CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 86/08
[2010] ZACC 5

In the matter between:

POVERTY ALLEVIATION NETWORK	First Applicant
MATATIELE DRAKENSBERG TAXI ASSOCIATION	Second Applicant
GOVERNING BODY OF THE KING EDWARD HIGH SCHOOL	Third Applicant
GEORGE MOSHESH TRIBAL AUTHORITY	Fourth Applicant
MALUTI CHAMBER OF BUSINESS	Fifth Applicant
MATATIELE AND MALUTI COUNCIL OF CHURCHES	Sixth Applicant
MPHARANE COMMUNITY BASED ORGANIZATION	Seventh Applicant
ZIZAMELE PRE-SCHOOL TRAINING PROJECT COMMUNITY BASED ORGANIZATION	Eighth Applicant
and	
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
PREMIER OF THE EASTERN CAPE	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCE OF THE EASTERN CAPE FOR LOCAL GOVERNMENT	Fifth Respondent
PREMIER OF KWAZULU-NATAL	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL OF THE	

PROVINCE OF KWAZULU-NATAL FOR LOCAL GOVERNMENT	Seventh Respondent
MUNICIPAL DEMARCATION BOARD	Eighth Respondent
SISONKE DISTRICT MUNICIPALITY	Ninth Respondent
ALFRED NZO DISTRICT MUNICIPALITY	Tenth Respondent
O.R. TAMBO DISTRICT MUNICIPALITY	Eleventh Respondent
UMZIMKULU MUNICIPALITY	Twelfth Respondent
UMZIMVUBU MUNICIPALITY	Thirteenth Respondent
MATATIELE MUNICIPALITY	Fourteenth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fifteenth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Sixteenth Respondent
SPEAKER OF THE EASTERN CAPE PROVINCIAL LEGISLATURE	Seventeenth Respondent
SPEAKER OF THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Eighteenth Respondent
ELECTORAL COMMISSION	Nineteenth Respondent
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Twentieth Respondent

Heard on : 3 November 2009

Decided on : 24 February 2010

JUDGMENT

NKABINDE J:

Introduction

[1] This application for direct access is a sequel to the litigation history of the dispute between the parties.[1] The applicants challenge the constitutional validity of the Constitution Thirteenth Amendment Act (Thirteenth Amendment Act),[2] which has the effect of altering the boundary of the Eastern Cape Province and the KwaZulu-Natal Province. A related attack is levelled at the validity of the Cross-boundary Municipalities Repeal and Related Matters Amendment Act (Repeal Amendment Act),[3] to the extent that it regulates the transfer of the Matatiele Local Municipality from the province of KwaZulu-Natal to the Eastern Cape Province. The statutes are challenged, mainly, on the grounds that the lawmaking processes did not measure up to the constitutional benchmark of facilitating public involvement as required in terms of sections 59(1)(a), 72(1)(a) and

[1] See *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (*Matatiele 1*) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2007 (6) SA 477 (CC) (*Matatiele 2*). The latter decision made it clear that the proposed legislation, namely, a Constitutional Amendment Bill, must be processed afresh in a manner that complies with all constitutional and procedural requirements. It is important to mention that although the order in *Matatiele 2* was formulated with reference to Matatiele Municipality only, the memorandum on the objects of the Thirteenth Amendment Act show that because of the so-called ñknock-on effectò on the municipalities now located in the province of the Eastern Cape, the legislative amendments intended to rectify the constitutional defect in *Matatiele 2* had to include reference also to the Eastern Cape Province.

[2] 23 of 2007. It amends Schedule 1A to the Constitution. It came into operation on 14 December 2007.

[3] 24 of 2007.

118(1)(a) of the Constitution[4] and that the lawmakers exercised their legislative powers to amend the Constitution under section 74[5] in a manner that was irrational.

Parties

[2] The first to eighth applicants are a grouping of organisations that claim to represent the broad spectrum of society in Matatiele and Maluti. They have filed joint papers and are collectively referred to as the applicants.

[3] A number of organs of state have been cited as respondents. Some of them oppose this application. Those opposing are: the second respondent, Minister for Provincial and Local Government (Minister for Local Government); the third respondent, the Minister for Justice and Constitutional Development (Minister for Justice); the fourth respondent, Premier of the Eastern Cape; the fifth respondent, Member of the Executive Council of the Province of the Eastern Cape for Local Government (MEC for Local Government, Eastern Cape); the sixth respondent, Premier of KwaZulu-Natal; the seventh respondent, Member of the Executive Council of the Province of KwaZulu-Natal for Local Government (MEC for Local Government, KwaZulu-Natal); the fifteenth respondent, Speaker of the National Assembly; the sixteenth respondent, Chairperson of the National Council of Provinces (Chairperson of the NCOP); the seventeenth respondent, Speaker of the Eastern Cape Provincial Legislature and the eighteenth respondent, Speaker of the

[4] The text of these provisions is set out in full at [32] below.

[5] Section 74 of the Constitution sets out the procedure for a constitutional amendment. The full text of the relevant parts thereof is set out below at n 13 and 14.

KwaZulu-Natal Provincial Legislature. Save for the Minister for Local Government, joint submissions have been filed on behalf of all the respondents who oppose this application. For convenience, they are referred to collectively as the respondents. The President of the Republic of South Africa[6] (the President) and the Umzimvubu Municipality abide the decision of the Court.

Relief sought

[4] The applicants seek, in the main, a declaratory order that the National Assembly and the National Council of Provinces (NCOP) exercised their legislative powers to amend the Constitution, in terms of section 74 thereof, in a manner that was irrational and unconstitutional. The applicants contend, in the alternative, that in approving that part of the Thirteenth Amendment Act that concerns the Matatiele Local Municipality, the provincial legislature of KwaZulu-Natal exercised its legislative power under section 74(8) of the Constitution in a manner that was irrational and inconsistent with the Constitution. In an alternative prayer, the applicants seek a declaratory order that Parliament did not comply with its constitutional obligations in terms of sections 59(1)(a) and 72(1)(a), alternatively, that the provincial legislature of KwaZulu-Natal failed to facilitate public involvement in terms of section 118(1)(a). The applicants also challenge the constitutional validity of the Repeal Amendment Act.

[6] Initially, the President filed a notice of intention to oppose the application. However, subsequently, he filed a notice to abide.

[5] Before I deal with the submissions of the parties, it is convenient to describe the constitutional and statutory context, as well as the background against which this application is brought.

Constitutional and statutory context

[6] This Court, in *Merafong*,[7] analysed the constitutional and statutory framework relating to provincial boundaries.[8] It is not necessary to restate this in detail. Suffice it to mention that the nine provinces of South Africa and their boundaries are established in Schedule 1A to the Constitution. Prior to amendment, the provinces were set out in section 103 of the Constitution.[9] The purpose of the Constitution Twelfth Amendment Act of 2005 (Twelfth Amendment Act) and the Cross-boundary Municipalities Real and Related Matters Act (Repeal Act)[10] was to re-determine the geographical areas of the nine provinces, including the Eastern Cape and KwaZulu-Natal Provinces, by reference to municipalities. The impugned statutes in this case seek to achieve the same objective in

[7] *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* [2008] ZACC 10; 2008 (10) BCLR 969 (CC); 2008 (5) SA 171 (CC) (*Merafong*).

[8] Id at paras 16-28. See also in this regard, *Matatiele 1* above n 1 at para 47.

