.

In defence the City filed an affidavit in which it sought to rely on various statutory bases for the removal of residents from their homes in Schubart Park. However, this line of argument was not pursued in subsequent oral arguments. The City then sought to justify the dismissal order made by the High Court, by confining its oral evidence to the defence of impossibility and safety it made before the High Court which served as the basis for the factual finding the High Court had made. As far as the tender implementation order is concerned the City contended that the order was premised on an acceptance that the applicants were entitled to re-occupation of their homes in Schubart Park if that were possible.

On appeal the main issue to be decided by the Constitutional Court was whether the High Court was correct in issuing the orders it did, namely the dismissal order and the tender implementation order. The applicant also attacked the factual basis relied upon by the High Court for the dismissal order, and sought an order for restoration on the ground that they were evicted from their homes without an order of court as required by section 26(3) of the Constitution, the fact which despoiled them of possession of their homes.

In deciding the matter the Constitutional Court analysed the reasoning used by the Supreme Court of Appeal in *Rikhotso*<sup>82</sup> and *Tswelopele*<sup>83</sup> as far as the application of a spoliation order or the *mandament van spolie* is concerned. As explained by the Supreme Court of Appeal in *Tswelopele* the remedy of spoliation or *mandament van spolie*, is aimed at restoration of possession and its effect is that “anyone illicitly deprived of property is entitled to be

**Comment [U1]:** Insert full footnote reference to these two cases.

<sup>81</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality*, 2013 (1) SA 323 (CC) at para 18.

<sup>82</sup> *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (WLD) at 535- B.

<sup>83</sup> *Tswelopele Non-Profit Organisation and Others v City of Tshwane Municipality and Others* 2007 (6) SA 511 (SCA) at para 21

restored to possession of such property before anything else is decided. Even an unlawful possessor such as thief or a robber is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the Court will decide competing claims to the object or property."<sup>84</sup>

The main issue here is whether a *spoliation* order actually determines the lawfulness of competing claims to the object or property and according to the Court it does not. According to the Court there are only a limited number of defences available to a spoliation claim, with impossibility being one of them.<sup>85</sup> In *Rikhotso* the court held that a spoliation order may not be granted if the property in issue has ceased to exist and that a spoliation remedy is only a remedy for the restoration of possession, not for the reparation.<sup>86</sup>

This closely tracks the reasoning by the Supreme Court of Appeal in *Tswelopele*. In *Tswelopele* the Supreme Court of Appeal was called upon to decide an application for a spoliation order by about hundred people who had been removed from their homes in a vacant piece of land in Garsfontein, a suburb in Pretoria. As they were being removed the materials used in the construction of their dwellings had been destroyed, with the results that they could not be restored to the possession of their homes. In deciding the matter the High Court followed the reasoning in *Rikhotso* and held that because of their destruction it could not order restoration under the *mandament van spolie*.<sup>87</sup> However, when the matter was brought on appeal the difficulty that faced the Supreme Court of Appeal was whether the High Court's ruling meant that the people whose homes had been destroyed were left remediless.

In *Fose*, Kriegler J noted that "the harm caused by the violation of the Constitution is harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise."<sup>88</sup> So the Court held that our object of remedying

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<sup>84</sup> *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA (SCA) (Tswelopepe).

<sup>85</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 24.

<sup>86</sup> *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997 (1) SA 526 (WLD) at 535 A-B.

<sup>87</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 25.

<sup>88</sup> *Fose v Minister of Safety and Security* (1997) ZACC, 6: 1997 (3) SA 786 (CC): 1997 (7) BCLR 851 (CC) at para 95.

these kinds of harms should, at least, be to vindicate the Constitution. According to Kriegler vindication recognises that a Constitution has as little or as much weight as the prevailing political culture affords. According to him the remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but on all.<sup>89</sup>

It is important to note that although the distinction between common law requirements for spoliation and that of constitutional relief under section 38 of the Constitution was upheld by the court in *Tswelopele*, it must be kept in mind that the court granted the eventual constitutional relief in a matter that was brought purely as a *spoliation* application. It was only in their founding affidavit where applicants had raised the section 26(3) aspect.<sup>90</sup>

In regard to *Tswelopele*, the Constitutional Court in *Schubart Park* concluded that it is conducive to clarity to retain the “possessory focus” of the spoliation remedy and keep it distinct from constitutional relief under section 38 of the Constitution. According to the Court this is so because the order made in relation to factual possession in spoliation proceedings does not in itself directly determine constitutional rights, “but merely sets the scene for a possible return to the status quo, in order for the subsequent determination of constitutional rights in relation to the property.”<sup>91</sup>

Therefore, according to the Court, by implication this means that the spoliation proceedings whether they result in restoration or not, should not serve as the judicial foundation for permanent dispossession in terms of section 26(3) of the Constitution.<sup>92</sup> Echoing Kriegler J in *Fose*, the spoliation remedy should instil humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the right of all.

#### *Appropriate relief under section 38 of the Constitution*

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<sup>89</sup> *Fose v Minister of Safety and Security* [1997] ZACC, 6: 1997 (3) SA 786 (CC): 1997 (7) BCLR 851 (CC) at para 96.

<sup>90</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality and others*, 2012 para 28.

<sup>91</sup> *Id* at para 29.

<sup>92</sup> *Id* at para 30.

The question before the Court was “could the dismissal order and the later tender implementation order, legitimately count as ‘appropriate relief’ under section 38 of the Constitution.”<sup>93</sup>

The contention by applicants that the High Court erred in its assessment of the facts relating to the dangerous conditions of the building, as well as their application for leave to introduce further evidence on the condition of the building were both found by the Court to be defective and as a result dismissed, the reason being that such a contention did not raise a constitutional matter that required adjudication in the Court. Whilst SERI accepted that the matter had to be determined on an acceptance of the facts found by the High Court, the key question was whether those facts did in actual fact justify a conclusion that impossibility, which is a valid defence to spoliation, had been established.<sup>94</sup> But upon the proper reading of the orders made by the High Court it was found that the High Court orders were not based on a finding of impossibility. In actual fact “the Judge conceded that the orders he made, including the dismissal of the order seeking immediate restoration, were justified by the provisions of section 38 of the Constitution.”<sup>95</sup>

As far as the determination of appropriate relief is concerned the Court made reference to its previous decision in *Hoffman* where it held that:

The determination of appropriate relief calls for the balancing of various interests that might be affected by the remedy. The balancing process must at least be guided by first, the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief, “we must carefully analyse the nature of the constitutional infringement and strike effectively at its source.”<sup>96</sup>

It is important to note that the disregard of or the infringement of the applicants’ right not to be evicted without a court order was the basis on which the High Court orders were

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<sup>93</sup> *Schubart Park Residence Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 31.

<sup>94</sup> *Id* at para 32.

<sup>95</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 32.

<sup>96</sup> *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 45.

being challenged. Effectively the High Court orders were viewed by the Constitutional Court as having the effect of condoning a profoundly illegal act as they failed to provide the applicants with any effective relief. Hence the Court found that there was merit in the applicants' argument that the relief granted by the High Court fell short of what was required, although the Court felt that the criticism might have been overstated.

It is worth noting that the Constitutional Court acknowledged the fact that the initial order granted on 22 September 2011 was made under very difficult circumstance. It was made late at night after hearing oral evidence in relation to violent protests action that was finally brought under control only that same day. The Court remarked that the factual assessment of immediate danger resulting from the fires to the lives of the residents, including elderly people and children, made by the Judge could not be second-guessed in the Court. Hence the Constitutional Court would find it difficult to fault the immediate effect of the order.<sup>97</sup>

However, the critical question before Court was whether that immediate order pronounced in a final way upon the lawfulness of the applicants' removal from their homes, and according to the Court if it did, whether it was legally incompetent. But in the Court's view what emerged from the High Court orders was not as clear cut as that. According to the Court upon closer study "the first order of 22 September 2011 included a provision that the parties should meet to prepare a draft order aimed at meeting the needs of the applicants as best as possible under the circumstances and to approach the High Court again the next day".<sup>98</sup> However, the next day the parties presented the draft order whose premise was that only those residents who accepted the City's tender would be returned to Schubart Park after refurbishment or renovation. This was even made much clearer by the final order of 3 October 2011, which provided for the immediate commencement of the refurbishment or renovation of Schubart Park, with the view of completing the process within 18 months, the period which could only be extended either by agreement or by order of Court. In terms of the above final High Court order permanent alternative accommodation could come into the picture only if that could not happen.<sup>99</sup>

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<sup>97</sup> *Schubart Part Residents Association v City of Tshwane Metropolitan Municipality* 2012 (1) SA 323 (CC) at para 36.

<sup>98</sup> *Id* at para 36.

<sup>99</sup> *Id* at para 36.



As far as the above High Court orders are concerned the Constitutional Court found the following deficiencies in the High Court orders which served as the basis of its judgement. Firstly, the Court found some ambiguity and contradiction in the assumption made in the orders, that the residents were entitled to return to Schubart Park as this was incompatible with the interpretation that the orders finally disentitled the residents from restoration of occupation to their homes.<sup>100</sup> Only those residents who accepted the City's tender would be returned to Schubart Park after completion of refurbishment and renovation.

