

REPUBLIC OF SOUTH AFRICA

CONSTITUTION THIRTEENTH AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 74);
Bill published in Government Gazette No. 29910 of 25 May 2007)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 24—2007]

REPUBLIEK VAN SUID-AFRIKA

DETIENDE WYSIGINGSWETSONTWERP OP DIE GRONDWET

*(Soos ingedien by die Nasionale Vergadering (voorgestelde artikel 74);
Wetsontwerp in Staatskoerant No. 29910 van 25 Mei 2007 gepubliseer)
(Die Afrikaanse teks is die amptelike vertaling van die Wetsontwerp)*

(MINISTER VIR JUSTISIE EN STAATKUNDIGE ONTWIKKELING)

[W 24—2007]

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To 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.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of Schedule 1A to the Constitution of the Republic of South Africa, 1996, as inserted by section 4 of the Constitution Twelfth Amendment Act of 2005

1. Schedule 1A to the Constitution of the Republic of South Africa, 1996, is hereby amended by— 5

(a) the substitution for the determination of the geographical area of the Province of the Eastern Cape of the following determination:

“The Province of the Eastern Cape

Map No. 3 of Schedule 1 to Notice 1998 of 2005 10
Map No. 6 of Schedule 2 to Notice 1998 of 2005
Map No. 7 of Schedule 2 to Notice 1998 of 2005
Map No. 8 of Schedule 2 to Notice 1998 of 2005
Map No. 9 of Schedule 2 to Notice 1998 of 2005
Map No. 10 of Schedule 2 to Notice 1998 of 2005 15
Map No. 11 of Schedule 2 to Notice 1998 of 2005”;

(b) the substitution for the determination of the geographical area of the Province of KwaZulu-Natal of the following determination:

“The Province of KwaZulu-Natal

Map No. 22 of Schedule 2 to Notice 1998 of 2005 20
Map No. 23 of Schedule 2 to Notice 1998 of 2005
Map No. 24 of Schedule 2 to Notice 1998 of 2005
Map No. 25 of Schedule 2 to Notice 1998 of 2005
Map No. 26 of Schedule 2 to Notice 1998 of 2005
Map No. 27 of Schedule 2 to Notice 1998 of 2005 25
Map No. 28 of Schedule 2 to Notice 1998 of 2005
Map No. 29 of Schedule 2 to Notice 1998 of 2005
Map No. 30 of Schedule 2 to Notice 1998 of 2005
Map No. 31 of Schedule 2 to Notice 1998 of 2005
Map No. 32 of Schedule 2 to Notice 1998 of 2005”.

Short title

2. This Act is called the Constitution Thirteenth Amendment Act of 2007.

**MEMORANDUM ON THE OBJECTS OF THE CONSTITUTION
THIRTEENTH AMENDMENT BILL OF 2007**

1. BACKGROUND

- 1.1 During December 2005 Parliament passed—
- (a) the Constitution Twelfth Amendment Bill of 2005 [B33B—2005] (now the Constitution Twelfth Amendment Act of 2005), that amended the Constitution of the Republic of South Africa, 1996 (“the Constitution”), to re-determine the geographical areas of the nine provinces of the Republic of South Africa to, amongst others, avoid municipal boundaries stretching over provincial boundaries; and
 - (b) the Cross-boundary Municipalities Laws Repeal and Related Matters Bill, 2005 [B36B—2005] (now Act No. 23 of 2005), that provided 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.
- 1.2 The constitutional validity of the Constitution Twelfth Amendment Act of 2005 (“the Twelfth Amendment”), and the Cross-boundary Municipalities Laws Repeal and Related Matters Act, 2005 (“the Repeal Act”), were challenged in the Constitutional Court in the case of *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC). In terms of these Acts the provincial boundary between, amongst others, the provinces of the Eastern Cape and KwaZulu-Natal was altered so that the area that previously formed the local municipality of Matatiele (“the Matatiele municipality”) was transferred from the province of KwaZulu-Natal to the province of the Eastern Cape and new municipal boundaries were created as a consequence.
- 1.2.1 On 27 February 2006 the Court rejected the applicants’ main argument that in passing the Twelfth Amendment Parliament unconstitutionally usurped the powers of the Municipal Demarcation Board to re-determine municipal boundaries. The Court further ruled that the local government elections scheduled for 1 March 2006 should be proceeded with. The Court, however, called for further argument on, amongst others, whether that part of the Twelfth Amendment that concerns the provinces of the Eastern Cape and KwaZulu-Natal was passed in accordance with the procedural provisions of the Constitution. This further hearing was to take place after the said local government elections had been held and the results had been declared.
- 1.2.2 On 18 August 2006 the Constitutional Court, in *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007 (1) BCLR 47 (CC) (“the *Matatiele* case”), declared that part of the Twelfth Amendment which transferred the Matatiele municipality from the province of KwaZulu-Natal to the province of the Eastern Cape to be inconsistent with the Constitution and therefore invalid. The order of invalidity was based on a procedural defect, namely the failure of the KwaZulu-Natal provincial legislature to facilitate public involvement, as required by section 118(1)(a) of the Constitution, when it considered whether or not to approve that part of the Constitution Twelfth Amendment Bill of 2005 that transferred the Matatiele municipality from the province of KwaZulu-Natal to the province of the Eastern Cape. As a result of the interrelationship between the Twelfth Amendment and the Repeal Act, the Court also declared that part of the Repeal Act which relates to the Matatiele municipality to be inconsistent with the Constitution and therefore invalid. The orders of invalidity were suspended for a period of 18 months, during which period Parliament has the opportunity to correct the constitutional defect that led to the order of invalidity.

