CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/05

MATATIELE MUNICIPALITY	First Applicant
POVERTY ALLEVIATION NETWORK	Second Applicant
CEDARVILLE AND DISTRICT FARMERS ASSOCIATION	Third Applicant
MATATIELE DRAKENSBERG TAXI ASSOCIATION	Fourth Applicant
MATATIELE CHAMBER OF COMMERCE	Fifth Applicant
GOVERNING BODY OF THE KING EDWARD HIGH SCHOOL	Sixth Applicant
GEORGE MOSHESH TRIBAL AUTHORITY	Seventh Applicant
MALUTI CHAMBER OF BUSINESS	Eighth Applicant
MATATIELE AND MALUTI COUNCIL OF CHURCHES	Ninth Applicant
MPHARANE COMMUNITY BASED ORGANISATION	Tenth Applicant
ZIZAMELE PRESCHOOL TRAINING PROJECT	Eleventh Applicant

versus

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT	Second Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE PREMIER OF THE EASTERN CAPE	Fourth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCE OF THE EASTERN CAPE FOR LOCAL GOVERNMENT	Fifth Respondent
THE PREMIER OF KWAZULU-NATAL	Sixth Respondent
THE 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
THE SPEAKER OF THE NATIONAL ASSEMBLY	Fourteenth Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifteenth Respondent
THE EASTERN CAPE PROVINCIAL LEGISLATURE	Sixteenth Respondent
THE KWAZULU-NATAL PROVINCIAL LEGISLATURE	Seventeenth Respondent
THE ELECTORAL COMMISSION	Eighteenth Respondent

Heard on : 30 March 2006

Decided on : 18 August 2006

JUDGMENT

NGCOBO J:

Introduction

[1] This case concerns the validity of the Constitution Twelfth Amendment Act of 2005 ("the Twelfth Amendment") and the Cross-boundary Municipalities Laws

Repeal and Related Matters Act 23 of 2005 ("the Repeal Act"). It raises an important question relating to the responsibility of a provincial legislature when its provincial boundary is to be altered. In particular, it concerns the obligation of a provincial legislature to consult with the people who are to be affected by the re-drawing of provincial boundaries.

Background

[2] Parliament adopted the Twelfth Amendment to the Constitution, which altered the basis for determining provincial boundaries. The provincial boundaries are no longer based on magisterial districts, but are now determined on the basis of municipal areas. This has resulted in the alteration of the boundary between the provinces of KwaZulu-Natal and the Eastern Cape. Among other changes, 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) has been transferred from KwaZulu-Natal province into the Eastern Cape province and new municipal boundaries have been created as a consequence. It is the transfer of the area that was Matatiele Local Municipality into the Eastern Cape province which is at the centre of the present constitutional challenge.

[3] The former municipality of Matatiele and a diverse group of businesses, educators, associations and non-governmental organisations challenged the constitutional validity of the Twelfth Amendment and the Repeal Act. They contended that the Twelfth Amendment is unconstitutional in that it effectively re-

demarcated Matatiele Municipality and removed it from KwaZulu-Natal into the Eastern Cape without complying with the provisions of the Constitution. The main thrust of the challenge was that the Twelfth Amendment re-determined municipal boundaries in a manner that usurped the authority reserved for the Municipal Demarcation Board under section 155(3)(b) of the Constitution.

[4] The challenge was resisted by the President of the Republic of South Africa, the Minister of Provincial and Local Government and the Minister of Justice and Constitutional Development. The other respondents, who comprised affected members of the Executive Councils for the provinces of KwaZulu-Natal and the Eastern Cape, the affected municipalities and the Municipal Demarcation Board, elected to abide the decision of the Court. The Speaker of the National Assembly and the Chairperson of the National Council of Provinces ("the NCOP") entered the fray on the side of the President.

[5] The matter was heard as one of urgency on 14 February 2006, a day before the commencement of the Court term. Although there was a substantial issue on the papers as to whether the Twelfth Amendment had been adopted in accordance with the procedures set out in the Constitution, this point was not taken in argument. On behalf of the applicants, it was conceded that the Twelfth Amendment had been adopted in accordance with the provisions of the Constitution. After hearing oral argument, the Court reserved judgment.

[6] In the course of considering the matter, it appeared to the Court that there was a substantial issue as to the correctness of the concession that the relevant part of the Twelfth Amendment which concerns the relocation of Matatiele had been adopted in accordance with the procedures set out in the Constitution. In view of the importance of resolving the question whether the Twelfth Amendment had been adopted in a manner that is consistent with the provisions of the Constitution, the Court considered it desirable to call for argument on this question. The Court thus provided the provincial legislatures of KwaZulu-Natal and the Eastern Cape, and the Electoral Commission, which had a substantial interest in this issue, the opportunity to make submissions on it.

[7] As the municipal elections were due to be held on 1 March 2006, it was impractical to attend to these matters prior to that date. But at the same time, it was necessary to give an indication as to whether the election should go ahead. Thus on 27 February 2006, the Court delivered judgment rejecting the applicants' main argument that in adopting the Twelfth Amendment Parliament unconstitutionally usurped the powers of the Municipal Demarcation Board to re-determine municipal boundaries. It ruled that the elections should go ahead, and gave directions dealing with the further conduct of the case.[1]

[1] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2006 (5) BCLR 622 (CC) ("*Matatiele I*").

[8] The Court did not finally decide the constitutional validity of the Twelfth Amendment or the Repeal Act. Nor did it deal with the question whether the applicants were entitled to approach this Court directly in relation to the Repeal Act. These issues are addressed in this judgment.

[9] The Court issued further directions calling for submissions on the following issues:

(a) Do the provisions of section 74(8) of the Constitution require a provincial legislature whose boundary is being redrawn by a proposed constitutional amendment to comply with the provisions of section 118(1)(a) of the Constitution?

(b) If the answer to paragraph (a) above is in the affirmative, what does section 118(1)(a) require and did the provincial legislatures of KwaZulu-Natal and the Eastern Cape comply with the provisions of section 118(1)(a) of the Constitution?

(c) If the answer to paragraph (b) is in the negative, does non-compliance with the provisions of section 74(8) and section 118(1)(a) render the approval contemplated in section 74(8) invalid?

(d) If the answer to paragraph (c) above is in the affirmative, what is the effect, if any, on the Twelfth Amendment?

(e) If non-compliance with the provisions of sections 74(8) and 118(1)(a) render the Twelfth Amendment invalid, either wholly or in part, what is

the effect of this on the municipal areas affected and the elections held in the affected areas?

(f) Must a constitutional amendment comply with the constitutional principle of rationality; and if so, did the Twelfth Amendment comply with that principle?