According to the Court great caution must be exercised in making an order under section 38 of the Constitution in a spoliation application, especially where the alleged dispossession involves the removal of people from their homes. The Court stated that where urgency dictates that immediate restoration will not be ordered it must be made clear, preferably by a declaratory order to that effect. Secondly, according to the Court, "the refusal to order re-occupation does not purport to lay a foundation for a lawful eviction under section 26(3) of the Constitution. The Court held that such an order must be temporary only and be subject to revision by the court. According to the Court "urgent orders of this kind will be rare and there is legislation providing for the timeous removal of people living in unsafe buildings,<sup>101</sup> for temporary evacuation in disaster situations<sup>102</sup> and for eviction in the normal course.<sup>103</sup>

According to the Constitutional Court the High Court orders fell short of the protection provided for in section 26(3) of the Constitution in a number of ways. Firstly, it provided for the occupation of the property only by those residents who accepted the tender. Those who did not accept are left without a remedy. Secondly, restoration to Schubart Park is made conditional upon proof of their right of occupancy to the property and their right of occupancy in the Republic of South Africa. Thirdly, although the High Court order provides for court access in relation of time, it did not do so in respect of the vitally important eventuality where restoration is stated to be impossible. In that case the only alternative residents had was the alternative habitable dwellings.<sup>104</sup>

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<sup>100</sup> *Schubark Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 37.

<sup>101</sup> *Id* at para 38.

<sup>102</sup> *Id* at para 38.

<sup>103</sup> *Id* at para 38.

<sup>104</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at

In summary, the Constitutional Court read the High Court order as accepting (1) that the removal of the residents was not a lawful eviction; (2) that the removal was instead temporarily necessary in order to save lives; (3) that the residents were entitled to re-occupation once it was safe to do so; and (4) that if it could not be made safe, those residents who accepted the tender must be provided with alternative accommodation, without the City having to come to court to effect what would then be an eviction that does not comply with section 26(3) of the Constitution.<sup>105</sup> In conclusion the Court accepted that in those particular circumstances of the case (1), (2) and (3) were legally permissible but that (4) was not.

### *Supervision and engagement*

The Court held that supervision and engagement orders normally accompany eviction orders where they relate to the provision of temporary accommodation pending final eviction. But in the Court's view there is no reason why such an order cannot be made in other circumstances where it is appropriate and necessary to do so. Hence, the Court held that section 38 is wide enough to accommodate that. Further to this the Constitutional Court accepted that in the particular circumstances of the matter the High Court used the provisions of section 38 to ensure that the needs of residents were seen to.

Although the Court considered some of the provisions as being inadequate in view of the conclusion reached earlier, the Court still held that reason for making provision for engagement and supervision existed. However, the Court was concerned about the fact that it was already more than a year after the residents were removed from their homes. Furthermore, the Court held that finding out who the residents were, where they were, and whether they still needed to re-occupy their homes, would require co-operation between them and the City.<sup>106</sup>

According to the Court many provisions in the Constitution require the substantive involvement and engagement of people in decisions that may affect their lives.<sup>107</sup> This is the

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para 40.

<sup>105</sup> Id at para 41.

<sup>106</sup> Id at para 42.

<sup>107</sup> Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 12 (1) *African Human Rights Law Journal* at 1.

issue that the Constitutional Court has recognised in its previous decisions relating to political decision making,<sup>108</sup> access to information,<sup>109</sup> freedom of expression,<sup>110</sup> freedom of association,<sup>111</sup> and socio-economic rights.<sup>112</sup> Hence the Court held that the cases dealing with the right to have access to adequate housing<sup>113</sup> were of relevance to the case in question, and the protection from arbitrary eviction or demolition of their homes under the Constitution.<sup>114</sup>

The above finding of the Court accords well with the claim I am making in this dissertation that service delivery protests are an enactment of a right to participatory democracy and that courts, through fostering engagement between the state and the impoverished people, can contribute meaningfully to the entrenchment of participatory democracy. The fact that the Court found it appropriate and necessary to order the parties to engage with each other with a view of reaching an amicable solution to the problem confirms the above claim.

By ordering engagement between the parties in dispute the Court embarked on “transformative adjudication”<sup>115</sup> and “gave a voice to the marginalised, as well as contributed forwards the restoration of their human dignity.”<sup>116</sup>

The Court had dealt with the issue of meaningful participation as a constitutional norm to a certain extent in its other previous decisions, namely in *Grootboom*,<sup>117</sup> *Kyalami*<sup>118</sup> and *Modderklip*,<sup>119</sup> although not exhaustively. In *Port Elizabeth Municipality* the Court found

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<sup>108</sup> *Doctors for life International v Speaker of the National Assembly and Other* [2006] ZACC 11, 2006 (6) SA 416 (CC); 2006 (2006) (12) BCLR 1399 at para 55.

<sup>109</sup> *South African Broadcasting Corp Ltd v National Director of Public Prosecution and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC) para 27-9.

<sup>110</sup> *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Other (Treatment Action Campaign and Another as Amici Curiae* [2005] ZACC at para 113.

<sup>111</sup> *Khumalo and Other v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 141.

<sup>112</sup> *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13 at para 66.

<sup>113</sup> Section 26(1) and (2) of the Constitution.

<sup>114</sup> Section 26 of the Constitution.

<sup>115</sup> Moseneke ‘The Fourth Bram Fisher Memorial Lecture- Transformative Adjudication’ (2002) 18 *SAJHR* 309.

<sup>116</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 49.

<sup>117</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 87.

<sup>118</sup> *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) at para 11.

<sup>119</sup> *President of the Republic of South Africa and Another v Modderfontein Boerdery (Pty) Ltd* (5) SA 3 (CC) at para 48.

that parties to a dispute must “engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.”<sup>120</sup>

In the Court’s view the above provisions enable judges to appreciate the interrelation between different rights and interest<sup>121</sup> as well as the fact that the exercise of these often competing rights and interests can best be resolved by engagement between the parties.

In *PE Municipality* the importance of engagement between the parties in dispute was expressed by the Court where it held that “[i]n seeking to resolve the above contradictions, the procedural and substantive aspects of justice and equity cannot always be separated” and that “the managerial role of the courts may need to find expression in innovative ways.”<sup>122</sup> Thus, according to the Court, one “potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a proactive and honest endeavour to find mutually acceptable solutions.”<sup>123</sup>

In this way the Court emphasised “a need to recognise the importance of engagement without preconceptions about the worth and dignity of those taking part in engagement process.”<sup>124</sup> Hence the Court stated that “those seeking eviction should be encouraged not to rely on concepts of faceless and anonymous squatters automatically to be expelled as obnoxious social nuisance.”<sup>125</sup> According to the Court such a stereotype has no place in the society envisaged by the Constitution, since justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity.

On the same line the Court further held that those who find themselves compelled by poverty and landlessness to live in shacks on the land of others should be discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral

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<sup>120</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7 2005; (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 39.

<sup>121</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) at para 95.

<sup>122</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 40

<sup>123</sup> *Id* at para 41.

<sup>124</sup> *Id* at para 41

<sup>125</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 50.

agency.”<sup>126</sup> In other words, they should still be able to engage so as to change their situation for the better. This is what Friedman meant when he said “the people best able to decide what the poor need are of course the poor themselves. They must act to change their world. Action by the poor may be the only way to ensure lasting change.”<sup>127</sup>

According to the Court in *Schubart Park*, the above particularly applies to those who bear the responsibility in providing access to adequate housing under the Constitution.<sup>128</sup> This is line with the reasoning of the Court in *Port Elizabeth Municipality* where it was held that the duties of municipalities extend beyond the development of housing schemes, to treating those within their jurisdiction with respect.<sup>129</sup>

In *Olivia Road*<sup>130</sup> the Constitutional Court had to determine whether an order sought by the City of Johannesburg evicting residents of a derelict building was constitutional. The Court found that the eviction order was not constitutional. In making such a finding the Court held that a municipality which ejects people from their homes without first meaningfully engaging with them acts in a manner that is at odds with the spirit, purport and purposes of constitution obligations. In this case Justice Yacoob stressed that those in need of housing should not be seen as a “disempowered mass.”<sup>131</sup> According to the Court the state has an obligation to negotiate with them reasonably and in good faith, taking into consideration their situation and grievances.<sup>132</sup>

The process of engagement will work only if both sides act reasonably and in good faith. The Court stated that “people who might be rendered homeless as a result of an order of eviction must, in turn, not content themselves with an intransigent attitude or nullify the engagement process by making non-negotiable, unreasonable demands”.<sup>133</sup> According to

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<sup>127</sup> Friedman ‘How can courts help combat social ills’. Available at [http:// www.newage.co.za](http://www.newage.co.za) (accessed 26 August 2014)

<sup>128</sup> *Schubart Park Residence Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 47.

<sup>129</sup> *Port Elizabeth Municipality v Various Occupiers* {2004} ZACC 7; 2005(1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 39.

<sup>130</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) at para 18.

<sup>131</sup> *Occupiers of 51 Olivier Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (CC) at para 20.