[9] Section 103 of the Constitution provided:

> ñ(1) The Republic has the following provinces:
> (a) Eastern Cape
> (b) Free State
> (c) Gauteng
> (d) KwaZulu-Natal
> (e) Mpumalanga
> (f) Northern Cape
> (g) Northern Province
> (h) North West
> (i) Western Cape.
> (2) The boundaries of the provinces are those that existed when the Constitution took effect.ò

[10] 23 of 2005.

relation only to the provinces of KwaZulu-Natal and Eastern Cape.[11] The Thirteenth Amendment Act seeks, by amending Schedule 1A to the Constitution, to amend the geographical areas of the provinces of the Eastern Cape and KwaZulu-Natal.[12]

[7] In terms of section 74 of the Constitution, a Bill that alters provincial boundaries must be passed by the National Assembly with a two thirds majority. Additionally, it must be passed by the NCOP with the supporting vote of at least six of the nine provinces.[13]

[8] Section 74(8) of the Constitution[14] deals with the powers of the NCOP if a Bill or any part thereof concerns only a specific province or provinces, as is the case in this

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[11] The Thirteenth Amendment Act seeks to amend Schedule 1A to the Constitution as inserted by section 4 of the Twelfth Amendment Act.

[12] Section 1 of the Thirteenth Amendment Act provides:

> ñSchedule 1A to the Constitution of the Republic of South Africa, 1996, is hereby amended byð
> (a) the substitution for the determination of the geographical area of the Province of the Eastern Cape of the following determination:
> . . .
> (b) the substitution for the determination of the geographical area of the Province of KwaZulu-Natal of the following determination . . .ò.

[13] Section 74(3) of the Constitution provides:

> ñAny other provision of the Constitution may be amended by a Bill passedð
> (a) by the National Assembly, with a supporting vote of at least two thirds of its members; and
> (b) also by the National Council of Provinces, with a supporting vote of at least six provinces, if the amendmentð
> (i) relates to a matter that affects the Council;
> (ii) alters provincial boundaries, powers, functions or institutions; or
> (iii) amends a provision that deals specifically with a provincial matter.ò

[14] Section 74(8) provides:

> ñIf a Bill referred to in subsection (3)(b), or any part of the Bill, concerns only a specific province or provinces, the National Council of Provinces may not pass the Bill or the relevant part unless it has been approved by the legislature or legislatures of the province or provinces concerned.ò

matter. In that event, the province or provinces concerned may effectively veto that part of the Bill relating to its boundary or their boundaries.

[9] Sections 59(1)(a) and 72(1)(a) of the Constitution require the National Assembly and the NCOP, respectively, to facilitate public involvement in their legislative and other processes and those of their committees. Section 118(1)(a) of the Constitution echoes the above sections insofar as the obligations of the provincial legislatures are concerned.

Background

[10] The history of the matter is canvassed in *Matatiele 1*.[15] Therefore, it is not necessary to set out in detail the context in which the constitutional challenges will be considered. I mention merely that the determination of provincial boundaries by reference to magisterial districts, pursuant to the establishment of nine provinces in terms of the Constitution, resulted in certain municipalities straddling provincial boundaries.

[11] Accordingly, the Constitution Third Amendment Act[16] was enacted to introduce cross-boundary municipalities. Section 155(6A)[17] of the Constitution authorised the

[15] Above n 1 at paras 8-30.

[16] 87 of 1998.

[17] Section 155(6A) of the Constitution was introduced by the Third Amendment Act. This section provides:

> ñIf the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundaryð
>
> (a) that municipal boundary may be determined across the provincial boundary, but onlyð
>
> (i) with the concurrence of the provinces concerned; and
>
> (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality within that municipal area; and

establishment of cross-boundary municipalities. To give effect to that section, the Local Government: Cross-boundary Municipalities Act[18] was promulgated for the establishment of these municipalities. A total of 16 cross-boundary municipalities were established under this Act. Those cross-boundary municipalities did not include any municipalities in KwaZulu-Natal. However, because Matatiele was described as a cross-boundary jurisdictional enclave, the boundary[19] between KwaZulu-Natal and the Eastern Cape was considered to raise issues similar to those raised by the cross-boundary municipalities.

[12] The cross-boundary municipalities were to be jointly administered by the MECs of the two provinces into which each of these municipalities fell. However, the joint administration presented economic, political and other challenges. These challenges included the exercise of joint legislative powers by the MECs concerned in relation to local government matters. That impacted on the respective provincial budgets and undermined service delivery in those provinces. Reports commissioned by the government recommended that cross-boundary municipalities be abolished. The recommendation resulted in the political decision to abolish cross-boundary

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(b) national legislation mayð
  (i) subject to subsection, (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
  (ii) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
  (iii) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a).ò

[18] 29 of 2000.

[19] In this regard see *Matatiele 1* above n 1 at paras 8-10.

municipalities and the promulgation of the Twelfth Amendment Act and the Repeal Act to ensure that all municipalities fell into one province or the other.

[13] In August 2005 the Minister for Provincial and Local Government requested the Demarcation Board to re-determine the boundaries of Matatiele Municipality in terms of section 22(1)(b) of the Local Government Municipal Demarcation Act.[20] The Board recommended that the Matatiele Municipality should remain in Sisonke District Municipality in KwaZulu-Natal and that the Maluti area should be included in KwaZulu-Natal. The Minister for Justice proposed that the Maluti area be excluded from Umzimvubu in KwaZulu-Natal and be included in the Alfred Nzo District Municipality in the Eastern Cape. During August 2005 the Minister for Justice signalled her intention to introduce the Twelfth Amendment Bill, 2005 (Twelfth Amendment Bill). Comments were invited from interested parties. The Matatiele Municipality and others submitted written comments. The Twelfth Amendment Bill was introduced in the National Assembly in September 2005. The Bill was signed into law on 22 December 2005.

[14] To understand the present matter, I note that the Twelfth Amendment Act altered the boundaries between a number of provinces, including the border between the provinces of KwaZulu-Natal and the Eastern Cape. As a result, the Matatiele Municipality, which was previously located in KwaZulu-Natal, fell within the Eastern Cape. The Repeal Act was also passed. It provided for consequential matters that had to

[20] 27 of 1998.

be dealt with as a result of the re-alignment of cross-boundary municipalities and the re-determination of the geographical areas of provinces.

[15] The Twelfth Amendment Act was the subject matter of the application in both *Matatiele 1* and *Matatiele 2*. In *Matatiele 1* the Court rejected the applicantsô main argument that in passing the Twelfth Amendment Act Parliament had usurped the powers of the Municipal Demarcation Board. The Court called for further argument on the issue of constitutional compliance in relation to the boundary change between KwaZulu-Natal and the Eastern Cape. On 18 August 2006 and on a narrow basis,[21] the Court found that the provincial legislature of KwaZulu-Natal had failed to fulfil its constitutional obligation to facilitate public involvement in terms of section 118(1)(a) read with section 74(1)(a) of the Constitution. The Court declared invalid that part of the Twelfth Amendment Act that transferred Matatiele into the Eastern Cape. The order of invalidity also applied to that part of the Repeal Act which related to the relocation of Matatiele. The orders of invalidity were suspended for a period of 18 months so as to allow Parliament the opportunity to correct the constitutional defect.