[10] In addition, in view of the impact that the proceedings might have on the provinces of KwaZulu-Natal and the Eastern Cape, and on the elections that were due to take place, the Court further directed that the provincial legislatures of these two provinces and the Electoral Commission be joined as parties to the proceedings. All of the parties were afforded an opportunity to lodge further affidavits and written argument dealing with the issues set out in the further directions. The matter was set down for further argument on 30 March 2006.

[11] The provinces of KwaZulu-Natal and the Eastern Cape have now been joined. The province of KwaZulu-Natal is resisting the application and is represented by counsel. The Eastern Cape province has decided to abide the decision of the Court.

[12] On the eve of the hearing of this matter, the new municipality of Matatiele withdrew from the case.[2] No explanation was furnished for the withdrawal. It is common cause between the parties that the withdrawal of the first applicant has no

[2] On 1 March 2006, municipal elections were held, and new municipalities came into existence pursuant to the Twelfth Amendment.

consequence for this litigation and that the remaining applicants are competent to proceed with the litigation. I am satisfied that this is so.

The issues presented

[13] Broadly speaking, the main issues raised in this case are:

(a) Whether that part of the Twelfth Amendment which concerns the provinces of KwaZulu-Natal and the Eastern Cape was adopted in accordance with the provisions of the Constitution, and if not, the consequences of such non-compliance;

(b) Whether the applicants were entitled to come to this Court directly in relation to the Repeal Act; and

(c) The constitutional validity of the Repeal Act.

[14] Ordinarily, the issue of direct access would be considered first, before considering the merits of the constitutional challenge. However, this issue relates to the Repeal Act only and does not affect the Twelfth Amendment. It will therefore be convenient to address the constitutional validity of the Twelfth Amendment first, followed by the question whether the applicants were entitled to approach this Court directly on the issue of the validity of the Repeal Act, and if so, whether the Repeal Act is constitutionally valid.

[15] In view of the differences in the submissions made by the different respondents, it will be necessary at times to refer to them separately. In this judgment, I will refer

to the President, the Minister of Provincial and Local Government and the Minister of Justice and Constitutional Development as the government, the National Assembly and NCOP as Parliament and the remaining respondents by their respective names. Otherwise, all the respondents will be referred to collectively as simply the respondents unless the context requires otherwise.

The validity of the Twelfth Amendment

[16] Section 74 deals with bills that amend the Constitution. Subsections 3 and 8 deal with constitutional amendments that alter provincial boundaries, powers, functions or institutions. These subsections provide:

> "(3) Any other provision of the Constitution may be amended by a Bill passed–
>
> (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 amendment–
>
> (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.
>
> . . . .
>
> (8) If 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."

[17] It is common cause between the parties that section 74(3) governs the Twelfth Amendment. The issue between the parties is whether the provisions of section 74(8)

apply to the Twelfth Amendment. The question which must first be considered therefore is whether the provisions of section 74(8) are applicable to the Twelfth Amendment.

Does section 74(8) apply?

[18] The government contended that section 74(8) does not apply to the Twelfth Amendment because the amendment does not affect only a specific province or provinces but affects all nine provinces. A number of submissions were advanced in support of this contention. The mainstay of this contention is that the amendment is of general application because it alters the nature of the boundaries of all provinces by delimiting them on the basis of municipalities rather than magisterial districts as was the case previously. The amendment does not therefore concern a specific province or provinces as required by section 74(8), so it was argued.

[19] In its papers, as well as its written argument, the provincial legislature of KwaZulu-Natal accepted that the provisions of section 74(8) are applicable. However, contrary to this, in oral argument, counsel for the KwaZulu-Natal legislature contended that section 74(8) does not apply, and that even if it does apply, it was complied with. No submissions were made in support of this contention.

[20] The applicants contended that the provisions of section 74(8) are applicable because there are parts of the Twelfth Amendment which affect only specific

provinces. For its part, Parliament conceded that section 74(8) is applicable in this case.

[21] The provisions of section 74(8) are clear and admit of no ambiguity. They apply where a "Bill . . . or *any part of the Bill* concerns only a specific province or provinces." (My own emphasis.) The plain and ordinary meaning of this phrase is that if any part of a proposed constitutional amendment concerns a specific province or provinces only, the provisions of section 74(8) apply. It is sufficient that a part of the proposed constitutional amendment concerns only a specific province or provinces and not other provinces. The fact that the proposed amendment deals with all provinces matters not. What matters is that there are parts of the proposed amendment which concern "only a specific province or provinces" and not other provinces.

[22] By its very nature and purpose, the Twelfth Amendment must consist of several parts that deal with the specific provinces because it redefines the geographical areas of the nine provinces. The amendment redraws provincial boundaries by using a new criterion, namely, municipal boundaries instead of magisterial districts. The introduction of the new criterion was bound to result in the re-determination of geographical areas of each of the nine provinces in accordance with the new criterion. These geographical areas are reflected in Schedule 1A to the amendment, which sets out the geographical areas of each province. The Twelfth Amendment therefore has different parts, which concern each of the nine provinces and thus "specific provinces".

[23] The part of the amendment that concerns KwaZulu-Natal and the Eastern Cape is that which redraws their boundaries and relocates the area previously known as Matatiele Municipality from Sisonke District Municipality in KwaZulu-Natal and incorporates it into Alfred Nzo District Municipality in the Eastern Cape; and relocates Umzimkhulu Local Municipality from Alfred Nzo District Municipality in the Eastern Cape into Sisonke District Municipality in KwaZulu-Natal. This part of the amendment concerns only the provinces of KwaZulu-Natal and the Eastern Cape and no other province. This, in my judgment, is sufficient to trigger the provisions of section 74(8).

[24] It was submitted on behalf of the government that because the amendment introduced a new criterion that applied to all provinces, the provisions of section 74(8) were not engaged. The fundamental flaw in this submission is that it overlooks the fact that the amendment consists of two kinds of provisions. There is a general provision of the amendment that alters the basis for determining provincial boundaries. This provision applies equally to all nine provinces. Then there are specific provisions of the amendment which define the geographical areas of each of the nine provinces by reference to the criterion set out in the general provision. Each of these provisions concerns the specific province to which it refers. These parts of the amendment trigger the provisions of section 74(8) because each of them is a "part of the bill [which] concerns only a specific province or provinces".[3]

[3] The government relied on the finding in *Matatiele I* (above n 1) that the new criterion for determining provincial boundaries applies not only to provinces that had cross-boundary municipalities, but to all nine

[25] Section 74(8) does not require the provinces to approve the general provision that defines the new criterion for delimiting provincial boundaries on the basis of municipalities. The legislatures of KwaZulu-Natal and the Eastern Cape were only required to approve those parts of the amendment that concerned them specifically. However, these two provinces were still required to cast their votes on the proposed constitutional amendment as a whole in terms of section 74(3)(b)(ii). Provinces cast their votes by conferring voting mandates on their delegations in terms of section 65 of the Constitution.[4] These are the supporting votes that are required at the NCOP to pass a constitutional amendment. Contrary to the submission by the government therefore, the application of the provisions of section 74(8) does not render the provisions of section 74(3)(b)(ii) redundant.