<sup>132</sup> *Id* at para 20

<sup>133</sup> *Id* at para 21

the Court people in need of housing must not be regarded as a disempowered group. They need to be proactive and not purely defensive. According to the Court civil society organisations that support the people’s claims should preferably facilitate the engagement process in every way possible.<sup>134</sup>

The Court further stated that in any eviction proceeding at the instance of a municipality therefore, the provision of a complete and accurate account of the process of engagement, including at least the reasonable efforts of the municipality within that process, would ordinarily be essential. The Court remarked that “the absence of any engagement or the unreasonable response of a municipality in the engagement process would ordinarily be a weighty consideration against the grant of an ejection order.”<sup>135</sup>

In *Joe Slovo*,<sup>136</sup> the issue of the legality of a planned eviction and relocation of twenty thousand people was brought before the Court. The Court held that the eviction could go ahead as planned, but subject to certain conditions, including that an on-going process of meaningful engagement about various facets of the eviction be carried out.<sup>137</sup> This order, although it had been backed by five concurring judgements, it has come under serious criticism for watering-down the requirement of meaningful engagement developed in *Olivia Road*.<sup>138</sup>

In spite of the criticism and the legal debate about the manner in which the *Joe Slovo* case was decided one should not, however, detract from the overarching importance the Court placed on meaningful participation in facilitating the remedy. According to Khampepe “the reasons for participation may vary from bubble to bubble, and a formalistic analysis of its genesis is not always helpful.”<sup>139</sup>

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<sup>134</sup> *Occupiers of 51 Olivier Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 at para 21.

<sup>135</sup> *Id* at para 21.

<sup>136</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) at para 11.

<sup>137</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) at para 12.

<sup>138</sup> Pillay ‘Towards effective social and economic rights adjudication : The role of meaningful engagement’ (2012) 10 *Intl J Constitutional Law* 732.

<sup>139</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at the Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 8.

The importance of meaningful participation was reiterated by the Court in its subsequent decisions. This includes *Blue Moonlight*,<sup>140</sup> where the requirements of meaningful engagement were expanded upon by the Court. According to Khampepe “case law on the need for meaningful engagement in the legislative making process is helpful because it makes explicit that participation is an ‘end to be achieved’, and not merely a means to an end”.<sup>141</sup> This quotation is taken from the *Doctors for Life*<sup>142</sup> case, which for many reasons is regarded as ground breaking. According to Khampepe participation is “a process of constant renewal, an inexhaustible obligation to seek justice.”<sup>143</sup>

As much as these remarks were made by the Court in cases relating to eviction orders, they are, according to the Court, equally, if not more, relevant in a case like *Schubart Park*. In *Schubart Park* the applicants were as a matter of law entitled to a restoration of their occupation but were nevertheless deprived of that restoration for a long period. According to the Court not only did their inherent right to dignity<sup>144</sup> entitle them to be treated as equals in the engagement process, but also their legal entitlement to return to their homes absent a court order for their eviction. According to the Court, it is so that the High Court could not immediately order restoration, but should have as a matter of law issued a declaratory order indicating the residents’ eventual entitlement to restoration.<sup>145</sup>

The Court held that the City’s tender was an inadequate basis for a proper order of engagement between the parties. This, in the Court’s view, incorrectly proceeded from a “top down” premise, namely that the City will determine when, for how long and ultimately whether at all, the applicants may return to *Schubart Park*. The unfortunate part, according to the Court, was that the history of the City’s treatment of the residents of *Schubart Park*

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<sup>140</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC) at para 76.

<sup>141</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 141.

<sup>142</sup> *Id* at para 142.

<sup>143</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 9.

<sup>144</sup> See *Grootboom* above n 35 at para 23, 44, and 83 and *Olivia Road* n 5 at para 16.

<sup>145</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323(CC) at para 49.

also showed that they appeared to regard them, generally, as “obnoxious social nuisances,”<sup>146</sup> who contributed to crime, lawlessness and other social ills.

What further perturbed the Court is what stopped the City and law enforcers from dealing with individuals in Schubart Park who were guilty of or contributed to these ills in accordance with the provisions of the law relating to them. The analogy to be drawn from the above is that in seeking an eviction order the authorities acted with an ulterior motive, namely to get rid of those regarded by them as social nuisance who according to them were behind lawlessness, criminal activities and social ills.

According to the Court the engagement part of the order issued in terms of section 38 should provide for meaningful engagement with the applicants at every stage of the reoccupation process.<sup>147</sup>

In *Blue Moonlight* the Court held that since it was uncertain how long that process would take, it was necessary for supervision by a court of the progress in that regard.<sup>148</sup> The Court held that experience has shown that this should be done by a High Court.<sup>149</sup>

On the basis of the above arguments, the Court came to a decision to uphold the applicant’s appeal and set aside the two orders made by the North Gauteng High Court and declared them as not constituting an order for the resident’s eviction as required by section 26(3) of the Constitution. The parties were ordered to engage meaningfully with each other in order to give effect to the declaratory order. The parties had to engage with one another with a view to reaching an agreement on the identification of the residents who were in occupation of Schubart Park prior to the 21 September 2011 removal, the date when the identified residents’ occupation of Schubart Park will be restored, the manner in which the City will assist the identified residents in the restoration process, as well as the manner in which the identified residents will undertake to pay for services supplied to Schubart Park by the City on restoration of occupation, etc.<sup>150</sup>

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<sup>146</sup> *Id* para 50.

<sup>147</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CCz) at para 51.

<sup>148</sup> *Id* at para 50.

<sup>149</sup> *Id* at para 51.

<sup>150</sup> *Id* at para at 51.



### 3.3 Conclusion

It is clear from the above analysis of *Schubart Park*, especially based on the Constitutional Court's ruling on this case that courts have an important role to play in advancing and can contribute significantly to the entrenchment of participatory democracy. What this chapter confirms is that the role of Courts in a democracy cannot be reduced to that of a spectator. Courts have a significant role to play in the entrenchment of participatory democracy and the court can achieve this through fostering engagement between the state and the poor people.

The role of the court mentioned above also enables it to contribute significantly in the fight for social justice as envisaged in South Africa's Constitution. This chapter illustrates that the prevailing circumstances of each case may at times necessitate or persuade the court to tolerate a rather unlawful action. For example, in the case of *Schubart Park*, which is under review here, the eviction of residents from Schubart Park without a court order, although unlawful, might have been necessary to protect lives from the imminent danger resulting from violent protests. This was also the case in *Joe Slovo*, where the Court "ordered that the eviction could go ahead, subject to certain conditions, including that an on-going process of meaningful engagement about various facets of the eviction be carried out."<sup>151</sup> While appreciating the difficult circumstances under which the High Court had to hear the application by residents for restoration to their homes, what seems to be emphasised in the analysis of the Constitutional Court's judgement on appeal is that in light of the supremacy of the Constitution, any act or conduct, which is effected in violation of the Constitution, even if it may have been necessitated by the prevailing circumstances at the time, would still be unlawful and hence invalid. The concern which the Constitutional Court had with this was with the order being ordered as final instead of an interim order and the orders finally disentiitling the residents from restoration of occupation of their homes.

Of importance here is that if the Court would have upheld the High Court ruling this would have confirmed the view of those who maintain that "courts may play the role of either

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<sup>151</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] 16;; 2010 (3) SA 454 (CC) ; 2009 (9) BCLR 847 (CC) at para 13.

safeguarding and advancing or effacing and overlooking democratic participation and citizenship.”<sup>152</sup> This is the main reason why the approach adopted by the Constitutional Court in *Joe Slovo* had come under criticism for watering down the requirement of meaningful engagement. In *Joe Slovo* the Court had to decide on the legality of a planned eviction of twenty thousand residents from the Joe Slovo informal settlement, Western Cape. There the Court had ordered that the eviction could go ahead as planned, subject to certain conditions, including that an on-going process of meaningful engagement about various facets of the eviction be carried out.<sup>153</sup> The main reason for the criticism against the Court is that engagement carried out after eviction would be after the fact and would therefore not be meaningful.

I argue in this study that if courts were to play their role of safeguarding meaningful engagement between the state and the poor then the interests of the poor would be protected and as such service delivery protests that we have seen in South Africa in the past and today would have been averted. To fully realise participatory democracy courts must not compromise on their role of fostering engagement between the parties as this contributes to the entrenchment of participatory democracy as envisaged by our Constitution.

However, the role of championing social justice and entrenching participatory democracy cannot be limited to that of courts alone. The role of courts should be complementary to that of the people, as “the people best able to decide what the poor need are of course the poor themselves.”<sup>154</sup> According to Klare, “in some meaningful, more than merely symbolic sense, a mobilised and engaged grass root is another “branch” of government.”<sup>155</sup> Since the people decide who they put into power to represent them in government, they should also have the power to decide the form and nature of such representation. Hence a need to engage the people in decision making processes of government is critical.

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<sup>152</sup> Botha ‘Representing the poor: Law, poverty and democracy’ (2011) Stellenbosch Law Review at 521.

<sup>153</sup> Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others [2009] ZACC 16 ; 2010 (3) SA 454 (CC); 2009 (9) BCRL 847 at para 9.

<sup>154</sup> Friedman ‘How can courts help combat social ill’. Available at [http:// www. Newage.co.za](http://www.Newage.co.za) (accessed 26 August 2014).

<sup>155</sup> Klare ‘Self Realisation, Human Rights, and Separation of Powers: Democracy Seeking Approach’ ( University of Stellenbosch Tenth Annual Human Rights Lecture, 20 August 2015) 456.