[16] As a direct result of *Matatiele 2*, the Thirteenth Amendment Act and the Repeal Amendment Act, relating only to the border between the Eastern Cape and KwaZulu-Natal, have been passed. As I have indicated, the Thirteenth Amendment Act seeks to achieve the same result as was foreshadowed by the Twelfth Amendment Act and the

[21] The Court did not decide the constitutional validity of the Twelfth Amendment Act or the Repeal Act. It ruled that the then pending elections should go ahead and issued directions dealing with the further conduct of the case.

Repeal Act in relation to KwaZulu-Natal. The legislation incorporates Matatiele into the Eastern Cape and Umzimkulu into KwaZulu-Natal, hence the constitutional challenge. The challenge does not relate to the incorporation of Umzimkulu into KwaZulu-Natal, but only to the incorporation of Matatiele into the Eastern Cape. It is, therefore, necessary to determine whether the passage and content of the impugned legislation are consistent with the Constitution.

Parties' submissions

[17] The applicants contend that the National Assembly, acting through its Portfolio Committee, and the NCOP, acting through its Select Committee, failed to fulfil their constitutional obligations to facilitate public involvement by affording the people of Matatiele a meaningful opportunity to be heard. In particular, the applicants submit (a) that Parliament and the KwaZulu-Natal Legislature failed to consult only with the *discrete* group, as identified in *Matatiele 2*;[22] (b) that Parliament failed to receive oral submissions from interested parties and to consider the representations made by the residents of Matatiele; and (c) that Parliament, in both cases, failed to take effective account of their feelings with regard to the boundary change. They also contend that Parliament and the NCOP did not act in a manner in keeping with the constitutional values of accountability, responsiveness and openness.

[22] In the replying affidavit the applicants refer to the *discrete* and identifiable group of citizens as the people of the original municipality of Matatiele.

[18] The applicants submit that in exercising their legislative powers to enact the Thirteenth Amendment Act, Parliament and the KwaZulu-Natal Legislature merely went through the motions of public participation without considering, in good faith, what was submitted in that process. They contend that the enactment of the impugned legislation was a product of a politically dictated, pre-determined decision. The applicants argue that the legislation is irrational and inconsistent with the Constitution.

[19] The Speakers of the respective provincial legislatures take issue with the applicantsô contentions. They submit that the manner in which public participation was facilitated, both at the provincial and national level, was in compliance with the Constitution. In relation to the rationality of the Thirteenth Amendment Act, the respondents submit that there is no evidence to suggest that the Thirteenth Amendment Act is irrational. The Speakers contend that the applicants have delayed unreasonably in bringing their application. They contend that the delay prejudiced the MEC for Local Government, Eastern Cape and the Premier of KwaZulu-Natal. The respondents contend that the application should, therefore, be dismissed.

[20] The Speaker of the National Assembly and the Chairperson of the NCOP have applied for condonation of the late filing of their answering and confirmatory affidavits. This must also be dealt with.

[21] Before I define the issues, I must say something about the basis upon which this Court determines this case. The determination of the constitutionality of an amendment to the Constitution and the decision as to whether Parliament has failed to fulfil a constitutional obligation fall within the exclusive jurisdiction of this Court in terms of section 167(4)(d) and (e) of the Constitution, respectively.[23] The Repeal Amendment Act is inextricably bound up with the Thirteenth Amendment Act and should not be dealt with separately. It is, therefore, in the interests of justice for this Court to consider the constitutionality of the Repeal Amendment Act as a court of first instance as was done in identical circumstances in *Matatiele 2*.[24] Direct access in terms of section 167(6)(a) of the Constitution[25] should be granted.

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[23] Section 167(4)(d) and (e) provides that:

> ñOnly the Constitutional Court mayð
>
> . . .
>
> (d) decide on the constitutionality of any amendment to the Constitution;
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation. . . .ò.

See in this regard *Women's Legal Centre Trust v President of the Republic of South Africa and Others (United Ulama Council of South Africa; Women's Cultural Group; Association of Muslim Lawyers and Accountants; Islamic Unity Convention; Coalition of Muslim Women as Amici Curiae)* [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 13 and *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) at paras 13-31 (*Doctors for Life*). See also *King and Others v Attorneys Fidelity Fund Board of Control and Another* 2006 (4) BCLR 462 (SCA); 2006 (1) SA 474 (SCA) at para 23 (*King*).

[24] Above n 1 at para 105 where Ngcobo J held:

> ñThere can be no question as to the interrelationship between the Twelfth Amendment and the Repeal Act. This, in my view, is sufficient to warrant leave to approach this Court directly. Otherwise, the applicants would have been required to lodge a constitutional challenge relating to the Twelfth Amendment in this Court, which is the only court having jurisdiction in relation to the Twelfth Amendment, and lodge a separate challenge in relation to the Repeal Act in the High Court.ò

See also *Merafong* above n 7 at para 12.

[25] Section 167(6)(a) of the Constitution provides:

> ñNational legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with the leave of the Constitutional Courtð
>
> (a) to bring a matter directly to the Constitutional Court.ò

Issues for determination

[22] The matter raises the following issues, and a range of subsidiary questions:

(1) Should the application for condonation for the late filing of the answering affidavit by the Speaker of the National Assembly and the Chairperson of the NCOP be granted?

(2) Was the delay in launching the application unreasonable?

(3) Issues of public involvement, includingð

(a) whether failure on the part of the respondents to consult only with the *discrete* group, as identified in *Matatiele 2*, renders the facilitation of participation by the respondents unconstitutional;

(b) whether the failure on the part of the National Assembly to receive oral submissions from interested parties constitutes non-compliance with the constitutional obligation; and

(c) whether the National Assembly and the KwaZulu-Natal Legislature considered the representations made by the residents of Matatiele.

(4) Issues of rationality, including whether the Thirteenth Amendment Act is rationally connected to a legitimate governmental purpose.

(5) If the applicants fail on these issues of public participation and rationality aboveð

(a) do we reach the dispute of fact?

(b) If so, is that dispute material?

(6) What is the appropriate remedy, if any?

(7) What is the appropriate costs order?

[23] I deal first with the preliminary issues relating to the application for condonation and the reasonableness of the delay in lodging this application.

Should condonation be granted?

[24] The Speaker of the National Assembly and the Chairperson of the NCOP seek condonation for the late filing of their answering affidavits. The explanation advanced includes the fact that the Chairperson of the National Assemblyôs Portfolio Committee on Provincial and Local Government, Mr Solomon Lechesa Tsenoli, had intended to depose to the answering affidavit. However, at a fairly late stage during the preparation of the answering affidavit, it became necessary to substitute the former Chairperson of the National Assemblyôs Portfolio Committee on Justice and Constitutional Development, Ms Fatima Chohan, for Mr Tsenoli. It is explained that Ms Chohan had an independent recollection of the facts appearing in the parliamentary documentation. Therefore, according to the Speaker of the National Assembly and the Chairperson of the NCOP, Ms Chohanôs substitution for Mr Tsenoli and the revision of the draft affidavit delayed the filing of the opposing papers. The applicants do not oppose the application for condonation. Accordingly, I am satisfied that it is in the interests of justice to grant condonation. The next preliminary issue relates to the reasonableness of the delay in challenging the constitutionality of the impugned legislation.

