

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Matatiele Municipality and Others v President of the Republic of South Africa and Others

CCT 73/05

Decided on: 18 August 2006

MEDIA SUMMARY

The following explanation is provided to assist the media in reporting this judgment and is not binding on the Constitutional Court or any member of the Court.

On 18 August 2006 the Constitutional Court delivered judgment in an application by a diverse group of businesses, educators, associations and non-governmental organisations, including the former local municipality of Matatiele, challenging the constitutional validity of the Constitution Twelfth Amendment Act (the Twelfth Amendment) and the Cross-boundary Municipalities Laws Repeal and Related Matters Act (the Repeal Act). The application was opposed by the government, including Parliament and the legislature of KwaZulu-Natal.

The applicants originally argued that the Twelfth Amendment was unconstitutional in that it re-demarcated the boundary of the municipality of Matatiele, and removed it from KwaZulu-Natal into the Eastern Cape. According to the applicants this re-demarcation ought in terms of the Constitution to have been carried out by the Municipal Demarcation Board. The Court dismissed this argument on 27 February 2006, but called for further argument on (a) whether that part of the Twelfth Amendment which concerns KwaZulu-Natal and the Eastern Cape was passed in accordance with the provisions of the Constitution relating specifically to proposed laws that concern the provinces, and, if not, the effect of this non-compliance; and (b) whether the Repeal Act had also been validly passed in terms of the Constitution.

Shortly before the second hearing of this matter, the new municipality of Matatiele withdrew from the case.

In a judgment in which a majority of the justices concurred, Ngcobo J held that a provincial legislature whose provincial boundary is being altered is required by the Constitution to approve such alteration. Without such approval, the provincial boundary cannot be altered. The requirement of approval is essential to protect the integrity of individual provinces. He held that, when a provincial legislature makes a decision of this nature, it is clearly involved in a law-making process, and it must therefore, in terms of the Constitution, facilitate public participation in making its decision. He further held that in facilitating public involvement, a provincial legislature must act reasonably. In determining whether a provincial legislature has acted reasonably, the Court will have regard to factors such as the intensity of the impact of the legislation on the public. The more discreet 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 ensure that the potentially affected section of the population is given a proper opportunity to have a say.

Ngcobo J found that the proposed constitutional amendment would have had the effect of relocating a whole community from one province to another province. Moreover, it had a direct impact on a discreet and identifiable section of the population, the people of Matatiele. It threatened an important and not easily reversible change to the provincial status of a clearly defined section of the population. The consequences of the amendment are of considerable symbolic and practical importance, affecting the identity of the people to be transferred and changing the structures and personnel responsible for welfare payments, health services and education.

Ngcobo J held that in these circumstances, in deciding whether to approve the constitutional amendment altering its boundary, the KwaZulu-Natal provincial legislature was required to involve the public in making its decision.

Ngcobo J found that the Eastern Cape had complied with its duty to facilitate public involvement by holding public hearings in the affected areas, but that KwaZulu-Natal, in not holding any public hearings or inviting any written submissions, acted unreasonably. It therefore had failed to fulfil its duty to involve the public in making its decision. Ngcobo J therefore concluded that that part of the Twelfth Amendment that alters the boundary of KwaZulu-Natal is invalid as it had not been adopted in a manner that is consistent with the Constitution. He accordingly declared invalid that part of the amendment that transferred the area of Matatiele Local Municipality. However, he suspended the order of invalidity for eighteen months so that Parliament can, if it so wishes, adopt a new amendment in a manner that is consistent with the requirements of the Constitution.

In addition, Ngcobo J found that the Repeal Act, to the extent that it relates to the boundary of KwaZulu-Natal, is unconstitutional, for substantially the same reasons as those rendering the Twelfth Amendment unconstitutional. The government was ordered to pay the costs of the applicants.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J and Sachs J concurred in the judgment of Ngcobo J

Yacoob J dissented and, in the light of the reasoning and conclusion in his dissenting judgment delivered yesterday in the *Doctors for Life International* case, held that the Constitution did not require provincial legislatures to comply with the public involvement provision in the province as a pre-requisite to the validity of a constitutional amendment.

Van der Westhuizen J concurred in the dissenting judgment by Yacoob J. In addition to the reasons given in *Doctors for Life International*, he held that section 74 of the Constitution sets out all the procedural requirements and steps for the passing of constitutional amendments and that additional requirements should therefore not be imposed.

Skweyiya J dissented from the majority judgment on the basis that public involvement is not a pre-requisite for the validity of constitutional amendments effected in terms of section 74(3) read with section 74(8) of the Constitution and that the Twelfth Amendment Act has accordingly not been shown to have been invalidly adopted. He also declined to deal with the validity of the Repeal Act.