In most instances when parties, namely elected representatives and the people, fail to engage meaningfully with one another, this usually leads to misunderstanding between them that results in disputes. Courts are then usually called upon to mediate with the view to helping to resolve the impasse. Whenever courts are called upon to help it is not necessarily the intention of the parties that the court takes over the process. The parties, especially the poor, expect the court to mediate and to create a platform for them to engage. How conducive the climate becomes depends on the approach of the court in facilitating the engagement process and the manner this helps them resolve their impulse. The role that ultimately gets accorded to the court in the process is determined by the approach adopted by the court and that of a presiding judge(s) in the process. As will be discussed in the chapter that follows, the judge's approach is always influenced by how he or she conceives of democracy. It is not the mere involvement of the court that determines whether the court becomes a champion of participatory democracy or not. The court's involvement may serve either to affirm or overlook the right of the poor to democratic participation and citizenship.<sup>156</sup>

In *Schubart Park*, the fact that the issue started as a grievance by residents emanating from dissatisfaction with the conditions of living in the residential complex known as Schubart Park and escalated into a service delivery protest, resulting in a dispute in Court clearly illustrates the existence of a link between service delivery, protests, adjudication and participatory democracy which is the main claim of this dissertation. This supports the expression forming the basis of this research, that *service delivery protests are an expression of a right to participatory democracy* and that courts, through fostering engagement between the state and the poor can contribute significantly to the entrenchment of participatory democracy. The realisation of this right calls for the courts to play their role meaningfully and for parties to engage with one another with mutual respect and act in good faith towards each other. What I suggest here is that when the state and the people fail to enter into meaningful engagements with each other democracy tends to be eroded, resulting in the eruption of protests, which at times tend to be accompanied by violence, as it was the case in *Schubart Park*.

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<sup>156</sup> Botha 'Representing the poor, law, poverty and democracy' (2011) *Stellenbosch Law Review* 3, at 521.

#### **4. CRITICAL ANALYSIS, EVALUATION AND INTERPRETATION OF THE COURTS' APPROACH IN THE FIGHT FOR SOCIAL CHANGE AND JUSTICE BASED ON THE DISCUSSION OF *SCHUBART PARK***

##### **4. 1. Introduction**

A critical question asked in this dissertation, is whether there is any link between service delivery protests, adjudication and participatory democracy. This is in line with the objectives of the research, namely: one, to investigate the notion of protests in the context of South Africa, with reference to the forms of protests and the reasons why protests have occurred in South Africa pre and posts 1994; two, to investigate the relationship between service delivery protests and participatory democracy; three, to investigate the role of courts in the fight for social justice and change, as well as the contribution that the judiciary or courts can make through fostering engagement between the state and the people, to the entrenchment of participatory democracy.

In pursuance of the research objectives stated above the discussion that has preceded this chapter has focused more on the relationship between protests, in particular service delivery protests and participatory democracy. This preceding discussion and an examination of *Schubart Park* has confirmed the contention that service delivery protests are an enactment of a right to participatory democracy.

In the discussion that follows, through the analysis and evaluation of the Court's approach in *Schubart Park*, more attention will be paid to the third and fourth objectives of the research, namely, to investigate whether there is any relationship between the right to participatory democracy and socio economic rights litigation; and the significant contribution that courts can play in the advancement and entrenchment of participatory democracy.

In furtherance of the above this chapter begins with different academic and legal debates on the role that should be played by courts in socio- economic rights disputes. Here, the aim is to examine and analyse critically the approach adopted by courts and how the Constitutional Court in the exercise of its adjudicative jurisprudence as the highest court in the land on constitutional matters has been able to foster the engagements between the

parties in dispute and whether this has assisted in safeguarding and enhancing participatory democracy or not.

#### 4.2 The role of courts in socio-economic rights disputes

There seems to be divergent views on the role that the judiciary should play in the fight for social justice, particularly, in socio-economic rights disputes. These views are informed by different theoretical perspectives on this subject. Among those academics who are very critical and sceptical about the role that the judiciary should play in the fight for social change and justice, particularly, in socio economic right disputes is Steven Friedman. According to Friedman “the more the courts do to fix poverty and inequality directly, the more likely it is that people will remain poor and unequal.”<sup>157</sup>

Other legal academics have for some time argued for courts to help the fight for social justice. However, according to Friedman, “this debate has been confined to law journals and has hardly registered in the public domain.”<sup>158</sup> For example, Henk Botha in his work entitled “representing the poor: law, poverty and democracy”<sup>159</sup> uses the term “representation” to refer to different contexts and settings. On one hand the term “representation” is used to denote the ways in which the interest and viewpoints of the poor are voiced, championed, overlooked and or effaced through representative legislative bodies. On the other hand, the term “representation” is used to refer to the ways in which the courts, through constitutional interpretations and enforcements affirm and reinforce the rights of the poor to democratic participation and citizenship.<sup>160</sup>

Botha further considers different judicial understandings of democracy and the extent to which these understandings can help reinforce the effective representation of the poor and affirm their right to democratic participation and citizenship. Subsequently, he also considers the extent to which these interpretations insulate relations of inequality and subordination from democratic debate and contestation, thereby contributing to the

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<sup>157</sup> Friedman ‘How can courts help combat social ills’ Available at <http://www.newage.co.za> (Accessed 26 August 2014).

<sup>158</sup> Id.

<sup>159</sup> Botha ‘Representation the poor: law, poverty and democracy’ (2011) *Stellenbosch Law Review*, at 521

<sup>160</sup> Id

silencing of the poor.<sup>161</sup> By placing emphasis on judicial understandings of democracy Botha draws attention to the adjudicative settings, and raises questions about the capacity of courts to serve as open democratic spaces in which the meaning of constitutional norms and commitments can be contested. The topic “representing the poor: law, poverty and democracy” points beyond the judiciary to legislatures as the primary institutions representing the people and to the people themselves.<sup>162</sup>

In Botha’s analogy legislatures are regarded as primary institutions representing the people in that they are democratically elected by the people for this purpose. Therefore, regarding any body, other than the legislature, as the champion of the interest of the poor, is viewed by some as being anti-democratic.<sup>163</sup> This creates a dilemma as to the role that the judiciary should play in the fight for social justice.

The real question to be answered is then which body or branch of government should actually best represent the interests of the poor between the legislatures, the courts or the people themselves. Botha attempts to answer this question by way of the following questions, namely: “How is ‘the people’ conceived in constitutional discourse? How is the relationship between the people and their representatives construed? And what are the conditions under which legislative bodies can be said to have made authoritative pronouncements in the name of the people they claim to represent.”<sup>164</sup>

Botha juxtaposes two conflicting conceptions of democracy, which are both derived from the Constitutional Court’s jurisprudence. One of these models can be labelled a dialogic, participatory and pluralistic model of democracy which underscores the agency and voice of those traditionally excluded from full citizenship; posits a dialogue between the people and their representatives; and requires the state to take positive steps to secure conditions under which citizens can exercise rights of democratic participation.<sup>165</sup>

According to Botha, the above model also embraces a vision of political equality which is suspicious of laws and practices which may have the effect of insulating social and political

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<sup>161</sup> Id

<sup>162</sup> Botha ‘Representing the poor: law, poverty and democracy’ (2011) *Stellenbosch Law Review*, at 521.

<sup>163</sup> Id at 521.

<sup>164</sup> Botha ‘Representing the poor: law, poverty and democracy’ (2011) *Stellenbosch Law Review*, at 522.

<sup>165</sup> Id at 522.

power from mechanisms designed to promote democratic accountability or allowing the wealthy and powerful to pass off their interests as the common good. This understanding, according to Botha, “sets the bar quite high for legislative enactments to qualify as authoritative pronouncements made in the name of the people.”<sup>166</sup> According to Botha “this model is suspicious of the idea of an identity of the people and their representatives, and assumes an active role for the courts in policing legislative and bureaucratic decisions to ensure that they emanate from inclusive participatory processes and do not impinge on basic norms of democratic accountability and responsiveness.”<sup>167</sup> This is the essence of “meaningful engagement” which is espoused by Justice Khampepe when she talks of “meaningful engagement as transformative process.”<sup>168</sup>

The second conception of democracy, according to Botha, conceives of democracy in more formal terms as the capacity of duly elected legislatures to enact laws within their constitutional area of competency. In terms of this conception, between elections, there is little that the people can do to hold their political representatives accountable, except in the <sup>169</sup>breach of clear, unambiguous constitutional provisions, wherein courts should intervene. Otherwise according to this view, courts should defer to the legitimacy and institutional competence of the political branches.<sup>170</sup>

For Botha, the above understandings or conceptions of democracy influence decisions on issues as diverse as access to courts, the application of the Bill of Rights to private relations, limitation analysis, remedies, and the substantive meaning of a broad range of constitutional norms such as equality, freedom of expression and socio-economic rights.

This study addresses a crucial question concerning the role of the courts in enforcing participatory democracy. In line with Botha’s analysis I focus on two areas of the Constitutional Court’s jurisprudence, one dealing with public participation in the legislative process and the other relating to the use of political power by those in position of authority to their advantage at the expense of the interests of the poor.

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<sup>166</sup> Botha ‘Representing the poor: law, poverty and democracy’ (2011) *Stellenbosch Law Review* 3, at 522

<sup>167</sup> Id at 522.

<sup>168</sup> Khampepe ‘Meaningful Engagement as Participatory Process: Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at the Stellenbosch University Annual Human Rights lecture. 6 October 2016) at 15.

<sup>169</sup> Botha ‘Representing the poor: law, poverty and democracy’ (2011) *Stellenbosch Law Review*, at 522.

<sup>170</sup> Id at 522.