The delay in launching this application

[25] The Speakers of the Eastern Cape and KwaZulu-Natal Provincial Legislatures have taken the point *in limine* that the applicants have delayed in bringing their application. They argue that the delay has been prejudicial to the MEC for Local Governments in the Eastern Cape and KwaZulu-Natal, respectively, because the process of transferring civil servants and assets from the KwaZulu-Natal Provincial Administration to the Eastern Cape Provincial Administration had begun. They contend, among other things, that the allocation of an equitable share of revenue to both provinces and the affected municipalities in terms of section 227 of the Constitution[26] had already been calculated on the basis of Matatiele being part of the Eastern Cape. The respondents claim that the reversal of the process would adversely impact on service delivery in Matatiele. Therefore, the respondents contend that the applicants are not entitled to the relief they seek.

[26] The Thirteenth Amendment Act commenced on 14 December 2007 and this application was lodged on 10 October 2008; a delay of approximately 9 months. The applicants contend that the delay is reasonable. They explain that they consulted with

[26] Section 227(1) provides:

> ñ(1) Local government and each provinceð
> (a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
> (b) may receive other allocations from national government revenue, either conditionally or unconditionally.ò

their legal representatives on 13 February 2008 with a view to preparing and lodging this application. In the meantime, they remained hopeful that the National Executive would resolve the issue. This hope was formed after their meeting with the newly elected President of the African National Congress, Mr Jacob Zuma, on 28 December 2007, where they gained an impression that he favoured the retention of Matatiele in KwaZulu-Natal. They also engaged the South African Human Rights Commission (HRC) to monitor the process. However, according to the applicants, the HRC failed to give them a report despite repeated requests. The applicants claim that this failure was the greatest source of the delay. Furthermore, they maintain that they were unsuccessful in their endeavour to obtain transcripts of the hearings.

[27] It cannot be gainsaid that applications of this kind should be brought without delay after the Bills have been promulgated to ensure, among other things, stability and legal certainty.[27] This is particularly so because the impugned legislation has practical and budgetary consequences for public administration relating to a wide variety of functional areas of national and provincial competence. As the respondents point out, these implications impact on the daily lives of citizens in the areas affected by the impugned legislation. Therefore, legal certainty must be obtained as speedily as possible.

[27] See in this regard *Doctors for Life* above n 23 at para 216 where this Court, per Ngcobo J, stressed the need to launch applications as soon as practicable after the Bills have been promulgated. The Court, at para 218, remarked that relief might be denied to those who have not pursued their cause timeously. See also *Merafong* above n 7 at para 15.

[28] In *Doctors for Life*,[28] this Court held that a challenge based on a failure to facilitate public participation must be launched ñas soon as practicable after the Bills have been promulgated.ò[29] The Court added that ñapplicants who have not pursued their cause timeously in this Court may well be denied relief.ò[30] Legislatures are entitled to know, as soon as possible, whether the process they followed in enacting the law will be challenged. This is to enable them to preserve all documents that may be necessary in the ensuing litigation. Where a litigant has not acted with promptitude, the litigant must provide a satisfactory explanation for any delay that has occurred.

[29] The applicants did not act with promptitude. The explanation that has been proffered is not entirely satisfactory. This is not the first litigation that they have initiated concerning the relocation of Matatiele into the Eastern Cape. In addition, they were always opposed to this relocation. It is, therefore, difficult to understand why it would have taken them approximately nine months to bring the application. The alleged difficulty in securing meetings with their legal representatives and coordinating a large group do not provide a satisfactory explanation for the delay. Nor does the fact that they were under the impression that the issue would be resolved without resorting to litigation. However, in the view I take of the main issues presented in this case, it is not necessary to reach any firm conclusion in this regard.

[28] Above n 23.

[29] Id at para 216.

[30] Id at para 218.

[30] Although the main attack is premised on the fact that the National Assembly and the NCOP exercised their legislative powers irrationally, it is appropriate, in the view I take of the matter, to address the issue relating to the constitutional obligation to facilitate public involvement first.

Was there adequate facilitation of public participation?

[31] Before I address this question, it is important to highlight the developed jurisprudence of this Court in relation to it.

[32] Section 59(1) requires the National Assembly toð

> ñ(a) facilitate public involvement in the legislative and other processes of the Assembly and its committeesò.

Section 72(1) requires the NCOP toð

> ñ(a) facilitate public involvement in the legislative and other processes of the Council and its committeesò.

Section 118(1)(a) requires a provincial legislature toð

> ñ(a) facilitate public involvement in the legislative and other processes of the legislature and its committeesò.

[33] This Courtôs approach to constitutional challenges of this nature is authoritatively set out by Ngcobo J in *Doctors for Life*[31] and *Matatiele 2*,[32] where the nature of our constitutional democracy is aptly described. That approach establishes that engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy.[33] When a decision is made without consulting the public the result can never be an informed decision.

[34] As this Court observed in *Doctors for Life*,[34] both the duty to facilitate public involvement and the positive right to political participation ñseek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation.ò[35] This can be achieved not only through elected representatives, but also by enabling citizens to participate directly in public affairs, ñthrough public

[31] Above n 23 at paras 110-7.

[32] *Matatiele 2* above n 1.

[33] Above n 7 at para 44 where Van der Westhuizen J noted the following:

> ñPublic participation strengthens the legitimacy of legislation in the eyes of the people. It is an important counterweight to secret lobbying and influence-peddling.ò

[34] Above n 23.

[35] Id at para 92. See also articles 9 and 13 of the African [Banjul] Charter on Human and Peoplesô Rights (African Charter) adopted on 27 June 1981, after the International Covenant on Civil and Political Rights (ICCPR) and acceded to by South Africa on 9 July 1996.

debate and dialogue with elected representatives, referendums and popular initiatives or through self-organisationò.[36]

[35] The Court held that the plain meaning of section 72(1)(a) requires the state to take steps to ensure that the public participate in the legislative process.[37] Furthermore, it was held that legislative bodies ñhave considerable discretion to determine how best to fulfil their duty to facilitate public involvement.ò[38] In determining the adequacy of public participation facilitation, this Courtôs role is to embark on a reasonableness enquiry so as to determine whether ñthere has been the degree of public participation required by the Constitution.ò[39] Striking a balance between the need to respect parliamentary autonomy on the one hand, and the right of the public to participate in the legislative process on the other, is crucial. The Court went on to say:

> ñIn determining whether Parliament has complied with its duty to facilitate public participation in any particular case, the Court will consider what Parliament has done in that case. The question will be whether what Parliament has done is reasonable in all the circumstances. And factors relevant to determining reasonableness would include rules, if any, adopted by Parliament to facilitate public participation, *the nature of the legislation under consideration*, and whether the legislation needed to be enacted urgently. Ultimately, what *Parliament must determine in each case is what methods of facilitating public participation would be appropriate*. *In determining whether what*

[36] *Doctors for Life* above n 23 at para 99. This practice of allowing the public to participate in the conduct of public affairs is akin to the traditional means of public participation in the lekgotla or imbizo, the process that was, and still is, followed within African communities where issues affecting the community are debated.

[37] Id at para 120.

[38] Id at paras 123-4 and 145.

[39] Id at para 124.

> *Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method.*ò[40] (Emphasis added.)