[26] In addition, the government's submission ignores the distinction between altering the criterion for determining the provincial boundaries which may or may not result in the alteration of physical boundaries, and altering the boundaries in the sense of excising an area from a province and incorporating it into another province. It is

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provinces. In *Matatiele I*, we were concerned with the argument that because the amendment declared itself to be concerned with cross-boundary municipalities it did not apply to Matatiele Municipality, which had not been a cross-boundary municipality. It was in this context that we held that the new criterion applied to all provinces. But as has already been pointed out in this judgment, the amendment contained parts that concerned specific provinces.

[4] Section 65 of the Constitution provides:

> "(1) Except where the Constitution provides otherwise–
>
> (a) each province has one vote, which is cast on behalf of the province by the head of its delegation; and
>
> (b) all questions before the National Council of Provinces are agreed when at least five provinces vote in favour of the question.
>
> (2) An Act of Parliament, enacted in accordance with the procedure established by either subsection (1) or subsection (2) of section 76, must provide for a uniform procedure in terms of which legislatures confer authority on their delegations to cast votes on their behalf."

true that the Twelfth Amendment introduced a new criterion that applies to all nine provinces. However, the effect of the application of the criterion, as set out in Schedule 1A, was that the boundaries of some but not all provinces were altered. The amendment altered the boundaries of seven of the nine provinces. The provincial boundaries of the Free State and the Western Cape were not altered by Schedule 1A. Only those provinces whose boundaries were altered were required to approve the parts of the amendment that concerned them specifically in terms of section 74(8).

[27] It was also submitted that if the provisions of section 74(8) are applicable here, then section 74(8) will be triggered each time an amendment alters provincial boundaries and this would introduce a third requirement for adopting a constitutional amendment, which is not contemplated by the Constitution. But this is precisely what the Constitution contemplated. It is plain from the Constitution that there are three requirements for a constitutional amendment that alters provincial boundaries: first, it must be adopted by a two thirds majority of the National Assembly;[5] second, it must be passed by the NCOP with a supporting vote of at least six provinces;[6] and third, if the proposed amendment concerns a specific province or provinces only, it must be approved by the relevant legislature or legislatures of the province or provinces concerned.[7]

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[5] Section 74(3)(a) of the Constitution.

[6] Section 74(3)(b) of the Constitution.

[7] Section 74(8) of the Constitution.

[28] In the *First Certification* judgment, this Court recognised that there are three requirements for a constitutional amendment that alters provincial boundaries. Dealing with the question whether section 74 makes provision for a special majority for a constitutional amendment as required by the Constitutional Principles, the Court explained that section 74 requires that constitutional amendments which alter provincial boundaries be passed by two thirds of the members of the National Assembly and two thirds of the provinces in the NCOP. It further held that "[i]f a bill amending the [Constitution] concerns a specific province or provinces only, NT 74(3) [the equivalent provision to section 74(8) in the Constitution] *also requires the approval of the relevant legislature or legislatures of the province or provinces concerned*."[8] (My own emphasis.)

[29] This construction of section 74(8) is consistent with our constitutional scheme of government. This scheme contemplates a "government [that] is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated."[9] The existence of the provinces is essential to this basic structure of government. To protect the territorial integrity of the provinces, the framers of our Constitution gave each province the final say on whether its boundary should be altered. The effect of section 74(8) is that the boundary of a province may not be altered without its approval. It protects the provinces from having their territories reduced, which could ultimately result in their disappearance from the

[8] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 232.

[9] Section 40(1) of the Constitution.

South African map. As this Court observed in the *First Certification* judgment, this provision constitutes a "bulwark of provincial integrity."[10]

[30] It follows therefore that whenever a proposed constitutional amendment alters provincial boundaries, the provisions of section 74(8) are engaged. To hold that the applicability of section 74(8) depends on the precise number of provinces specifically affected by the amendment would therefore be contrary to the basic structure of government. Indeed this would be inconsistent with the very purpose of section 74(8), which is aimed at protecting the territorial integrity of each of the nine provinces.

[31] The argument by the government and the province of KwaZulu-Natal that section 74(8) is not applicable in this case must therefore be rejected.

[32] The question which now arises is whether in considering a proposed constitutional amendment which alters its boundary, a provincial legislature is obliged to facilitate public involvement as required by section 118(1)(a).

Does section 118(1)(a) apply?

[33] Section 118 provides:

> "(1) A provincial legislature must–
>
> (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and

[10] *First Certification* judgment above n 8 at para 233.

> (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken–
>
> (i) to regulate public access, including access of the media, to the legislature and its committees; and
>
> (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.
>
> (2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society."

[34] Identical duties are imposed on the National Assembly by section 59 and on the NCOP by section 72.

[35] The government and the province of KwaZulu-Natal contended that the provisions of section 118(1)(a) are not applicable when a provincial legislature considers whether to approve a proposed constitutional amendment. The main submission advanced in support of this contention is that section 118(1)(a) governs provincial legislation and not national legislation. The Twelfth Amendment is a national bill and not a provincial bill and therefore section 118(1)(a) does not apply, so it was argued. However, Parliament accepted that the provisions of section 118(1)(a) are applicable.

[36] Our Constitution embodies the basic and fundamental objectives of our constitutional democracy. Like the German Constitution, it "has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit [our] Constitution reflects certain overarching principles and fundamental decisions to

which individual provisions are subordinate."[11] Individual provisions of the Constitution cannot therefore be considered and construed in isolation. They must be construed in a manner that is compatible with those basic and fundamental principles of our democracy. Constitutional provisions must be construed purposively and in the light of the Constitution as a whole.

[37] The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution. This provides the context within which a provision in the Constitution must be construed. In *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others*,[12] this Court emphasised this approach to constitutional interpretation in the context of construing section 155(3) of the Constitution, saying:

> "A provision in a Constitution must be construed purposively and in the light of the constitutional context in which it occurs. Our history, too, may not be ignored in that process.
>
> . . . .

[11] 1 BVerfGE 14 as translated by Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed (Duke University Press, Durham and London 1997) at 63.

[12] 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC).

> In order to determine the question presented here, it is necessary to construe these provisions in the context of the constitutional scheme of the allocation of powers and functions of the national government, provincial government and the Demarcation Board in relation to the establishment of municipalities.
>
> . . . .
>
> Section 155(3)(a) cannot be construed in isolation but must be construed purposively and in the context in which it occurs. It occurs in the context of the scheme of the allocation of powers and functions in relation to the establishment of municipalities set out in section 155 and it is that context which must inform its construction. In particular, it must be construed in the light of section 155(3)(b) and the functions that are required to be performed under section 155(3)(b)." (Footnote omitted.)[13]

[38] With that prelude, I turn to consider whether section 118(1)(a) applies in this case.