- 1.3 The Constitutional Court's order of invalidity was formulated with reference to the Matatiele municipality only. It could, however, be argued that the failure of the KwaZulu-Natal provincial legislature to consult on the proposed changes to its provincial boundary also affects other boundary changes impacting on the province of KwaZulu-Natal. It could, therefore, further be argued that because the order of invalidity was based on a procedural defect, the other provisions of the Twelfth Amendment that effected boundary changes to the province of KwaZulu-Natal will, if challenged in the Constitutional Court, also be found to be unconstitutional as a result of the failure of the KwaZulu-Natal provincial legislature to facilitate the required public involvement.
- 1.4 The view has been expressed that although the constitutional defect that gave rise to the order of invalidity only relates to the failure of the KwaZulu-Natal provincial legislature to facilitate the required public involvement by not consulting on the proposed changes to its provincial boundary, it appears not possible to attend to this defect in isolation. As a result of the "knock-on effect" on municipalities that are now located in the province of the Eastern Cape, the further view has been expressed that any proposed legislative amendments that are intended to rectify the constitutional defect that led to the Constitutional Court's order of invalidity must also include references to the province of the Eastern Cape.

2. OBJECTS OF BILL

- 2.1 From the judgment in the *Matatiele* case it is clear that new legislation, namely a Constitution Amendment Bill, must be processed afresh in a manner that complies with all constitutional and procedural requirements.
- 2.2 The Bill is premised on the principle that only those provisions of the Constitution that are affected by the failure of the KwaZulu-Natal provincial legislature to facilitate the required public involvement (in other words all the provisions that refer directly to the provinces of the Eastern Cape and KwaZulu-Natal), are to be substituted and re-enacted.
- 2.3 The Bill therefore seeks to amend the Constitution so as to substitute and re-enact those provisions of the Constitution that have been declared to be inconsistent with the Constitution and therefore invalid by the Constitutional Court in the *Matatiele* case.
- 2.4 Although the judgment in the *Matatiele* case relates to the Matatiele municipality only, it is, for the reasons set out in paragraphs 1.3 and 1.4 necessary to substitute and re-enact all the provisions in the Constitution that refer directly to the provinces of the Eastern Cape and KwaZulu-Natal and not only those that refer to the Matatiele municipality.
- 2.5 The Eastern Cape provincial legislature facilitated the required public involvement when it considered whether or not to approve that part of the Constitution Twelfth Amendment Bill of 2005 that concerned it. The Bill, however, also seeks to substitute and re-enact those provisions of the

Constitution that refer directly to the province of the Eastern Cape and, therefore, the Eastern Cape provincial legislature must again facilitate the required public involvement when it considers whether or not to approve that part of the Bill that concerns it.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 3.1 The Department of Provincial and Local Government was consulted.
- 3.2 In terms of section 74(5) of the Constitution the Bill was—
 - (a) published in the national *Gazette* for public comment; and
 - (b) submitted to the provincial legislatures for their views.

4. IMPLICATIONS FOR PROVINCES

The Bill has to be approved by the provincial legislatures of the Eastern Cape and KwaZulu-Natal as required by section 74(8) of the Constitution.

5. FINANCIAL IMPLICATIONS FOR STATE

None

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the proposed amendments fall within the ambit of section 74(3)(b) of the Constitution and consequently require the approval of both the National Assembly and the National Council of Provinces.
- 6.2 As the Bill is intended to re-determine provincial boundaries, the National Council of Provinces may not, in terms of section 74(8) of the Constitution, pass the Bill unless it has been approved by the legislatures of the provinces concerned. Furthermore, the legislatures of the provinces of the Eastern Cape and KwaZulu-Natal must, in considering whether or not to approve that part of the Bill that concerns them, facilitate public involvement as required by section 118(1)(a) of the Constitution.
- 6.3 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