[36] The Court also pointed out that:

> ñWhether a legislature has acted reasonably in discharging its duty to facilitate public involvement will depend on a number of factors. The nature and importance of the legislation and the intensity of its impact on the public are especially relevant. Reasonableness also requires that appropriate account be paid to practicalities such as time and expense, which relate to the efficiency of the law-making process. Yet the saving of money and time in itself does not justify inadequate opportunities for public involvement. In addition, in evaluating the reasonableness of Parliamentôs conduct, this Court will have regard to what Parliament itself considered to be appropriate public involvement in the light of the legislationôs content, importance and urgency. Indeed, this Court will pay particular attention to what Parliament considers to be appropriate public involvement.ò[41]

[37] As is apparent from *Matatiele 2*, a new constitutional amendment had to be enacted to comply with all constitutional and procedural requirements. It is therefore necessary to establish the methods adopted and steps taken by the lawmakers to ensure that public involvement, as required by the Constitution, took place.

[38] There can be no doubt that public participation was indeed facilitated by both Parliament and the KwaZulu-Natal Provincial Legislature. That is borne out by the contents of various transcripts of the public hearings held at different places, both at

[40] Id at para 146.

[41] Id at para 128.

national and provincial level, and from the minutes of meetings of the Portfolio Committees on Justice and Constitutional Development and Provincial and Local Government, as well as the minutes of the meetings of the NCOP Select Committee.

[39] At national level, the Minister for Local Government announced on the government website,[42] on 17 May 2007, that a constitutional amendment to correct the defect in the process of correcting boundary anomalies in KwaZulu-Natal and the Eastern Cape would be introduced. The Cross-boundary Municipalities Law Repeal and Related Matters Bill, 2007 (the Repeal Amendment Bill) was published in the Government Gazette.[43] On 25 May 2007 the Minister for Justice signalled her intention of introducing the Constitution Thirteenth Amendment Bill, 2007 in the National Assembly and, at the same time, published the Bill for public comment in accordance with section 74(5)(a) of the Constitution. She invited persons wishing to comment on the proposed amendment to submit written comments by no later than 25 June 2007. The notice was published in the Government Gazette.[44]

[42] South African Government Information, *Government corrects legislative defect in the transfer of Matatiele Municipality from KwaZulu-Natal to Eastern Cape* http://www.info.gov.za/speeches/2007/07051716451003.htm, accessed on 16 July 2007.

[43] GG 29895 GN 621 of 2007, 18 May 2007.

[44] GG 29910 GN 639 of 2007, 25 May 2007.

[40] On 18 June 2007, and in reaction to the invitation to the public to comment on the Bills, the Matatiele/Maluti Mass Action Committee (Mass Action Committee)[45] submitted written comments on the Bills. In those submissions, the Mass Action Committee stated, among other things, that:

> ñGovernment, including the National Assembly and the National Council of Provinces did not act in an accountable, responsive, open or transparent manner. Nor did they afford the people of Matatiele the basic rights of dignity and self respect.ò

The Mass Action Committee maintained that: the National Assembly and the NCOP did not ñin a material sense enlighten themselves as to the merits of the removal of Matatiele from KwaZulu-Natalò; the government had seemingly made up its mind to press ahead with the Bills despite the opposition by the people of Matatiele and the process followed by the Demarcation Board and its provisional re-determination was neither credible nor thorough. That Committee denied that Matatiele was ever ña cross-jurisdictional enclaveò as was claimed by the then Minister for Local Government when he advanced reasons for the removal of Matatiele from KwaZulu-Natal. The Mass Action Committee asked for the withdrawal of the Bills.

[41] On 23 July 2007, the former Chairperson of the Portfolio Committee on Justice and Constitutional Development (Chairperson) issued a press statement in which she

[45] This Committee consists of various organisations that are representatives of the broad spectrum of the residents of the affected areas. The organisations are: Poverty Alleviation Network; Cedarville and District Farmers Association; Matatiele Chamber of Commerce; Governing Body of the King Edward High School; George Moshesh Tribal Authority; Maluti Chamber of Business; Matatiele and Maluti Council of Churches; Moharane Community Based Organization and Zizamele Pre-school Training Project.

referred to *Matatiele 2* and invited the public to make submissions on the Thirteenth Amendment Bill by no later than 7 August 2007. Press statements, according to the Chairperson, are well publicised and elicit submissions by members of the public. In her answering affidavit the Chairperson points out that a large number of submissions from the public were received. This is evidenced by a list of submissions on both Bills compiled by the Secretary: Portfolio Committee on Provincial and Local Government dated 11 November 2008. The Portfolio Committee on Provincial and Local Government also invited written comments on the Repeal Amendment Bill via advertisements in major national newspapers.[46]

[42] The applicantsô submissions were among those that were discussed at a joint meeting of the Portfolio Committees on Provincial and Local Government and Justice and Constitutional Development, held on 28 August 2007. The minutes of the meeting reflect that the Chairperson asked the Department of Provincial and Local Government to extract from the submissions all concerns pertaining to service delivery. A comprehensive report was commissioned on that issue, as well as a report on the issue of the alignment of service delivery points with the municipal boundaries. These averments and the veracity of the minutes of these meetings remain unchallenged. The Committees did not deem it necessary to call for oral submissions.

[46] These newspapers included: *Business Day*, *Mail & Guardian*, *Sowetan* and *Sunday Times*.

[43] At provincial level, the KwaZulu-Natal Legislature referred the Thirteenth Amendment Bill to its own NCOP Select Committee and Local Government and Traditional Affairs Portfolio Committee. After the briefing on the Bills, a number of public meetings were arranged during October 2007. Among these meetings was a meeting on 15 October at which the KwaZulu-Natal Legislature invited the applicants to attend public hearings on 23 October at the Matatiele Town Hall. Another meeting took place on 24 October at the KwaZulu-Natal Legislature in Pietermaritzburg and yet another on 25 October at the Umzimkulu Town Hall.

[44] The meeting on 23 October was organised by the Eastern Cape and KwaZulu-Natal Legislatures. Two meetings seemingly took place. One was arranged by the Eastern Cape delegation and the other by the KwaZulu-Natal delegation. The latter insisted on holding a separate hearing as the Court had allegedly ordered. People from as far as Mount Frere were transported by busses to attend the meeting. Despite a chaotic commencement of the KwaZulu-Natal delegation public hearing, it was eventually brought under control. That is evident from the report by the HRC monitor. Those who supported the move to KwaZulu-Natal based their argument on two issues: first, lack of service delivery and, second, corruption in the Eastern Cape provincial government for which various examples, including poor service delivery on roads, electricity, housing and poor feeding schemes in schools, were cited. According to the report, many written submissions were received from individuals and groups. At that meeting, the KwaZulu-

Natal delegation announced that another meeting would be arranged at the stadium, in order to accommodate all people.

[45] In his report, the HRC monitor concluded that the hearings went well and that the people of Matatiele were afforded a fair chance to address the provincial governments of the Eastern Cape and KwaZulu-Natal on whether they wanted to be incorporated into the Eastern Cape or into KwaZulu-Natal. The monitor remarked that although there was a disruption during the meeting of the delegation from KwaZulu-Natal, not all was lost because another meeting was scheduled to take place at a bigger venue. Although the applicants describe the meeting of 23 October 2007 as a failure, they concede that the events took place very much as described by the HRC monitor even though they disagree with the monitorôs conclusion.