The Constitution expressly provides for participatory democracy in provisions calling for public participation in legislative processes.<sup>171</sup> The Constitution also calls for procedural fairness in administrative action<sup>172</sup> which provides for the right to be heard before action is taken affecting any person, known as the *audi alteram partem* principle. According to Geo Quinot “the Constitutional Court has expressly and enthusiastically aligned these provisions to models of participatory democracy.”<sup>173</sup> For example, in the first and second *Matatiele* judgements the Court stated, with reference to these constitutional provisions, that our Constitution contemplates a democracy that is representative, with elements of participatory democracy.<sup>174</sup> The Court thus rejected an argument by the government that the proper participation of elected representatives in the national legislative process was sufficient to ensure a democratic outcome, as this would render the public participation provision in the Constitution meaningless and would reduce our democracy to a representative democracy only. Hence according to the Court the government had misconceived the participatory nature of our democracy.<sup>175</sup>

In *Merafong* these principles of participatory democracy were further confirmed and declared by the Court, in relation to the nature of participation. The Court stated that “citizens- have a meaningful opportunity to be heard and that in the process of considering and approving a proposed constitutional amendment regarding the alteration of provincial boundaries, a provincial legislature must at least provide the people who might be affected a reasonable opportunity to submit oral and written comments and representations.”<sup>176</sup>

The other most notable endorsement of the Constitution’s vision of participatory democracy was in *Doctors for Life International v Speaker of the National Assembly*, the case which dealt with the issue of public participation in the legislative process. In this judgement the Court relied on article 25 of the International Covenant on Civil and Political Rights,

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<sup>171</sup> Sections 57, 59, 70, 72, 116, 160.

<sup>172</sup> Section 33.

<sup>173</sup> Quinot ‘Snapshot or participatory democracy? Political engagement as fundamental human right’ (2009) 25 SAJHR, at 398.

<sup>174</sup> Id at 398.

<sup>175</sup> Id at 398.

<sup>176</sup> *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* 2008 (5) SA (CC) at para 27.



which provides that “every citizen shall have the right and the opportunity... to take part in the conduct of public affairs, directly or through freely chosen representatives.”<sup>177</sup>

In *Doctors for Life International* the Court held that “parliament is under a positive obligation to ensure that citizens have an effective opportunity to participate in the legislative process; and that non-compliance with this requirement must result in the constitutional invalidity of the legislative process.”<sup>178</sup> This implies that it is not enough to allow public participation, but parliament must afford the public a reasonable opportunity to participate in the legislative process through public education, the provision of information and various other initiatives to bring democracy closer to the people and the Court has the power to test whether this duty was exercised reasonably.<sup>179</sup> Surely, this view as enunciated in the majority decision in *Doctors for Life International* expresses a particular understanding or conception of democracy, that is aligned to a dialogic, participatory and pluralistic model of democracy, which as indicated above is sceptical of laws and practices which may have the effect of insulating social and political power from mechanisms designed to promote democratic accountability.<sup>180</sup>

The argument about the extent to which different judicial understandings of democracy influence the judicial decisions is notable when one compares the majority judgement in *Doctors for Life International* with the minority judgement of Yacoob J, which dissents from the majority based on his use of textual and structural modes of interpretation. This places more emphasis on grammatical meaning of words. In Judge Yacoob’s view the majority conflates public involvement “with the stronger notion of public participation”, and according to him this is so because the majority overlooked the fact that section 72(1)(a) requires the NCOP to merely “facilitate” public involvement, which Yacoob J regards as a less exacting requirement than to “promote involvement”. This clearly reflects a particular understanding of democracy which informs his interpretation of the constitutional text. Botha’s conclusion that Yacoob J’s insistence that it is the Court’s task to determine what the Constitution requires, and not to engage in theoretical speculation about the meaning of “democracy” or the ideal balance between its representative and participatory

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<sup>177</sup> Article 13.

<sup>178</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) at para 269.

<sup>179</sup> Botha ‘representing the poor: law poverty and democracy’ (2011) *Stellenbosch Law Review* 3, at 527.

<sup>180</sup> *Id* at 522.

dimensions, is consistent with the textualist leaning of his judgement. In actual fact the inference to be drawn from this is that in Yacoob J's view the decisions of elected representatives are identical with the will of the people.

The critical question to be asked here is, if the decisions of elected representatives are identical with the will of the people, then why do "people" end up resorting to protests action against the decisions of political representatives? The main argument or claim of this study is that protests are an enactment of a right to participatory democracy. In other words protests are a ventilation by people of their dissatisfaction with decisions taken by the state about them without their involvement. While it is common knowledge that during apartheid protests were motivated by under or lack of representation or non-existence of a democratic system and could therefore be justified on democratic grounds, the present government cannot be accused along the same fault lines.<sup>181</sup> The current dissatisfaction about government is generally caused by different factors.

Literature suggests that current protests are in part a manifestation of frustrations and unhappiness with local government's service delivery efficiencies and effectiveness.<sup>182</sup> For example, in *Schubart Park* the decision by authorities to stop the supply of water and electricity to the complex triggered a protest action by residents about living conditions. This clearly contradicts the suggestion or view that the decisions of elected representatives are identical with the will of the people.

I argue that participatory democracy is inherent and implied in our representative democracy. This view accords well with the doctrine of separation of powers which is entrenched in our Constitution. The doctrine of separation of powers assigns different roles on different branches of government, with distinctive functions, as far as state governance is concerned. In terms of the doctrine of separation of powers the executive has, on one hand, the power to govern, which involves the power to formulate and execute policy, as well as to determine how best the interests of the public are to be fulfilled in consultation with the people about whom such decisions are being made , while on the other hand the

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<sup>181</sup> Netswera 'The underlying factor behind violent municipal service delivery protests in South Africa' (2014) *Journal for Public Administration* 49 (1) 261- 273

<sup>182</sup> Netswera & Phego, K 'How affordability to pay for municipal services determine participation in municipal processes'.

court is drawn in to evaluate government policy. There is therefore a need to strike a “balance between the judicial supervision of government and respect for its imperative to govern”.<sup>183</sup>

The doctrine of separation of powers ordinarily means that if one of the three branches of government is responsible for the enactment of the rules of law, the other branches should then be charged with their execution or with judicial decisions about them. As indicated in the *Doctors for Life International* case discussed above while the legislatures are allowed a broad discretion to decide how best to fulfil their duty to govern, the Court on the hand has the power to test whether that power was exercised reasonably and justifiably. This view was also expressed by the Constitutional Court in *SARFU* where the Court stated that “the Constitution makes provision for the separation of powers and vest in the judiciary the power of declaring statutes and conduct of the highest organ of state inconsistent with the Constitution.”<sup>184</sup> Of crucial importance here is the extent to which deference by the judiciary effectively limits the role of the court.

More importantly, through the inclusion of socio economic rights among the fundamental rights in the Constitution, South Africa has implicitly aligned and defined herself as a social welfare state. As a result thereof, as Sandra Liebenberg puts it “needs talk in South Africa, like in other welfare state societies, has been institutionalised as a major vocabulary of political discourse. It is an idiom in which political conflict is played out and through which inequalities are symbolically elaborated and challenged.”<sup>185</sup> In this way, it is argued that mere basic needs have taken a centre stage to the point that they have been elevated and accorded the status of basic human rights. Accordingly this has created a space for the enforcement of socio-economic rights in law by courts, hence the whole question about the dawn of an adjudicative paradigm on socio economic right comes into play. As Carol Steinberg puts it, courts are “required to come to the assistance of any individual whose life circumstances fall below the minimum core of entitlement consistent with the maintenance of human dignity.”<sup>186</sup> In *Schubart Park* the Court held that “residents were as a matter of

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<sup>183</sup> Kriel ‘Administrative law’ 1998 ASSAL 89 at 95.

<sup>184</sup> *SARFU v President of the RSA* (CCT16/98) [1999] ZACC11.

<sup>185</sup> Fraser *Talking about Needs: Interpretive Contests as Political Conflicts in Welfare- State Societies* (2012) The University of Chicago Press, at 291.

<sup>186</sup> Steinberg ‘Can reasonableness protect the poor: A review of South Africa’s socio- economic rights,

law entitled to a restoration of their occupation of their homes, but were nevertheless deprived of that restoration for a long period”.<sup>187</sup> Accordingly the Court held that “not only did their inherent right to dignity entitle them to be treated as equals in the engagement process, but also their legal entitlement to return to their homes absent a court order for their eviction.”<sup>188</sup>

Danie Brand, in his thesis entitled “Courts, socio-economic rights and transformative politics” investigates the extent to which the “adjudication of socio-economic rights cases limits transformative politics, firstly, by describing impoverishment as technical rather than political in nature” and how courts “implicitly legitimise in their judgements liberal-capitalist views of impoverishment that insist that impoverishment is best addressed through unregulated markets”. Secondly, he investigates how views of legal interpretation in terms of which legal materials have a certain determinable meaning that can mechanically be found by courts “limit transformative politics by insulating adjudication from critique and emphasising finality in adjudication.”<sup>189</sup> For example, in *Schubart Park* the Court held that it was so that the High Court could not have immediately ordered restoration, but should have as a matter of law issued a declaratory order indicating the residents’ eventual entitlement to restoration.<sup>190</sup>

Towards the end of his thesis Brand concludes by conceding that the limiting impact of adjudication on transformative politics is so inherent that not much can be done to wholly avoid them, and according to him the court should aim to be continually aware of them.

My approach slightly differs from that of Brand, firstly, in terms of focus and emphasis. Unlike Brands’, my study focuses more on the concept of participatory democracy instead of “transformative politics”. Whilst I acknowledge the fact that the two studies may have similar outcomes at the end, this study, however, maintains that service delivery protests

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Jurisprudence’, *The South African Law Journal*, at 268.

<sup>187</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323(CC) at para 42.

<sup>188</sup> *Id at para 49.*

<sup>189</sup> Brand ‘Courts, socio-economic rights and transformative politics’ Unpublished LLD Thesis (2009) Stellenbosch University at 148.

