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THE CORNERSTONE OF (LOCAL) PARTICIPATORY DEMOCRACY

Community participation is key to the functioning of local government. One of the constitutional objects of local government is to encourage the involvement of communities and community organisations in local government. The landmark *Doctors for Life* and *Matatiele* judgments, passed by the Constitutional Court in August 2006, are critical for the interpretation of the law of community participation in local government. The judgments are fundamental, particularly in relation to the nature and scope of the duty to involve the community in decision making as well as the enforceability of the legal provisions on community participation.

Applicability of the judgments

The judgments deal with the duty of Parliament and provincial legislatures to facilitate public involvement in their law-making processes. Their key principles, however, apply with equal force

to local government. As a result, municipal councils are as much obliged to uphold the principles of participatory democracy as are Parliament and provincial legislatures. Further, the duty of Parliament and the provincial legislatures

to involve the public rests on provisions that bear repetition in local government legislation. It can even be argued that the judgements' key principles apply with additional force to local government, since numerous constitutional and statutory provisions compel it to not only strive towards encouraging public participation in general, but also to adopt and adhere to participatory processes.

Value of community participation

Importantly, the Constitutional Court outlined the benefits of community participation as the following:

- It provides vitality to the functioning of representative democracy.
- It encourages citizens to be actively involved in public affairs.
- It encourages citizens to identify themselves with the institutions of government.
- It encourages citizens to become familiar with the laws as they are made.
- It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.
- It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice.
- It strengthens the legitimacy of legislation in the eyes of the people.

General principles for community participation

The Municipal Systems Act is the primary statute to give effect to the constitutional commitment to community participation in local government. Fundamentally, it defines the municipality as comprising its political structures, its administration and the community of the municipality. The Act thus makes it clear that communities are an integral part of the municipal governance of local government affairs. A municipality must develop "a culture of municipal governance that complements formal representative government with a system of participatory governance".

The complementary nature of participatory governance was elaborated upon by the Constitutional Court in *Matatiele*. The

KEY POINTS

- The impact of the *Matatiele* judgement on local government serves to strengthen the public participation spaces and processes envisaged in the Constitution and legislation.
- It reinforces the importance of a citizen's voice in our system of participatory democracy and places the onus on local government to ensure that this takes place.
- The municipality has the duty to facilitate public participation by ensuring that citizens have the necessary information and effective opportunity to exercise this right.
- Municipalities must ensure that, in making by-laws and formulating policy, the public is afforded a 'meaningful opportunity' to engage with and contribute to the decisions that affect them.

Court observed that it is a principle established by the Constitution itself and firmly rejected the argument advanced by government to the effect that duly elected representatives of the people possess the legitimacy to speak on their behalf and thereby fulfil the requirements of participatory governance. The Court made it clear that, with its commitment to participatory democracy, the Constitution contemplates a role for communities that is additional to the electoral process.

The Systems Act is clear in that it instructs the municipality to not only encourage community participation in the affairs of the municipality, but also to create conditions for it. In terms of the latter requirement, a municipality must contribute to building the capacity of the community to enable it to participate in municipal affairs. Importantly, the municipality must use its resources and annually allocate funds in its budget as may be appropriate for community participation.

Vehicles for community participation

The Systems Act lists structures and mechanisms for community participation. First, participation must take place through established political structures, defined as the municipal council or any committee or other collective structure of a municipality that has been elected, designated or appointed in terms of the Structures Act. Ward committees and subcouncils are the most visible structures that explicitly relate to community participation in municipal governance. However, it is clear from the Systems Act that all other political structures of the municipality have a role to play in facilitating



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community participation. Second, the Act mentions the councillor as a vehicle for participation, particularly the ward councillor. Third, community participation must take place through mechanisms, processes and procedures established in terms of the Systems Act itself. Fourth, community participation must take place through mechanisms, processes and procedures established by the municipality to enable the local community to participate in municipal affairs.

Enforceability of community participation requirements

A key issue is the determination of the legal nature and justiciability of the various provisions on community participation. Even though compliance with the formal and procedural requirements is easily measured, the question of whether or not there has been substantive compliance is more difficult.

Standard of reasonableness

The Constitutional Court developed a standard of reasonableness to determine whether the degree of public involvement in law making is in line with the Constitution. The

standard was adopted and first used in relation to the question of whether Parliament and the provincial legislatures discharged their duties to facilitate the involvement of the public in law making. However, the ambit of the standard of reasonableness extends to all organs of state exercising legislative actions, including municipal councils. A municipality's efforts at involving the local community must therefore meet the same standard of reasonableness.

The legislative actions, i.e. by-laws and budgets of municipal councils, fall to be gauged by the same standard of reasonableness. However, municipal councils are also vested with executive powers. It is suggested that the standard of reasonableness should not be interpreted to apply to a municipal council's legislative actions only. First, a limitation of the Constitutional Court's principles to municipal by-laws and budgets would be contrary to the manner in which the local government legislation has placed community participation central to the entire municipal enterprise. Second, as outlined below, the standard adopted by the Court is not a rigid, formalistic one but is adapted to the context. This renders it capable of application to actions other than legislative actions.

The standard of reasonableness was first used in the *Doctors for*

Life and Matatiele judgments. It is, in the words of the Court, “an objective standard which is sensitive to the facts and circumstances of a particular case”. The Court stressed that “context is all important”. It is therefore not a rigid test, but rather a set of factors that jointly determine whether or not a municipality’s regulations, mechanisms and efforts towards community participation are reasonable. Some of these factors are discussed here.

Nature and importance of the decision
The nature and importance of the decision to be taken by the municipality must be considered in deciding whether its efforts to involve the community were reasonable. In this regard, the Systems Act puts forward a number of decisions that are deemed of special importance, in relation to which municipalities are thus under a special obligation to ensure participatory decision making.

Efficiency of decision making
The Court stressed, “[r]easonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process”. The need to take into account practicalities is echoed by the Systems Act. However, the Court issued a stern warning that “the saving of money and time in itself does not justify inadequate opportunities for public involvement” and, when it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable.

Meaningful opportunity
The Court further stressed that the duty to facilitate community participation entails both the duty to afford the opportunity for participation and the duty to ensure that communities are enabled to seize the opportunity. The sum total is a duty to ensure a ‘meaningful opportunity’. To engage in public debate and dialogue with elected representatives at public hearings is not all; the municipality has the duty to facilitate public participation by ensuring that citizens have the necessary information and effective opportunity to exercise this right. The concept of a meaningful opportunity also means that participation must be facilitated at a point in the process where involvement by interested members of the public would indeed



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be meaningful. Clearly, it is not reasonable to seek the involvement of the public at a stage in the process where amending the proposed decision is virtually impossible.

Comment

The impact of the judgments on local government serves to strengthen the public participation spaces and processes envisaged in the Constitution and legislation. It reinforces the importance of a citizen’s voice in our system of participatory democracy and in this regard places the onus on local government, as the sphere of government closest to the people, to ensure that this takes place. Municipalities must ensure that, in making by-laws and formulating policy, the public is afforded a ‘meaningful opportunity’ to engage with and contribute to the decisions that affect them. Municipalities must develop a ‘culture of participatory governance’, if the vision of developmental local government, so eloquently articulated in the White Paper, is to be realised.

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