[46] The records of the meeting at the KwaZulu-Natal Provincial Legislature, held at Pietermaritzburg, reveal that the applicants were also invited to address the Provincial Local Government Portfolio Committee on 24 October 2007. There, on the applicantsô own version, they made oral submissions through their legal representatives, who also submitted written representations against the Constitution Thirteenth Amendment Bill. The submissions were substantially similar to the written submissions submitted on 18 June 2007 and discussed by the Joint Portfolio Committees in Parliament. Regarding the meeting of the Local Government Portfolio Committee in Pietermaritzburg, it would seem that no one spoke in favour of the Bill.

[47] The meeting at the Umzimkulu Town Hall took place on 25 October 2007. The report by the HRC shows that this public hearing did, indeed, take place and that most of the submissions received echoed the desire to remain in KwaZulu-Natal because the Province provided better services than the Eastern Cape.

[48] On 30 October 2007 the second public hearing for the people of Matatiele regarding the Constitution Thirteenth Amendment Bill was held at the Thandanani Stadium. Approximately 3 000 people attended. As is apparent from the transcript of the public hearings on that date, the community members clearly supported the applicantsô opposition to relocation to the Eastern Cape.

[49] The KwaZulu-Natal Legislature, thereafter, approved the Bill by 40 to 36 votes with three absent on 1 November 2007. The applicants claim that the public perception of the conduct of the KwaZulu-Natal Legislature was that the vote in favour of the Thirteenth Amendment Bill was ordered and directed by the national government.

[50] Objectively, it is manifest that participation was facilitated.[47] During oral argument, counsel for the applicants did not dispute this, nor was it contended that the applicants were unable to present their views. The applicantsô complaint, as it was

[47] See *Doctors for Life* above n 23 at para 127, where the standard of reasonableness is stated.

presented in oral argument, is that the residents of Matatiele alone, as a *discrete* group, ought to have been afforded an exclusive opportunity to participate during the public hearings. It is contended that because all interested parties, and not only the residents of Matatiele, were allowed to express their views, the applicantsô views were watered down. The question then arises whether failure to consult only with the *discrete* group rendered facilitation of public participation unconstitutional.

Does failure to consult only with the discrete group render public participation inadequate?

[51] I mention at the outset that the contention regarding the failure to consult the *discrete* and identifiable group was not raised by the applicants as one of the grounds they contend gave rise to the constitutional challenge to the Thirteenth Amendment Act. In any event, I consider that there is no merit in the argument. Quite apart from the difficulties the applicants had in defining who they meant by the *discrete* group they claimed had to be consulted, they appear to have misconstrued the judgment in *Matatiele 2*, in which this Court stated the following:

> ñ[T]he applicants are a discrete and identifiable group who are directly affected by that part of the Twelfth Amendment which relocates Matatiele to the Eastern Cape province. They have actively asserted their right to be heard. And once the Twelfth Amendment was enacted, they immediately approached this Court for relief. In these circumstances, relief cannot be denied to them.ò[48]

[48] Above n 1 at para 100.

[52] And earlier in that matter the Court remarked that:

> ñThe more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say.ò[49]

[53] Properly understood, the statement does not appear to advocate that when seeking to involve an identifiable and *discrete* group, participation of only this group, to the exclusion of all others, is required. What it indicates, I consider, is that the group must be afforded a reasonable opportunity to participate meaningfully in the law-making processes. In any event, the alleged *discrete* group is not what the applicants contend it is. As I have indicated earlier, the impugned legislation affects not only the people of Matatiele but also those of Maluti and Umzimkulu. It would have been unreasonable for the Government to have excluded the people in those areas. As a matter of law and fact, the complaint is unfounded and also not borne out by the case in the founding papers. Accordingly, the constitutional challenge on this ground must fail. Next, for determination, is whether the failure by the National Assembly to receive oral submissions from interested parties constitutes non-compliance with the constitutional obligation to involve the public in the law-making process.

Does the failure to receive oral submissions render public participation inadequate?

[49] Id at para 68.

[54] The applicants contend that the National Assemblyôs decision to dispense with oral submissions was premised on the assumption that the applicantsô sole concern was that service delivery would deteriorate as a result of the relocation of Matatiele. It is submitted by the applicants, however, that this was not their sole concern. Their concern, it is argued, is that they may have been able to dispel the illusion that the issue was solely one of service delivery, had the *discrete* group been afforded the opportunity to make oral representations.[50] They argue that in being prevented from making oral submissions, the National Assembly failed to comply with its constitutional obligation to facilitate public involvement.

[55] Our Constitution establishes the founding values of the state which include ña multi-party system of democratic government, to ensure accountability, responsiveness and openness.ò[51] The principle that government must act transparently and accountably bear on the construction of constitutional and statutory obligations.[52] The principles of accountability and responsiveness, however, require that the procedures chosen to fulfil the constitutional obligation to facilitate public involvement must, in each case, ñbe

[50] Their other concerns were the deterioration of the town in general and the financial reserves of the Municipality as well as the increase in its rates and obligations as a result of large loans.

[51] See section 1(d) of the Constitution.

[52] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (4) BCLR 301 (CC); 2005 (2) SA 359 (CC) at para 76.

reasonably related to the material they have to considerò[53] and, if challenged, those responsible should account for the procedures they have adopted.[54]

[56] In *Doctors for Life,* this Court stated:

> ñParliament and the provincial legislatures have broad discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement in a given case, so long as they act reasonably. Undoubtedly, this obligation may be fulfilled in different ways and is open to innovation on the part of the legislatures. In the end, however, the duty to facilitate public involvement will often require Parliament and the provincial legislatures to provide citizens with a *meaningful opportunity to be heard* in the making of the laws that will govern them. Our Constitution demands no less.ò[55] (Emphasis added.)

The applicants concede that the obligation to facilitate public involvement may be fulfilled in different ways and that lawmakers have a discretion to determine how best to fulfil their constitutional obligation to facilitate public involvement.

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[53] See *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others; In re: Application for Declaratory Relief* [2005] ZACC 14; 2006 (8) BCLR 872 (CC); 2006 (2) SA 311 (CC) at para 633.

[54] The Speaker of the National Assembly drew the Courtôs attention to the stipulated procedure for introducing a Constitution Amendment Bill. The Rules of the National Assembly, in particular, Rule 258(2)(b) read with section 74(5) of the Constitution, stipulate that a Bill must be published in the Government Gazette and must contain a notice stating the intention to introduce the Bill, the objects of the Bill andð

> ñan invitation to interested persons and institutions to submit *written representations* on the draft constitutional amendment to the person or committee intending to introduce the bill.ò (Emphasis added.)

After receiving written comments, a Portfolio Committee proceeds to the ñpublic participationò stage, in that it would formally engage with the content of the submissions made, and depending on the clarity of the submissions received; this stage *may* include the receipt of oral submissions.

[55] Above n 23 at para 145. See also *King* above n 23 at para 21.

[57] On the applicantsô own admission, they sent full representations to both the Minister for Provincial and Local Government and the Minister for Justice on 18 June 2007. These representations were received by the National Assembly acting through its Portfolio Committees and the NCOP acting through its Select Committee. The minutes of the meetings of the Portfolio Committees reveal that those representations were considered by the National Assembly, with the result that the Portfolio Committees observed that the content of the representations contained no matters of substance. The representations were characterised under three distinct themes.[56] After deliberating on all the representations received and having formed the view that no clarity on the submissions was required by the lawmakers, the Portfolio Committees decided to dispense with oral submissions.