<sup>190</sup> *Shubart Park Residents association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para 49.

are a consequence of a lack of participatory democracy and that adjudication has a meaningful role to play in advancing participatory democracy.

My contention is that participatory democracy requires engagement between the parties, namely elected representatives and communities. This applies that whenever decisions are mooted which concern those communities there is always a need for government to engage communities in such decisions. This should be the case also when misunderstandings between parties arise about some decisions or actions of government. I argue here that the role of the court must be to create an enabling environment for it to be easier for parties to engage. The ultimate end is that elected political representatives and the people should be able to engage on their own. Here the study maintains the views that poor people themselves are best able to act to change their world.<sup>191</sup>

“In *Joe Slovo*, the Court, after finding that the state had previously failed to engage meaningfully with the community, did not set the decision aside, but ordered the state to engage with affected occupiers on a narrow range of issues”<sup>192</sup> Residents could be evicted from the Joe Slovo informal settlement only if government complied with a timetable annexed to the order. However, this ruling of the Court in Joe Slovo has been a subject of criticism for downplaying and undermining the gains won by the Court in its previous decisions such as *Olivier Road* and *PE Municipality* for ordering an eviction even though engagement did not occur.

In *Olivier Road*, unlike in *Joe Slovo*, the Court found that where people are to be evicted in circumstances such as those of *Joe Slovo*, residents must be informed and consulted on a wide range of issues, including the purpose of the relocation and how those who cannot be accommodated in the development area will be provided with permanent housing. This appeared to have been undone in *Joe Slovo* as the obligation of state institutions to engage meaningfully prior to taking decisions affecting residents were overlooked by the Court,

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<sup>191</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.newage.co.za> (Accessed the 26 August 2014).

<sup>192</sup> Kapindu *The Desperate Left in Desperation: a court in retreat* (Constitutional Court Review (2010) Pretoria University Press at 240.

hence the ruling of the Court in *Joe Slovo* has been viewed to be two steps backward in realising the principle of participatory democracy enshrined in our constitution<sup>193</sup>.

However, according to McLean both *Olivier Road* and *Joe Slovo* are classical examples of cases where the court displayed unwillingness to deal with the primary dispute before it. By focusing solely on procedural fairness alone, rather than substantive reasonableness and by avoiding to engage with the primary dispute before it at all, in both cases the Court retreated into a narrower approach to the review of socio-economic rights. While on one side *Olivier Road* is a typical example of the failure of the Court to engage with the substance of the attack by residents on the constitutionality of the City's housing policy. Instead the Court sought to resolve the dispute by encouraging the parties to negotiate with a view to reaching a settlement. On the other side *Joe Slovo*, according to McLean, represents a retreat to a narrow approach to meaningful engagement and procedural fairness<sup>194</sup>. "In *Olivier Road*, the Court failed to engage with the hard issues, preferring instead to refer the matter back to the parties to resolve among themselves. On the other hand, in *Joe Slovo*, the Court ordered an eviction of the masses of people, even where the state had failed to engage meaningfully with those affected by its decision"<sup>195</sup>

In essence, this implies that the role of the Court in ensuring that the government and the people engage meaningfully to a point of reaching agreement is crucial. In *Pheko* government was ordered to meaningfully engage with the residents in identifying alternative land, in the immediate vicinity of Bapsfontein, from which area the residents had been unlawfully removed.<sup>196</sup> More than just parties agreeing, what the parties agreed upon had to be endorsed by Court and be made an order of Court. A conclusion to be drawn from this analogy is that democracy is meaningless if it is not participatory and that the judiciary or courts, as a branch of government, have a crucial role to play in safeguarding participatory democracy.

In *Masetla*, the Court held that procedural fairness, "would as a bare minimum, entail informing the other party of the proposed action and reasons for such an action and

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<sup>193</sup> Id at 237.

<sup>194</sup> McLean Meaningful Engagement: One Step forward or Two Back? Some Thoughts of *Joe Slovo* Constitutional Court Review (2010) 3, Pretoria University Press, Pretoria at 240.

<sup>195</sup> Id at 241

<sup>196</sup> *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) CCT19/11 [2015] ZACC 10.

allowing the other party to comment on those matters.”<sup>197</sup> This concerned the situation where the State President without any prior notice or warning simply took a decision to unilaterally alter the term of office of the Head of the NIA and terminated the contract of employment of the Head of the NIA prior to its expiration date. No attempt at all was made to reach agreement, that is, it was not a case where the President attempted to reach the agreement but failed due to the obstructive attitude of the other party. Hence the Court found the actions of the President to be arbitrary and according to the court since the President’s powers derived from the Constitution he could only act within the constraints of the Constitution<sup>198</sup>.

**Comment [U2]:** Insert footnote reference to the relevant paragraph.

In *SARFU* the court found that “by failing to observe procedural fairness this served as the basis on which a court might review the exercise of the powers of the President under section 84 (2) of the Constitution.”<sup>199</sup> This view of the court tallies well with the common law doctrine propagated by Jeffrey Jowell which calls for the court to apply the rule of law as a guiding precept of legality in the broadest sense. According to Jowell “the court should not only be concerned with the form that a particular decision takes, but with the circumstances of the decision itself.”<sup>200</sup>

There are two important conclusions to be drawn from these decisions. Firstly, those in positions of authority must always engage those to be affected by decisions purported to be taken prior to taking such decisions. Secondly, where the purported actions of authorities result in conflict with communities the court may be called upon to intervene. One of the most frequent issues on which the court has intervened is eviction, including striking down a section of the law in response to a case brought by the shack-dwellers movement Abahlali baseMjondolo. There were also other issues on which the court has been called upon to intervene and has handed down judgement on issues such as access to water and electricity, education healthcare.

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<sup>197</sup> *Masetla v President of the RSA* (CCT01/07) [2007] ZACC 20 (CC) at para 75.

<sup>198</sup> *Masetla v President of the RSA* (CCT01/07) [2007] ZACC 20 (CC) at para 78.

<sup>199</sup> *President of RSA v SARFU* (CCT16/98) [1999] ZACC11 (CC) at para 43.

<sup>200</sup> Jowell ‘of vires and vacuums: the Constitutional Context of Judicial Review (1999), University of London Press, London 446-460.

It is common among legal academics to see the role of court as that of a fighter for the poor and the weak. However, according to Friedman, reality may be more complicated.<sup>201</sup> Unlike in “minimum core content” judgements, like *Grootboom*<sup>202</sup> and *Treatment Action Campaign*<sup>203</sup> (*TAC*), the first cases where the court told government to take specific action, in most instances reality may be more complicated for the court to do so. For example, in *TAC*, the judgement where the Constitutional Court instructed the government to provide anti-retroviral medication to prevent mothers transmitting HIV to their infants “could only be implemented because activists pressed health authorities to supply the medicine.”<sup>204</sup> Even in these cases, the Court has found ways to avoid telling the government what its policy should be. For example, in *Grootboom*, the case involving the provision of housing, instead of the Court telling government what its housing policy should be and ruling that everyone was entitled to a decent house, it told government to come up with a more “reasonable” approach.

Comment [U3]:

At first glance, telling the government what its housing policy should be and how to address poverty may sound like a more radical option and is surely more likely to ensure social justice than merely ordering it to negotiate and come up with a more “reasonable” approach.<sup>205</sup> Reality may, however, dictate differently as this approach is not most likely to serve the needs of the poor and homeless people. The idea that the court should decide what the government policy should be is viewed by others as not only anti-democratic because it wants unelected judges to dictate to elected politicians, but also seeks to remove the most important weapon which poor people have, that is, their ability to change the world. According to Friedman “minimum content judgments reflect the court’s opinion, not a legal principle.”<sup>206</sup> For example it is not clear “what legal doctrine says people have a right to 12 kl of free water, instead of 9 or 24kl”.<sup>207</sup> According to Friedman, “human rights lawyers may cheer when a court doubles the amount of free water people should receive, but

<sup>201</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.newage.co.za> (accessed 26 August 2014).

<sup>202</sup> *Soobramoney v Minister of Health, KwaZulu Natal* [1998] (1) SA765 (CC).

<sup>203</sup> *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* (CCT8/02 [2002] CC).

<sup>204</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.newage.co.za> (accessed 26 August 2014)

<sup>205</sup> *Id.*

<sup>206</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.newage.co.za> (accessed 26 August 2014).

<sup>207</sup> *Id.*



nothing stops another court from deciding that government need only provide 3kl”.<sup>208</sup> According to Friedman “once judges, not the political process decide, there is no guarantee that their rulings will favour the poor.”<sup>209</sup>

Therefore, there is a view that the “people best able to decide what the people need are the poor themselves” and if the poor people cannot win political gains which empower them, the court rulings are likely to be of little help to them.<sup>210</sup> Court orders, once made by court are left to government for implementation and “left alone, the government can always find ways to delay implementing the court orders or not bother at all.”<sup>211</sup> So, according to Friedman, courts that want to fight the plight of the poor are not assisting the poor by deciding for them what they need as this deprives the people of power by taking the ability to decide or act out of their hands. As long as poverty exists courts will need to give as many rulings as possible. Hence according to Friedman, “actions by the poor may be the best way to ensure lasting change.”<sup>212</sup>

Whilst acknowledging the above view with approval it should however, be stated that the authors of this approach are also cognisant of the fact that it is not easy for the poor to act since the balance of power is stacked against them. More often than not parties refer their issues before courts as disputes after all other existing remedies have been exhausted and they are usually emotional and not in speaking terms with one another when they do so. The parties then rely on the court as a neutral body for intervention. There have also been many instances where those in power used their majority power to impose their views and suppress the marginalized and powerless.<sup>213</sup> Hence, the most important contribution that the court should make during the adjudication process is to make sure that it is easier for the parties to engage in order to find amicable solutions to the problems that face the parties.