[39] The contention advanced by the government and the province of KwaZulu-Natal does not take sufficient account of the basic and fundamental objectives of our constitutional democracy. In the end, it considers and construes section 118(1)(a) in isolation, without regard for the basic principles which underlie our democracy and the other provisions of the Constitution. This approach to constitutional interpretation is flawed. One of the basic and fundamental objectives of our constitutional democracy is to establish a democratic government which is constituted as national, provincial and local spheres of government. What is more, section 42(4) of the Constitution describes the role of the NCOP as being "to ensure that provincial interests are taken into account in the national sphere of government." The

[13] Id at paras 44-5 and 48.

construction of the provisions of the Constitution must be informed by these basic and fundamental objectives.

[40] Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the preamble openly declares, what is contemplated is "a democratic and open society in which government is based on the will of the people". Consistent with this constitutional order, section 118(1)(a) calls upon the provincial legislatures to "facilitate public involvement in [their] legislative and other processes" including those of their committees. As we held in *Doctors for Life International v The Speaker of the National Assembly and Others*,[14] our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State.[15]

[41] There is another fundamental objective of our democracy that is equally relevant here; the principle of co-operation and communication between national and provincial legislatures. In *Doctors for Life International* we held that our Constitution requires institutional co-operation and communication between national and provincial legislatures.[16] And we held that the NCOP "institutionalises the principle

[14] CCT 12/05, 17 August 2006, as yet unreported. See also *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amicus Curiae*)* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 111-3.

[15] *Doctors for Life International* id at para 121. The Constitution requires public participation in the legislative processes of Parliament (the National Assembly (section 59(1)(a)) and the NCOP (section 72(1)(a))) and local government (sections 152(1)(e) and 160(4)(b)).

[16] Id at para 81.

of co-operation and communication by involving the nine provinces directly in the national legislative process and other national matters."[17] In addition, in terms of section 70(2)(b), the NCOP "must provide for . . . the participation of all the provinces in its proceedings in a manner consistent with democracy".

[42] Here it must be recalled that in terms of section 74(3)(b)(ii), a proposed constitutional amendment that alters provincial boundaries must be passed by the NCOP "with a supporting vote of at least six provinces". And in terms of section 65(1)(a), "each province has one vote [at the NCOP], which is cast on behalf of the province by the head of its delegation".[18] The NCOP "is a council of provinces and not a chamber composed of elected representatives."[19] This "[v]oting by delegation reflects accurately the support of the different provincial legislatures for a measure under consideration [at the national level]".[20] In this manner, provinces are given a direct say on a proposed amendment. Our constitutional enterprise therefore contemplates that the provinces will participate in the national legislative process.

[43] In addition, the Constitution sets out two requirements that must be complied with by a provincial legislature whose boundary is being altered. First, it must decide whether to approve the alteration of its boundary as required by section 74(8).

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[17] Id.

[18] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC) at para 62.

[19] Id.

[20] Id.

Second, it must decide how to vote on the constitutional amendment as a whole as required by section 74(3)(b)(ii). The passing of an amendment that alters a provincial boundary requires the supporting vote of six provinces at the NCOP. But such amendment may not be passed unless it is approved by the legislature of the province affected. The Constitution therefore entrusts the approval of the alteration of a provincial boundary to the specific province affected. It follows from this that the process of approving the alteration of a provincial boundary is a process of a provincial legislature as contemplated by section 118(1)(a).

[44] Section 118(1)(a) must therefore be construed purposively and in the context of a constitutional scheme which requires legislative organs of the State to facilitate public participation in their legislative and other processes, and which contemplates that the provinces will participate in the national law-making process.

[45] Construed in this context, section 118(1)(a) envisages that a provincial legislature will facilitate public involvement whenever it is engaged in a legislative process or any other process of the legislature. Consistent with our democracy, it requires that when the legislative organs of the State are involved in those "legislative [or] other processes", they should facilitate public involvement in those other processes.

[46] Much store was placed by the fact that section 118(1)(a) occurs in chapter 6 of the Constitution, which deals with the legislative powers of the provinces. It must be

clear from what I have said above that the starting point of this submission is fallacious. The section cannot be construed in isolation. It must be construed purposively and in the context of the constitutional scheme that regulates the law-making process. That scheme contemplates that the provincial legislatures will participate in the national law-making process. It gives them a vote on legislation that is under consideration at the national level and the power to veto a proposed constitutional amendment which alters their provincial boundaries. The scope of the application of section 118(1)(a) must therefore be determined by reference to the constitutional scheme for the national law-making process, in particular, the role of the provinces in that process.

[47] It is patently clear from this scheme that the role of a provincial legislature goes beyond legislating for the province; it includes taking part in the national legislative process. The provisions of section 118 follow the provincial legislatures and require them to facilitate public involvement whenever they are engaged in the "legislative or other processes of the legislature". The Constitution contemplates the provincial legislatures, consistent with our constitutional scheme, will be involved in the law-making process at national level, such as when they are required to confer voting mandates on their NCOP delegations or when they consider whether or not to approve proposed constitutional amendments that alter their boundaries. As these processes involve law-making, the Constitution requires that they be carried out in a manner that is consistent with the duty to facilitate public involvement.

[48] In my judgment, when provincial legislatures consider a proposed constitutional amendment that alters their provincial boundaries, which is under consideration at the national level, decide on how to vote on the amendment, and cast their votes on the amendment, they are manifestly involved in a law-making process. To hold that the provincial legislatures are not required to facilitate public involvement when they consider whether to approve a proposed constitutional amendment that alters their boundaries would be contrary to the Constitution's commitment to democracy and the principles of accountability, responsiveness and openness.

[49] The argument by the government and the province of KwaZulu-Natal that the provincial legislatures are not required to comply with the provisions of section 118(1)(a) when considering whether or not to approve a proposed constitutional amendment that alters their provincial boundaries must therefore be rejected. It follows that the concession that was made by Parliament in this regard was properly made. The next question to consider is what the duty to facilitate public involvement entails.

The duty to facilitate public involvement

[50] In *Doctors for Life International*, this Court considered the nature and scope of the duty to facilitate public involvement in relation to the NCOP.[21] The Court concluded that the proper approach is the following:

[21] Above n 14 at paras 118-29.