[58] It also needs to be mentioned that in the context of a constitutional amendment that affects provinces, public participation is facilitated at various levels. In this case, for example, the applicants were afforded a further opportunity to address the Portfolio Committee on 24 October 2007. There, the applicants made joint representations through their legal representatives who also submitted written submissions against the Bill. These submissions were, on the applicantsô version, substantially similar to those submitted on 18 June 2007 by the Mass Action Committee. Therefore, there is nothing to suggest that

[56] The Parliamentary Records reveal that the Committees, after considering the written submissions, characterised the applicantsô submissions under three headings, namely, (a) personal preferences either for the retention of Matatiele in the Eastern Cape or the inclusion thereof in the province of KwaZulu-Natal; (b) calling for incorporation of Matatiele into the province of KwaZulu-Natal based on historic, ethnic and cultural links with that province; and (c) relating to future lack of service delivery.

dispensing with oral representations rendered the process nugatory. This argument must, therefore, fail. Next, is the question whether the representations made by the residents of Matatiele were considered by the lawmakers.

Did the National Assembly and the KwaZulu-Natal Legislature consider the representations made by the residents of Matatiele?

[59] The applicants argue that Parliament and the KwaZulu-Natal Legislature did not consider their representations but merely went through the motions in inviting submissions and arranging public meetings so as to secure constitutional compliance regardless of the outcome of the process. They claim that the decision to relocate Matatiele was pre-determined and that the public hearings were a formalistic sham.

[60] It cannot be gainsaid that citizens must be afforded an opportunity to be heard and that lawmakers should keep an open mind and consider the input by the populace. In *Merafong*,[57] this Court puts it thus:

> ñTo say that the views expressed during a process of public participation are not binding when they conflict with Governmentôs mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. *Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public*.ò[58] (Emphasis added.)

[57] *Merafong* above n 7.

[58] Id at para 51.

[61] In its report, the Portfolio Committee on Justice and Constitutional Development maintained that it engaged the public during its consideration of the Thirteenth Amendment Bill by calling for written submissions and that it considered the submissions, including those submitted to the Speaker of the National Assembly and the Chairperson of the NCOP. The applicantsô full written submissions of 18 June 2007 were undisputedly among those submissions received by the relevant Portfolio Committees. As mentioned earlier,[59] these submissions were discussed at the joint briefing of the Portfolio Committees on Provincial and Local Government and Justice and Constitutional Development on 28 August 2007. During these deliberations it became apparent that the issue of service delivery was the main concern of the applicants. That gave rise to the Chairperson of the Portfolio Committee on Justice and Constitutional Development asking the Department of Provincial and Local Government to extract from the applicantsô submissions all issues pertaining to service delivery. The Chairperson also commissioned a report on that aspect, as well as a report on the alignment of service delivery with municipal boundaries. Interestingly, the applicants do not take issue with these averments or dispute the veracity of the minutes of the meetings of these committees.

[62] As I understand their contentions, the applicantsô argument suggests that compliance with the Constitution depends on the outcome of the participation, which must have an impact on the final decision. Although due cognisance should be taken of

[59] See [42] above.

the views of the populace, it does not mean that Parliament should necessarily be swayed by public opinion in its ultimate decision. Differently put, public involvement and what it advocates do not necessarily have to determine the ultimate legislation itself.[60]

[63] The fact that the process of engagement is not reflected in a change to the legislation, or in the accommodation of the representations submitted to Parliament, does not necessarily mean that reasonable public participation did not take place or that the views of the public were not considered. Finally on this issue, I conclude that the applicants have failed to show that Parliament, the NCOP and the KwaZulu-Natal Provincial Legislature failed to fulfil their constitutional obligations to facilitate public involvement in terms of sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution, respectively. Next for consideration is the issue relating to the rationality of the legislation in question.

Is the decision to promulgate the Thirteenth Amendment Act rationally connected to a legitimate governmental purpose?

[64] The answer to this question must be in the affirmative.

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[60] See in this regard *Merafong* above n 7 at para 50 where the Court remarked:

> ñBut being involved does not mean that oneôs views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.ò (Emphasis added.)

[65] The principle that every law and every exercise of public power should not be arbitrary but rational has been developed by this Court in a series of judgments.[61] This principle sets rationality[62] as a necessary condition for legal validity that every law or act of organs of state should fulfil.[63]

[66] In *Merafong,* the Court, per Van der Westhuizen J, stated the following:

> ñWhat is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are, however, available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. *It is not for this court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to*

[61] See for example *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at paras 74-9; *Merafong* above n 7 at paras 62-6; *United Democratic Movement v President of the RSA and Others (1)* [2002] ZACC 21; 2002 (11) BCLR 1179 (CC); 2003 (1) SA 495 (CC) at para 55 (*UDM 2*)*; Pharmaceutical Manufacturers Association of SA and Others ;In Re: Ex Parte Application of President of the RSA and Others* [2000] ZACC 1; 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC) at paras 85 and 90 (*Pharmaceutical Manufacturers*); *New National Party of South Africa v Government of the RSA and Others* [1999] ZACC 5; 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at paras 19 and 24 (*New National Party*) and *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at para 156.

[62] The source of the Courtôs power to review the validity of the legislation and the exercise of public power is the principle of legality, which is justified by the broader value of the rule of law. See in this regard *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras 56-8 and *Pharmaceutical Manufacturers* above n 61 at para 85.

[63] See in particular *Pharmaceutical Manufacturers* above n 61 at para 90 where this Court stated:

> ñRationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.ò

> *achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is.*ò[64] (Emphasis added.)

[67] The long title of the Thirteenth Amendment Act provides:

> ñTo amend the Constitution of the Republic of South Africa, 1996, so as to correct invalid provisions inserted into the Constitution; and to provide for matters connected therewith.ò

[68] The invalid provisions that the Thirteenth Amendment Act seeks to correct are those provisions which were declared invalid by this Court in *Matatiele 2*.[65] Therefore, the purpose of the Thirteenth Amendment Act must be assessed in the light of what the Twelfth Amendment Act sought to achieve.[66] During oral argument counsel for the applicants stressed that if public participation is to be meaningful, it must influence the outcome. The applicantsô argument seeks to link process with outcome and, in doing so,

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[64] *Merafong* above n 7 at para 114. See also *New National Party* above n 61 at para 25.

[65] *Matatiele 2* above n 1 at para 114. The relevant portion of the order provided:

> ñ(b) That part of the Constitution Twelfth Amendment of 2005 which transfers the area that previously formed the local municipality of Matatiele, designated KZ5a3 by Municipal Notice 147 published in the KwaZulu-Natal Provincial Gazette 5535 on 18 July 2000, from the province of KwaZulu-Natal to the province of the Eastern Cape is declared to be inconsistent with the Constitution and therefore invalid.ò

[66] The Twelfth Amendment Act declares that its purpose is ñto re-determine the geographical areas of the nine provinces of the Republic of South Africa; and to provide for matters connected therewithò, while the Repeal Act declares its purpose as being amongst other things, toð

> ñprovide for consequential matters as a result of the re-alignment of former cross-boundary municipalities and the re-determination of the geographical areas of provinces; and provide for matters connected therewith.ò

See also *Matatiele 1* above n 1 at para 16 where this Court stated the following:

> ñThe problems associated with the administration of the cross-boundary municipalities led to huge financial burdens and costs and often undermined service delivery. . . . Various reports that were commissioned on the cross-boundary municipalities recommended that the concept of cross-boundary municipalities should be abolished. . . . It was this political decision that led to the enactment of the Twelfth Amendment and the Repeal Act.ò

muddles up the procedural requirement for legislative validity and the requirement that there be a rational connection between legislation and the legitimate governmental purpose sought to be achieved. Rationality necessarily concerns itself with outcome, in the sense that any legislation that results from the process must itself be rational. Legislation passed without adequate consultation could be rational but not pass constitutional muster because of a lack of consultation.