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<sup>208</sup> id

<sup>209</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.newage.co.za> (accessed 26 August 2014)

<sup>210</sup> Id.

<sup>211</sup> Friedman ‘How can court help combat social ills’. Available at <http://www.newage.co.za> (accessed 26 August 2014).

<sup>212</sup> Id.

<sup>213</sup> Klare ‘Self Realisation. Human Rights and Separation of Powers: A Democracy Seeking Approach’ (University of Stellenbosch Tenth Annual Human Rights Lecture, 20 August 2015) at 456.

### 4.3 Conclusion

It is quite clear from the above discussion that the role of the judiciary in socio- economic rights litigations as well as in the fight for social justice is quite a significant one. While acting within the context of the principle of separation of powers, the Court should be mindful and avoid retreating into a narrow consideration of the notion of meaningful engagement. Without necessarily trending to the usurping of powers vested in the other branches government, the court must view its role as being a much broader one and a complementary one to that of the other branches of government. It should avoid “focusing solely on the narrow meaning of meaningful engagement”<sup>214</sup> as it did in *Joe Slovo*.

White it is common course that courts are usually called upon whenever tensions are already high, and government and communities have clashed over service delivery issues and the court is expected to mediate in order to resolve the impulse, the Court should threat its mediatory role as an opportunity to encourage substantive engagement on issues by parties. During such engagements the Court should be prepared to engage with hard issues and should avoid reducing engagement into mere proceduralism and formalism at it was the case in *Joe Slovo*. There instead of using procedural safeguards for the purpose for which they were intended, that is, to serve as additional safeguards to engagement and to allow parties to engage on substantive issues meaningfully, the Court merely ‘collapsed the procedural and substantive questions, finding that the state had met its obligation to meaningfully engage the residents and that it was just and equitable to order an eviction even where the state had failed to engage meaningfully with those affected by its decision.’<sup>215</sup>. The Court should avoid retreating to what McLean terms “an even narrower concept of reasonableness in section 26(2) of the Constitution”<sup>216</sup> which he says the Court does “by focusing solely on the concept of meaningful engagement.”<sup>217</sup>

The study has also revealed that the approach of the courts in trying to quickly reach finality on matters brought before it does not assist the impoverished as “impoverishment is much

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<sup>214</sup> McLean ‘Meaningful engagement: One Step forward or Two back? Some thoughts of *Joe Slovo* (2010) 3 Constitutional Court Review at 222- 242

<sup>215</sup> Id at 241.

<sup>216</sup> Id at 241.

<sup>217</sup> Id at 241.

more complex and deeper than it may appear at face value”<sup>218</sup>. The court should guard against the mistakes it committed in Olivier Road, where instead of dealing with hard issues facing it, it instead followed a quick and easier route and preferred referring the matter back to parties to try and sort out between themselves. The study seems to confirm the view of Danie Brand, who maintains that by erroneously “describing impoverishment as technical rather than political in nature courts limit transformative politics and may tend to legitimise in their judgements liberal-capitalist views of impoverishment that insist that impoverishment is best addressed through unregulated markets.”<sup>219</sup> The argument by Steven Friedman that “the people best able to decide what the poor needs are of course the poor themselves”<sup>220</sup> is valid in these circumstances. However people cannot change their world unless they are empowered to do so. They must be empowered to act to change their world. One of the ways to empower people to act is through creating a climate for engagement with their political representatives, which should be facilitated by courts whenever the political process has failed and collapsed. Therefore, courts have a crucial role to play in socio-economic rights disputes as well as in entrenching participatory democracy.

I argue in this study that the Constitutional Court has realised and stated to correct its past mistakes committed in its previous decisions discussed above by finding correctly in Schubart Park, where it starts to link meaningful engagement to human dignity. Hence the point being argued here is that the Court held correctly in Schubart Park where it held that “the High Court erred by failing to at least issue a declaratory order indicating the resident’s eventual entitlement to restoration to their homes after they were unlawfully evicted from their homes.”<sup>221</sup> In this case the Court linked meaningful engagement to human dignity.<sup>222</sup> According to Khampepe “to engage others in a spirit of amity and felicity gives expression to human dignity”<sup>223</sup> I agree with the reasoning of the Constitutional Court in Schubart Park

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<sup>218</sup> Brand ‘Courts, socio-economic rights and transformative politics’ Unpublished LLD Thesis (2009) Stellenbosch University at iii.

<sup>219</sup> Id.

<sup>220</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.newage.co.za> (Accessed 26 August 2014).

<sup>221</sup> *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323(CC) at para 49.

<sup>222</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa (Delivered at Stellenbosch University Annual Human Rights Lecture, 6 October 2016) at 9.

<sup>223</sup> Khampepe ‘Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa’s Constitutional Democracy ( Delivered at Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 9.

that this should have been the consideration of the High Court even if the Court could not have immediately ordered restoration<sup>224</sup>

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<sup>224</sup> Schubart Park Resident's Association v City of Tshwane Metropolitan Municipality 2013 (1) SA 323 (CC) at para 49.

## 5. RESEARCH FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

### 5.1 INTRODUCTION

The purpose of this study was to investigate the relationship between the work of courts in socio-economic rights litigations and participatory democracy as enacted in service delivery protests. In the study the link between service delivery protests, adjudication and participatory democracy was considered. Hence, the title of the dissertation “Service delivery protests and adjudication: an expression of a right to participatory democracy”. This implies that the service delivery protests that we have seen occurring in South Africa, some of which end up before courts for adjudication are nothing else but an expression by people of their right to participatory democracy. The study was conducted against the background of protests that have occurred in South Africa over the past concerning socio-economic rights issues and the resultant social dialogue, as well as the role played by the Court in fostering engagement between citizens and their political representatives in government resulting from those protests.

Chapter 1 was an introduction that contextualised the research problem. Chapter 2 provided a historical background to the question being researched and then followed by the review of literature relevant to the study. Chapters 3 and 4 were more of a discussion of different theoretical perspectives of the concept of participatory democracy and the role of the courts in the adjudication of socio-economic rights disputes, as well as a critical analysis, evaluation and interpretation of the Constitutional Court’s decision in the case of *Schubart Park* and other relevant cases.

I focused on investigating different forms of protests which have been experienced in South Africa prior to and during the democratic era, which is before and after the dawn of democracy in 1994, as well as the forms taken by those protests. The emphasis was on the emergence of a social dialogue between the people and their political representatives as well as the role played by the courts as well as people themselves in the struggle for social change and justice.

This now brings us to the point for the presentation of the main findings, conclusions and recommendations of this study.

## 5.2 SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS FROM THE RESEARCH.

### 5.2.1 Participatory democracy and a need for on-going engagement of people in a democratic process

It is evident from this study that, as envisaged in our Constitution, participatory democracy is central to the success and proper functioning of any system of democracy. However, what seems to be confirmed through this study is that in most democracies, including ours in South Africa, not much emphasis is placed on “meaningful participation”<sup>225</sup> by citizens in decision making processes of government. In most so-called democracies the tendency is to reduce democracy to what Geo Quinot refers to as “snapshot” democracy, “that is the guaranteed right to take part in elections every five years and leaving it to the elected representatives to get on with governing in-between, instead of true participatory democracy, calling for participation and engagement on an on-going basis in the political process.”<sup>226</sup>

The negative consequence of lack of meaningful engagement is that communities, when acting out of anger and frustration with this lack of engagement by government in decision making processes, end up resorting to forms of self-help mechanisms such as protests, which in most instances tend to be accompanied by violence, resulting in the destruction of property and a threat to lives. Meaningful engagement and participation by communities in decision making processes is recommended as a solution which can help in averting service delivery protests.

#### Recommendation

The study recommends an on-going and “meaningful engagement”<sup>227</sup> and participation of people in decision making processes of government. This should include the establishment

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<sup>225</sup> Khampepe ‘Meaningful Participation as Transformative Process: Challenges of Institutional Change in South Africa’s Constitutional Democracy’ ( Delivered at the Stellenbosch University Annual Human lecture. 6 October 2016) at 15.

<sup>226</sup> Quinot ‘Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right’ (2009) 25 *SAJHR*.

<sup>227</sup> Khampepe ‘Meaningful Participation as Transformative Process: Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at the Stellenbosch University Annual Human Rights lecture. 6 October 2016) at 16.

of forums or structures for regular engagement with communities such as the so called Izimbizo to enhance meaningful participation by communities in decision making processes of government. These should also be used as platforms for communities to express their satisfaction or otherwise with government's service delivery levels and also to voice out areas of improvement. These may also be used as forums where elected representatives engage and provide feedback to communities on progress with planned service delivery programmes, including government informing the people about the challenges it may be encountering, such as lack of funding, and actions intended to counter or remedy those challenges. Engagement forums may also be used by government to get the buy-in of communities in the reprioritization process in light of financial challenges explained above. All these endeavours may help avert protests.