> "[T]he duty to facilitate public involvement must be construed in the context of our constitutional democracy, which embraces the principle of participation and consultation. Parliament 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 it is reasonable to do so. 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.
>
> In 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 Parliament has done is reasonable, this Court will pay respect to what Parliament has assessed as being the appropriate method. In determining the appropriate level of scrutiny of Parliament's duty to facilitate public involvement, the Court must balance, on the one hand, the need to respect Parliamentary institutional autonomy, and on the other, the right of the public to participate in the public affairs. In my view, this balance is best struck by this Court considering whether what Parliament does in each case is reasonable.[22]

[51] The government submitted that the duty to facilitate public involvement requires no more than that the legislature should create space for the public to be involved. As I understand this argument, it amounts to this: the Constitution does not

[22] Id at paras 145-6.

require a legislature to take positive measures to facilitate public participation in the law-making process relating to any particular bill under consideration; all that is required of the legislature is that it creates conditions that make it easier for the public to participate in the law-making process, such as by, for example, making rules which facilitate public involvement. Reduced to its essence, the submission is that the duty to facilitate public involvement does not require the public to participate in the law-making process. For this narrow view of the duty to facilitate public involvement, the government relied on the decision of the Supreme Court of Appeal in *King and Others v Attorneys' Fidelity Fund Board of Control and Another*.[23]

[52] In the first place, I do not understand the Supreme Court of Appeal in the *King* case as suggesting that the duty to facilitate public involvement requires only that the legislature must have rules in place. Nor to be suggesting that the duty does not include the duty to allow the public to participate in the specific legislation under consideration. On the contrary, the Supreme Court of Appeal in the *King* case expressed the view that "[p]ublic involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content."[24]

[53] It is apparent from this that the Supreme Court of Appeal accepted that the duty to facilitate public involvement is not confined to taking steps that will make it easier

[23] 2006 (1) SA 474 (SCA); 2006 (4) BCLR 462 (SCA).

[24] Id at para 22.

for members to participate in the law-making process, but may also include the opportunity to participate in the legislative process by submitting written or oral representations. I agree with this view.

[54] In *Doctors for Life International*, we held that there are at least two aspects of the duty to facilitate public participation and said:

> "What is ultimately important is that the legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as 'a continuum that ranges from providing information and building awareness, to partnering in decision-making.' This construction of the duty to facilitate public involvement is not only consistent with our participatory democracy, but it is consistent with the international law right to political participation. As pointed out, that right not only guarantees the positive right to participate in the public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised. It will be convenient here to consider each of these aspects, beginning with the broader duty to take steps to ensure that people have the capacity to participate." (Footnote omitted.)[25]

[55] The Constitution contemplates that the public should be given the opportunity to participate in the law-making process.[26] When the provincial legislatures make

[25] Above n 14 at para 129.

[26] See id at paras 135-41.

rules to regulate their proceedings, they are required to do so "with due regard to representative and participatory democracy, accountability, transparency and public involvement."[27] In addition, they are empowered to hold public hearings[28] and "receive petitions, representations or submissions from any interested persons or institutions."[29] They are required to conduct their business in an open manner and hold their sittings and those of their committees in public;[30] they must provide public access to their proceedings and those of their committees;[31] and they may not exclude the public from the sittings of their committees "unless it is reasonable and justifiable to do so in an open and democratic society."[32] All this facilitates public participation.

[56] The government also submitted that section 118(1)(a) means that the provincial legislature, as a body that consists of representatives elected by the citizens of each province, would have the authority to speak on the amendment and on behalf of the people of the province. As I understand this submission, in effect it says that because a provincial legislature consists of duly elected representatives of the people in the province, it is not necessary to facilitate public involvement under section 118(1)(a) because it is speaking on the behalf of the people of the province. But if this is true of section 118(1)(a), it must also be true of section 72(1)(a) which relates to the NCOP

[27] Section 116(1)(b) of the Constitution. See similar provisions in relation to the National Assembly (section 57(1)(b)) and the NCOP (section 70(1)(b)).

[28] Section 115(a) and (b) of the Constitution.

[29] Section 115(d) of the Constitution.

[30] Section 118(1)(b) of the Constitution.

[31] Id.

[32] Section 118(2) of the Constitution.

and section 59(1)(a) which relates to the National Assembly. Taken to its logical conclusion, this submission would render meaningless the public involvement provisions and reduce our democracy to a representative democracy only. The government has misconceived the nature of our democracy.

[57] Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy.

[58] Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves.

[59] The representative and participative elements of our democracy should not be seen as being in tension with each other. They are mutually supportive, as we pointed out in *Doctors for Life International*:

> "In the overall scheme of our Constitution, the representative and participatory elements of our democracy should not be seen as being in tension with each other. They must be seen as mutually supportive. General elections, the foundation of representative democracy, would be meaningless without massive participation by the

> voters. The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."[33]

[60] What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy."[34] The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function.[35] The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process.

[61] It is difficult to reconcile the submissions made by the government and the province of KwaZulu-Natal with the commitment of Parliament and the provincial legislatures to the conception of democracy in our Constitution. As we noted in

[33] *Doctors for Life International* above n 14 at para 115.

[34] Id at para 122.

[35] Id.

Doctors for Life International,[36] Parliament and the provincial legislatures have developed the notion of the People's Assembly, whose objectives include the creation of an opportunity for the public, particularly the most marginalised communities, to engage with Parliament and the provincial legislatures in order to build the legacy of active participation by the public, and to provide a vehicle for people's voices to be heard on issues affecting them. As part of its proceedings, the People's Assembly 2005 set up workshops which focused on four commissions, including a commission on public participation. Apart from noting that the "constitutional obligation to ensure that the views of the broader public are heard by conducting public hearings about draft legislation and amendments to legislation is vigorously implemented at both national and provincial levels", the Commission on Public Participation also emphasised that–

> "one of the distinctive features of public participation processes in South Africa has always been that it is firmly grounded in the constitutional imperative of democratic participation and keeping society involved in legislative, policy and other decision-making processes. The Constitution makes Parliament and the provincial legislatures, as well as municipal councils, the primary democratic institutions in South Africa. The people have a voice in these institutions, not only through elected representatives, but also through access to committee meetings and deliberations. The people also have the right to speak and make representations to committees and meetings, which is in line with the Constitution, which states that all people shall be entitled to take part in the administration of the country."[37]

[36] Id at paras 113-4.

[37] Parliament of the Republic of South Africa Announcements, Tablings and Committee Reports No 63, 5 June 2006 at section 3.3.