[69] The applicants argue that Matatiele was never a cross-boundary municipality and therefore that it should never have been included within the scheme of the Twelfth Amendment Act.[67] They argue that the Thirteenth Amendment Act is premised on an error of fact. The applicants deny that Matatiele was ever a cross-jurisdictional enclave. The respondents do not contend that Matatiele is a cross-boundary municipality. As indicated above, they describe Matatiele as a cross-jurisdictional enclave.[68] The respondents submit that the purpose of the Thirteenth Amendment Act is to make the Matatiele Municipality economically viable and to improve its governance.

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[67] For that reason, it is contended that the present matter should be differentiated from *Merafong*.

[68] In the report entitled ñFormer Cross Boundary Municipalitiesò dealing with the issue of cross-boundary municipalities prior to the passing of the Thirteenth Amendment Act, the following is stated:

> ñProblems around provincial boundaries were not limited to cross boundary municipalities and problems were also created around the Eastern Cape/KwaZulu-Natal boundary.ò

Furthermore even at the time of the Twelfth Amendment Act, when this matter came before the Court in *Matatiele 1*, it was made clear that the complicated demarcation of the district rendered it difficult to sustain development and basic service provision in the area.

The parliamentary debates and minutes from committee meetings all indicate that service delivery is a problem in the area and that, technically, Matatiele is not a cross-boundary municipality but problems associated with cross-boundary municipalities are common to Matatiele because of its complicated boundary.

[70] There is no doubt that Matatiele is a cross-jurisdictional enclave. That is fortified by the applicantsô own version that, for years, since the creation of the former Transkei, there was a bubble of land around the village of Umzimkulu which intruded into the province of KwaZulu-Natal but which was part of the Eastern Cape Province. The applicants also state that the settlement of Maluti, situated in the Umzimvubu Local Municipality within the Alfred Nzo District Municipality, in the Eastern Cape, has always been an adjunct to Matatiele. Needless to say, these straddling municipalities would, as is the case with cross-boundary municipalities, have similar economic and political challenges.

[71] As this Court observed in *Pharmaceutical Manufacturers*,[69] a court cannot interfere with legislation simply because it disagrees with its purpose or believes that it should be achieved in a different way.[70] Unless it can be shown that the objective is arbitrary, capricious or manifests naked preferences, ñit is irrelevant to this inquiry whether the scheme chosen by the legislature could be improved in one respect or

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[69] Above n 61 at para 90.

[70] See in this regard *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council and Others* [1997] ZACC 19; 1998 (1) BCLR 1 (CC); 1998 (2) SA 61 (CC) at para 24 where Oô Regan J stated the following:

> ñThe question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes.ò

See also *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) at para 36 and *Weare and Another v Ndebele NO and Others* [2008] ZACC 20; 2009 (4) BCLR 370 (CC); 2009 (1) SA 600 (CC) at para 46.

another.ò[71] Indeed, lawmaking is the function of Parliament alone. This Court cannot decide in which province people must live or second-guess the option chosen by Parliament to achieve its policy goals.

[72] In a separate argument, the applicants sought to demonstrate that the Thirteenth Amendment Act was irrational becauseð

(a) the decision was predetermined;[72]

(b) the lawmakers were instructed to vote in a particular manner; and

(c) the ruling party instructed its representatives in Parliament on how to vote on the Thirteenth Amendment Bill.

[73] This argument requires the Court to go behind the rationally enacted constitutional amendment and investigate the motives of Parliament and the ruling party. This the Court cannot do. The Court cannot concern itself with the individual motives of legislators.[73] There is good reason for this: if the Court preoccupies itself with what precedes the passing of the legislation (the motive), to the exclusion of its actual purpose, it would fail to focus on the proper object of the enquiry, which is the rationality of the

[71] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) BCLR 139 (CC); 1999 (2) SA 1 (CC) at para 17.

[72] The applicantsô contention that the voting on the Bills was predetermined and subject to pressure by the National Assembly seems to be based on the assumption that there was ñabsence of willingness to consider all views expressedò.

[73] See *UDM 2* above n 61 at para 56 where the Court stated the following:

> ñCourts are not, however, concerned with the motives of the Members of the Legislature who vote in favour of particular legislation.ò

legislation and not necessarily the motives of those who enacted it.[74] Therefore, any investigation into these matters will, in the circumstance of this case, focus on matters not shown to be relevant, instead of enquiring into what was relevant, namely, the rationality of the legislation.[75]

[74] Any such interference by a court should be guided by the principle of separation of powers. As pointed out by this Court in *Doctors for Life*, ñ[c]ourts must be conscious of the vital limits on judicial authority and the Constitutionôs design to leave certain matters to the other branches of governmentò and ñshould not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.ò[76]

[75] In the light of this conclusion, the alleged disputes of fact the applicants raise (which the respondents deny), are irrelevant.

[76] I conclude that the impugned legislation is rationally connected to a legitimate governmental end. The application must, therefore, be dismissed.

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[74] See *Pharmaceutical Manufacturers* above n 61 at para 86 where this Court stated the following:

> ñThe question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle.ò

[75] In any event, in the view I take of the matter, any such investigation would be of no moment.

[76] Above n 23 at para 37.

Costs

[77] The general rule on costs in constitutional litigation has been expressed in *Biowatch*.[77] The applicants contend that their litigation is neither frivolous nor vexatious. I agree. They contend that each party should pay its own costs in the event of them being unsuccessful. During oral argument, counsel for the Premier of the Eastern Cape, the MEC for Local Government, Eastern Cape, the Premier of KwaZulu-Natal, the Speaker of the National Assembly, the Chairperson of the NCOP, the Speaker of the Eastern Cape Provincial Legislature and the Speaker of the KwaZulu-Natal Provincial Legislature submitted that it would be appropriate if each party paid its own costs. Counsel for the Minister for Provincial and Local Government did not contend otherwise. In the circumstances, I am satisfied that it would be appropriate to order each party to pay its own costs.

Order

[78] The following order is made:

(a) The application for condonation by the Speaker of the National Assembly and the Chairperson of the NCOP is granted.

(b) Direct access is granted.

(c) The application is dismissed.

(d) Each party is ordered to pay its own costs.

[77] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (10) BCLR 1014 (CC); 2009 (6) SA 232 (CC) at paras 21-4.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Nkabinde J.

For the Applicants:	Advocate GD Goddard instructed by Venn Nemeth and Hart Attorneys.
For the Fourth, Fifth, Sixth, Seventh, Fifteenth, Sixteenth, Seventeenth and Eighteenth Respondents:	Advocate JC Heunis SC and Advocate GA Oliver instructed by the State Attorney.
For the Second Respondent:	Advocate IV Maleka SC and Advocate M Lekoane instructed by the State Attorney.