### **5.2.2 Engagement as a requirement in all court proceedings**

One of the findings of this study is that in those government systems where the doctrine of separation of powers is practiced the tendency by the state is to engage communities whenever grievances concerning the provision or non-delivery of socio-economic rights arise between them and those grievances have the potential of ending up in court as disputes. In such instances the state tendency is to adhere to engagement as a formality since it is one of the procedural requirements in court processes. This is normally the case with disputes that end up before the Constitutional Court for adjudication. In most eviction proceedings the Constitutional Court judges require parties to produce evidence that they have engaged with one another or attempted to do so, prior to approaching the Court. In such instances the onus usually shifts to the legal representatives of the state.

#### **Recommendation**

I recommend that the requirement of engagement be extended to be a requirement in all court proceedings concerning socio-economic rights, not only evictions. This will help avoid situations where engagement is adhered to only as a formality so as to conform with the procedural requirements in cases before the Constitutional Court. In other words, the study recommends the extension of the requirement of engagement to all litigation involving socio-economic rights.

### 5.2.3 Enhancing the role of the judiciary and limiting the effects of adjudication

As part of its findings this study has established that, in line with what Nancy Frazer has described as an *institutional* understanding of politics and democracy<sup>228</sup>, courts tend to defer to the other branches of government on matters that require policy decision and are complex in nature. This is usually done on the pretext that the judiciary lacks expertise to authoritatively pronounce on matters that are complex and policy-laden in nature. Others have also argued that the judiciary lacks the legitimacy to pronounce on matters that are complex in nature as these are regarded as highly contested issues of public policy.

#### Recommendation

I recommend and suggest ways in which the role of the court can be enhanced and the limiting effects of adjudication can be overcome. The study recommends the creation of more platforms of engagement between parties in dispute, which should be built in as part of the adjudication process.

In accordance with Brand's proposition, the study recommends that courts should allow for parties to engage and "always refrain from overemphasising finality in adjudication and instead adopt a facilitation mode in adjudication and a dispute settlement approach by parties under the guidance of courts and with prescribed time frames for parties engage."<sup>229</sup> Once a settlement has been reached courts should then seal those settlements as binding and then issue them as court orders.

### 5.2.4 The role of the court in enabling people to "act to change their world"

I have found that the "responsibility to act to change the world rests with the people themselves,"<sup>230</sup> not with courts only. In actual fact the research has confirmed that "action by the poor may be the only way to ensure lasting change."<sup>231</sup> However, I acknowledge that, because of the fact that the power balance is stacked against the poor it is not easy for

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<sup>228</sup> Frazer, N 'Talking about needs: interpretive contests as political conflicts in welfare-state societies' (1989) 99 Ethics 297.

<sup>229</sup> Brand 'Courts, socio- economic rights and transformative politics.' Unpublished LLD Theses (2009) Stellenbosch University, at 211.

<sup>230</sup> Friedman 'How can courts help combat social ills'. Available at <http://www.newage.co.za> (Accessed 26 August 2014).

<sup>231</sup> Id.



poor people to act.<sup>232</sup> Hence the important role that the court should play is to create a climate that is conducive for people to act.

#### Recommendation

The study recommends that for “people to be able to act to change their world”<sup>233</sup> courts must contribute by ensuring that it is easier for poor people to do so. The court can do this by forcing those holding power to engage and negotiate with the poor.<sup>234</sup> People must be engaged in decisions that may affect their lives through on-going engagement with their political representatives.<sup>235</sup> Engagement should not only be viewed as an event that only occurs when there is an election or a dispute that needs to be resolved. Engagement and participation by people must be regularised and become entangled as an inherent element in all decision making processes of government. This should include the making of decisions by government about what service delivery needs people have and the prioritisation processes regarding the fulfilment of such needs or services. The impoverished poor should also be empowered to realise their role regardless of their prevailing circumstances at a particular point in time. They should be encouraged to engage regardless of their status as far as land ownership is concerned.

#### 5.2.5 Dealing with issues of Poverty and Service Delivery as a strategy to mitigate protests

I also found that lack of service delivery, poor living conditions and unemployment were responsible for protests generation. The study showed that lack of service delivery has both direct and indirect causal effects on protests. What has been established in the study is that regardless of the era that has been studied, pre- or post democratic, issues of service delivery, poor living conditions and poverty always featured prominently as the cause of protests.

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<sup>233</sup> Friedman “How courts can help combat social ills” Available at <http://www.newage.co.za> (Accessed 26 August 2014).

<sup>234</sup> Id.

<sup>235</sup> Liebenberg ‘Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of meaningful engagement’ (2012) 12 (1) *African Human Rights Law Journal* at 1.

What has also been evident in this study is that what caused protests was not solely the lack of service delivery, but that protests are also exacerbated by lack of openness or transparency about what the challenges are that may be faced by government at a particular point in time, thereby impacting negatively on its ability to deliver the much needed services. This lack of communication and information leave communities in the dark about what the government's plans and intentions are. Hence communities are left to speculate or assume that government has no will to deliver such services. This situation is subject to manipulation by political adversaries of the present government or other players who may opportunistically take advantage of the situation and use it to incite communities to engage in protests. This is part of democracy and is based on the fact that power is always contested.

#### Recommendation

The study recommends a focused attention of governments on issues of service delivery and improvement of the living conditions of people as a strategy to mitigate the occurrence of protests. This requires government regularly to engage communities meaningfully on what services it should deliver and the time lines of such planned delivery. Government must improve on its consultative strategy and must always endeavour to communicate progress in the achievement of its undertakings by way of community engagement gatherings, in the form of Izimbizo. The study further recommends that where circumstances, such as lack of funds, militate against the ability of government to deliver services, government must not hesitate to revert back to communities in order to alert them about any predicament it may be facing at a particular point and then outline what its plans and intentions are moving forward. Where tensions have already arisen and engagement cannot occur without the involvement of a third party the court may be approached to facilitate the engagement process between the parties.

#### **5.2.6 Enhancing the role of courts in safeguarding participatory democracy and the fight for social justice**

Another important finding of this study is that courts have a crucial role to play in safeguarding participatory democracy and also in the fight for social justice. Courts are usually called upon to mediate wherever parties, namely the state and the people have

failed to find one another and are in dispute. How the court assumes or approaches its role is very crucial as courts, through fostering engagement between the state and the impoverished, can contribute significantly to the entrenchment of participatory democracy. The court may do this either by assuming the role of mediator and facilitator or an adjudicator.

#### Recommendation

To enhance the involvement and participation of people the role of the court as a facilitator and mediator is recommended. Courts must create platforms for parties to engage with each other with the view to reaching agreement. In the adjudication process courts must avoid rushing to reach finality. In cases like *Schubart Park*, where prevailing circumstances, such as the existence of immediate danger to lives of the people resulting, for example, from violent protests, the court should rather issue a declaratory order as an interim measure instead of a final order, and thereafter order the parties to engage.

### 5.3 CONCLUSION

My main purpose with this study was to investigate the relationship between participatory democracy and the work of courts in socio economic rights litigations as enacted in service delivery protests. The study was based on the belief that service delivery protests are an enactment of a right to participatory democracy. The study focused on the extent and ways in which South African courts have, through their adjudication of socio-economic rights disputes taken account of the advancement and entrenchment of participatory democracy in line with the vision encapsulated in the Constitution.

I focussed on the South African Constitution's vision of participatory democracy. I particularly explored how the judiciary has related its work in adjudicating socio-economic rights disputes to the advancement of participatory democracy. I aligned my study to the work of other scholars, such as Henk Botha, Karl Klare and Danie Brand, who depicted the adjudication of socio- economic rights as one form of transformative political struggle or an instrument supportive of transformative political action by focusing particularly on the ways in which "socio-economic rights adjudication limits rather than promotes transformative

political action.”<sup>236</sup> However, what distinguishes my research from the work of the above scholars and other related studies already conducted in the relevant field is that my research focuses on the role of courts in the advancement of a project of participatory democracy.

In this study it has been clearly shown and illustrated through specific court decisions such as the *Schubart Park* case that adjudication can have a significant contribution to play in the entrenchment and safeguarding of participatory democracy as well as the extent to which this can help in averting the occurrence of protests in South Africa. It has become evident from this study that there is a strong relationship between participatory democracy and adjudication and that in South Africa this relationship is enacted in service delivery protests.

An important conclusion to be drawn from this study is that service delivery protests are an enactment of participatory democracy and that courts, through fostering engagement between the state and the impoverished people, can contribute significantly to the entrenchment of participatory democracy. The extent to which the judiciary or courts succeeds in their role of entrenching participatory democracy does not merely depend on their involvement, but rather on their ability to foster engagement by parties themselves by putting in place normative instruments for such engagement. This approach is quite consistent with the view that “the people best able to change their world are the poor themselves.”<sup>237</sup> Hence an important contribution that the judiciary can make in a democracy is by creating an environment where it is easier for the parties themselves to engage.<sup>238</sup> As it has been illustrated in the entire study this is the essence of meaningful participation, which Justice Khampepe describes as forward looking since it empowers individuals to constructively find mutually-beneficial solutions and as self-determination in action.<sup>239</sup>

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<sup>236</sup> Brand ‘Courts, socio-economic rights and transformative politics’ Unpublished LLD thesis (2009) Stellenbosch University at 198.

<sup>237</sup> Friedman ‘How can courts help combat social ills’. Available at <http://www.co.za>. (accessed 26 April 2014).

<sup>238</sup> Id.

<sup>239</sup> Khampepe ‘Meaningful Participation as Transformative Process: Challenges of Institutional Change in South Africa’s Constitutional Democracy’ (Delivered at the Stellenbosch University Annual Human Rights Lecture. 6 October 2016) at 9.

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