[62] Consistent with this commitment to our conception of democracy, Rule 6 of the Joint Rules of Parliament makes provision for members of the public to participate in the joint business of Parliament by attending the sittings of the Houses and their committees; commenting in writing on bills or other matters before joint committees, or giving evidence or making representations or recommendations on a bill before the House.[38] The Standing Rules of the Eastern Cape Provincial Legislature make provision for public hearings.[39] These rules are made pursuant to the provisions of the Constitution which provide that when legislatures make rules to regulate their internal proceedings they must do so "with due regard to representative and participatory democracy, accountability, transparency and public involvement."[40]

[63] To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role

[38] Rule 6(1) of the Joint Rules of Parliament provides:

> "Members of the public may participate in the joint business of the Houses by–
> (a) attending joint sittings of the Houses or meetings of joint committees;
> (b) responding to public or specific invitations–
> (i) to comment in writing on Bills or other matters before a joint committee; or
> (ii) to give evidence or to make representations or recommendations before joint committees on such Bills or other matters, either in person or through a representative."

[39] Rule 32 of the Standing Rules of the Eastern Cape Provincial Legislature provides:

> "32.1 The Legislature and its committees must facilitate public involvement in its legislative and other processes through implementing the following–
> 32.1.1 observing the institutionalised days as provided in Rule 18;
> 32.1.2 conducting public hearings on all provincial bills, except money and technical bills;
> 32.1.3 conducting public hearings on important national bills;
> 32.1.4 receiving and attending to petitions of the public; and
> 32.1.5 educating the public on their role in the Legislature.
> 32.2 The Legislature and its committees must consider all comments and inputs received from the public."

[40] Sections 57(1)(b), 70(1)(b) and 116(1)(b) of the Constitution.

for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected.

[64] In the event, the argument by the government that the duty to facilitate public involvement in section 118(1)(a) must be given a restrictive meaning, must fail.

[65] Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity[41] and "a multi-party system of democratic government to ensure accountability, responsiveness and openness."[42] And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies.

[66] Consistent with our constitutional commitment to human dignity and self-respect, section 118(1)(a) contemplates that members of the public will often be given

[41] Section 1(a) of the Constitution.

[42] Section 1(d) of the Constitution.

an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."[43]

[67] Second, the provincial legislatures have broad discretion to choose the mechanisms that, in their view, would best facilitate public involvement in their processes. This may include providing transportation to and from hearings or hosting radio programs in multiple languages on an important bill, and may well go beyond any formulaic requirement of notice or hearing.[44] In addition, the nature of the legislation and its effect on the provinces undoubtedly plays a role in determining the degree of facilitation that is reasonable and the mechanisms that are most appropriate to achieve public involvement. Thus, contrary to the submission by the government, it is not enough to point to standing rules of the legislature that provide generally for public involvement as evidence that public involvement took place; what matters is that the legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of a given case.

[68] The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include the nature and the importance

[43] Bryden "Public Interest Intervention in the Courts" (1987) 66 *Canadian Bar Review* 490 at 509, cited with approval by the Court of Appeals of Quebec, Canada in *Caron v R* 20 Q.A.C. 45 [1988] R.J.Q. 2333 at para 14.

[44] See *Doctors for Life International* above n 14 at paras 132 and 145.

of the legislation and the intensity of its impact on the public. The 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. In addition, in evaluating the reasonableness of the conduct of the provincial legislatures, the Court will have regard to what the legislatures themselves considered to be appropriate in fulfilling the obligation to facilitate public participation in the light of the content, importance and urgency of the legislation.[45]

[69] Taking such factors into account, the question is whether the provinces of KwaZulu-Natal and the Eastern Cape have taken reasonable steps to comply with their duty to facilitate public involvement.

Did the provincial legislatures of KwaZulu-Natal and the Eastern Cape comply with the provisions of section 118(1)(a)?

Eastern Cape

[70] The Eastern Cape legislature received the Twelfth Amendment Bill from the NCOP and referred it to the NCOP Business Committee. The Business Committee determined that the Twelfth Amendment Bill was an "important national bill", which meant that the legislature and its committees were required to conduct public hearings

[45] Id at para 128.

in terms of Rule 32 of the Standing Rules of the Eastern Cape Legislature.[46] It referred the Bill to the Portfolio Committee on Local Government and Traditional Affairs with directions to conduct public hearings.

[71] The Portfolio Committee held public hearings in seven areas that it viewed to be directly affected by the Bill. The hearings concentrated on both rural and urban parts of these areas. The Committee also received written submissions from various stakeholders, including individuals, municipalities, political parties and traditional leaders. The Committee's report on the public hearings indicated that the majority of submissions were in support of the proposed constitutional amendment. It acknowledged, however, that the Committee received submissions against inclusion in the Eastern Cape, which primarily raised issues relating to service delivery. The Report also noted an overwhelming demand for Kokstad to fall under Alfred Nzo District Municipality in the Eastern Cape, rather than Sisonke District Municipality in KwaZulu-Natal.

[72] The Committee recommended approval of the Twelfth Amendment Bill. It also recommended, however, based on the concerns expressed by members of the public, that special considerations be given to improving service delivery in Alfred Nzo District Municipality and other areas and that the Premier "be mandated to pursue the issue of Kokstad as an integral part of the Eastern Cape." Following further deliberations at the NCOP and provincial levels, the Eastern Cape legislature

[46] See above n 39.

approved the Twelfth Amendment Bill and conferred a mandate on the Eastern Cape delegation to the NCOP to vote in its favour.

[73] It is therefore clear that the Eastern Cape complied with its duty to facilitate public involvement in relation to the constitutional amendment by holding public hearings in the affected areas.

KwaZulu-Natal

[74] It is common cause that KwaZulu-Natal legislature did not hold public hearings or invite written representations on the proposed constitutional amendment. The Deputy Speaker of KwaZulu-Natal expressly admitted that no public hearings were held by that province, saying that "it is common cause that no specific hearing was held in relation to the issue [of Matatiele]".

[75] The question is whether the KwaZulu-Natal legislature acted reasonably by failing to hold public hearings or invite written submissions on the Twelfth Amendment Bill.

Did the KwaZulu-Natal legislature act reasonably in failing to hold public hearings or invite written representations?

[76] It is clear that both Parliament and the provincial legislatures – including KwaZulu-Natal – considered public hearings to be a reasonable and yet effective way of fulfilling the duty to facilitate public involvement in relation to the Twelfth Amendment. During October 2005, the Joint Committee of the National Assembly

and the NCOP issued a proposed program for managing the constitutional amendment and the Repeal Act that made provision for public hearings to be held in the provinces during the week of 14 November.[47] All the provinces which had their boundaries altered held public hearings, except for KwaZulu-Natal.

[77] Even in KwaZulu-Natal, the general view was that public hearings were required. The minutes of the KwaZulu-Natal Portfolio Committee on Local Government and Traditional Affairs indicate that after members of that Committee had received a briefing from the NCOP delegate, some members of that Committee expressed the view that public hearings or a referendum should be held on the Bill. In addition, when the constitutional amendment was considered by the legislature sitting in plenary session, a number of speakers called for public hearings on the proposed amendment. Others even called for a referendum.

[78] What this shows is that holding public hearings in the affected communities was considered to be the most effective way of ensuring that the affected communities were given a real opportunity to have a say on an amendment that altered the boundary of the province in which they lived and which was to affect their lives. That the NCOP and provincial legislatures, including KwaZulu-Natal, considered public hearings to be desirable in regard to the Twelfth Amendment militates against the

[47] However, a subsequently revised program which was issued on 14 November 2005 made no provision for hearings, and no explanation was given. From what one gathers from the record, these bills suddenly became urgent and that was probably the reason for dispensing with public hearings. Counsel for Parliament was unable to offer any explanation for this change in attitude.

conclusion that KwaZulu-Natal acted reasonably in failing to invite written or oral submissions.

[79] In addition, the legislation involved was a constitutional amendment that would alter the boundary of KwaZulu-Natal and would have the effect of relocating whole communities from one province to another. This legislation had a direct and profound impact on a discrete and identifiable section of the population – the people of Matatiele. By a stroke of a pen, they were relocated from the province of KwaZulu-Natal into the province of the Eastern Cape. It is true, they were not physically relocated; they remain in the same homes, in the same streets for those who live in towns, in the same neighbourhoods and retain the same neighbours. But the difference is this: they now live in another province, which is not their choice. The attachment of individuals to the provinces in which they live should not be underestimated. Indeed there are "natural sentiments and affections which grow up for places [in] which persons have long resided; the attachments to [province], to home and to family, on which is based all that is dearest and most valuable in life."[48]

[80] But there is more at stake here. The amendment affects one of the fundamental rights of citizenship; the right "to enter, to remain in and to reside anywhere in, the Republic."[49] Citizens of South Africa, whether rich or poor, have the right to live in the province of their choice. And if the right to freedom of movement and residence

[48] *Virginia v Tennessee* 148 US 503, 524 (1893).

[49] Section 21(3) of the Constitution.

guaranteed in the Bill of Rights is to have any meaning, it must include the right of every citizen of this country to enter any province for purposes of establishing residence therein.

[81] The proposed boundary alteration 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 importance. They affect the identity of the people to be transferred. They are of great practical importance too. They change the structures and personnel responsible for welfare payments, health services and education.

[82] If public involvement means anything, it requires that the people of Matatiele be given a reasonable opportunity to engage with the legislature most directly concerned with the matter, namely the KwaZulu-Natal legislature. The provincial legislature of KwaZulu-Natal was the legislative organ of the State entrusted by the Constitution to safeguard the interests of the province, in particular, its territorial integrity. So vital was its authority and responsibility, that the Constitution gave it, like all provincial legislatures in its position, the power to veto a proposed constitutional amendment that specifically altered its boundaries. In this respect its decision to reject the boundary change would trump a unanimous vote in the National Assembly and the vote of eight provincial delegations in the NCOP.

[83] Finally, there was no suggestion that effective public involvement was not feasible. The Eastern Cape province managed to hold carefully monitored public consultations in areas contiguous to Matatiele where facilities were probably less developed. Furthermore, the need for appropriate consultation with the people of Matatiele was especially intense because another governmental agency, namely, the Municipal Demarcation Board, an independent body entrusted with the constitutional authority to determine municipal boundaries, had in fact held public consultation and after listening to the people had arrived at a completely different conclusion.

[84] Having regard to all of this, the conclusion that the KwaZulu-Natal legislature acted unreasonably in failing to hold public hearings or invite written representations, is unavoidable. This is a plain, clear and unmistakable violation of section 118(1)(a) of the Constitution.

Conclusion

[85] To sum up therefore, in terms of section 74(8), the KwaZulu-Natal legislature was required to approve that part of the Twelfth Amendment that transfers the area that previously formed Matatiele Local Municipality from the province of KwaZulu-Natal to the Eastern Cape province. The Constitution contemplates that the approval in terms of section 74(8) will be given by a provincial legislature concerned after complying with the provisions of section 118(1)(a). In considering whether or not to approve that part of the Twelfth Amendment, the KwaZulu-Natal legislature was required by section 118(1)(a) to facilitate public involvement by holding public

hearings in the area of Matatiele. Failure by the provincial legislature of KwaZulu-Natal to facilitate public involvement therefore violated not only section 118(1)(a) but also section 74(8). That part of the Constitution Twelfth Amendment of 2005 which tranfers 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 was as a consequence adopted in manner that is inconsistent with the Constitution.

[86] It now remains to consider the remedy.

Remedy

[87] The conduct of the provincial legislature of KwaZulu-Natal in failing to comply with its constitutional obligation to facilitate public participation prior to taking a decision to approve that part of the Twelfth Amendment that affected Matatiele was a violation of the provisions of section 118(1)(a) and section 74(8) of the Constitution. That conduct on the part of KwaZulu-Natal must, pursuant to section 172(1)(a) of the Constitution, be declared to be inconsistent with section 118(1)(a) and section 74(8). But what are the consequences of this unconstitutional conduct?

[88] In *Doctors for Life International*, we held that the obligation to facilitate public involvement contemplated in section 72(1)(a) of the Constitution is a material part of

the law-making process.[50] This applies equally to the obligation contemplated in section 118(1)(a). Legislation that is enacted in a manner that violates the provisions of section 118(1)(a) is invalid.[51] And this Court has the power under section 172(1)(a) to declare invalid a law adopted in violation of section 118(1)(a).[52] This applies to a constitutional amendment.

[89] In terms of section 74(8), the legislature of KwaZulu-Natal was required to approve that part of the Twelfth Amendment which concerned the province of KwaZulu-Natal. As I have held, this approval should have been given by the KwaZulu-Natal legislature after complying with the provisions of section 118(1)(a). Failure by that legislature to comply with the provisions of section 118(1)(a) renders the purported approval of that part of the amendment which concerns the province of KwaZulu-Natal given by the legislature of KwaZulu-Natal, invalid. This is so because the purported approval was given in a manner that is inconsistent with the Constitution. The NCOP could not therefore validly pass that part of the Twelfth Amendment which concerned the boundary of KwaZulu-Natal as required by section 74(8). It follows therefore that that part of the Twelfth Amendment which concerns Matatiele cannot be valid.

[50] Above n 14 at para 209.

[51] Id at paras 208-9.

[52] Id at para 211.

[90] In my judgment therefore, that part of the Twelfth Amendment that transfers the area that previously formed the local municipality of Matatiele from the province of KwaZulu-Natal to the province of the Eastern Cape must be declared invalid.

[91] In terms of section 172(1)(b), this Court has the power to make any order that is just and equitable, including an order suspending an order declaring invalid a constitutional amendment. What is just and equitable depends on facts of each case.[53] Considerations that are relevant in this regard include the potentiality of prejudice being sustained if an order of invalidity is not suspended; the interests of the parties as well as that of the public; and the need to promote the constitutional project and prevent chaos.[54] Of particular relevance in this case are: the consequences of the order of invalidity on the elections; the powers of Parliament to alter provincial boundaries; and the responsibility of the provinces in relation to an amendment which alters their boundaries.

[92] If that part of the Twelfth Amendment which relocates Matatiele to the Eastern Cape province is declared invalid, the elections that took place consequent to it must be invalid as well. The concession made by the Electoral Commission in this regard was properly made. If this declaration is made with immediate effect, the elections held on 1 March 2006 will become invalid with immediate effect. There will be no

[53] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2006 (3) SA 1 (CC); 2006 (3) BCLR 423 (CC) at para 47.

[54] Compare id.

municipalities in the affected areas in KwaZulu-Natal or in the Eastern Cape. This will have serious implications for the provision of services in the affected areas.

[93] As the Electoral Commission explained, the effect of the invalidation of the Twelfth Amendment is that the affected municipal areas will revert to municipalities with the same status, areas of jurisdiction, wards and number of councillors as they were listed immediately before 1 March 2006; that is, the municipalities as they existed when the general municipal elections were held on 5 December 2000 but with re-determined boundaries where such re-determinations became effective before 1 March 2006. Elections held in these municipalities on 1 March 2006 will be invalid. Fresh elections will have to be held in the affected municipalities.

[94] Various steps will have to be taken before such elections can be held in the affected areas. These include: delimitation of the municipal boundaries of the affected municipal areas by the Municipal Demarcation Board; consequential steps that will have to be taken by the relevant provincial members of the Executive Council; and preparation for the holding of fresh elections by the Electoral Commission. The Electoral Commission contemplates that it will take it approximately six months from the time after the Municipal Demarcation Board completes delimitation, for it to prepare for the registration of voters and the holding of elections. We do not have the estimation of time required by the Municipal Demarcation Board to complete the delimitation process.

[95] Taking these steps in order to prepare for fresh elections will, no doubt, involve great costs. In addition, the holding of such elections will not, of course, prevent Parliament from passing a fresh constitutional amendment that alters the boundaries of the provinces of KwaZulu-Natal and the Eastern Cape in a manner that is consistent with the Constitution. Were this to happen, this would necessitate further elections which will be held consistently with the new constitutional amendment. This will require further expenditure in connection with the preparation for and conduct of third elections. In my view, justice and equity militate against an order of invalidity that takes immediate effect.

[96] On the other hand, suspending the order of invalidity will allow Parliament to remedy the constitutional defect and adopt a new constitutional amendment after complying with the provisions of the Constitution. This would allow the elections held on 1 March 2006 to stand pending a new constitutional amendment. If Parliament decides not to proceed with the amendment, or does not enact it within the period of suspension, or if the KwaZulu-Natal provincial legislature decides to veto an amendment that alters its boundary, the order of invalidity will take effect and the elections of 1 March 2006 will be rendered invalid. In that event, fresh elections will have to be held in accordance with the position of the municipalities as they were before the Twelfth Amendment came into operation. This will therefore require one more election to be held as opposed to an order of invalidity that takes immediate effect, which may require two additional elections, at even greater costs.

[97] We are certain that the legislature of KwaZulu-Natal will properly consider the representations of the people. While it is true that the people of the province have no right to veto a constitutional amendment that alters provincial boundaries, they are entitled to participate in its consideration in a manner which may influence the decisions of the legislature. The purpose of permitting public participation in the law-making process is to afford the public the opportunity to influence the decision of the law-makers. This requires the law-makers to consider the representations made and thereafter make an informed decision.[55] Law-makers must provide opportunities for the public to be involved in meaningful ways, to listen to their concerns, values, and preferences, and to consider these in shaping their decisions and policies. Were it to be otherwise, the duty to facilitate public participation would have no meaning.

[98] Ultimately, the power to alter provincial boundaries rests with Parliament and the provincial legislature concerned. However, these legislative bodies may only have the provincial boundaries altered in a manner that is consistent with the Constitution. In my judgment, these legislative bodies must be given the opportunity to correct the constitutional defect and in a manner that is consistent with the Constitution adopt a fresh amendment. To this extent, the declaration of invalidity must be suspended. However, if Parliament decides not to proceed with the amendment, or if the KwaZulu-Natal legislature decides not to approve the amendment proposing the alteration of its boundary, Parliament, together with all interested parties, must approach this Court for guidance on how to deal with the consequences of invalidity

[55] *New Clicks* above n 14 at para 483.

of that part of the Twelfth Amendment that concerns the boundary of KwaZulu-Natal. An order to this effect must be made. Similarly, I consider it desirable to make provision for any interested person or organisation to approach this Court for an extension of the order of suspension or some other relief once it is apparent that Parliament will not be able to pass the constitutional amendment before the expiry of the period of suspension.

[99] What is just and equitable in this case is to suspend the order declaring invalid that part of the Twelfth Amendment which concerns the province of KwaZulu-Natal, for a period of eighteen months.

[100] Finally, the 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.

Rationality

[101] In view of the conclusion that I have reached on the validity of the Twelfth Amendment, it is not necessary to consider the question of rationality.

[102] It now remains to consider the constitutional validity of the Repeal Act.

The Repeal Act

[103] Unlike in the case of a constitutional amendment, this Court does not have exclusive jurisdiction in relation to the Repeal Act. Other courts also have jurisdiction. The question is whether the applicants were entitled to come directly to this Court with a challenge to the Repeal Act.

[104] In terms of section 167(6)(a) of the Constitution, a person is entitled to bring a matter directly to this Court when it is in the interests of justice to do so and with leave of this Court.[56] The question is whether it is in the interests of justice for the applicants to be granted leave to approach this Court directly in relation to the Repeal Act.

[105] There 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 to the Repeal Act in the High Court. The result would be two applications in two different courts raising substantially the same issue. I have no doubt that the High Court considering the constitutionality of the Repeal Act would

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

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

Section 16(2)(a) of the Constitutional Court Complementary Act 13 of 1995 read with Rule 18 of the Rules of the Constitutional Court give effect to this provision.

have had to await the outcome of the challenge to the Twelfth Amendment. In all the circumstances, I am satisfied that the applicants were entitled to approach this Court directly. They are therefore entitled to leave granting them direct access to approach this Court in relation to the Repeal Act.

[106] I now turn to the merits of the challenge to the Repeal Act.

[107] The applicants mounted substantially the same challenge to the Repeal Act as to the Twelfth Amendment, namely, that it unconstitutionally usurps the functions of the Municipal Demarcation Board. The focus of the challenge was on the provisions of section 2(4)(a) of the Repeal Act. In the view I take of the matter, it is not necessary to consider whether the provisions of section 2(4)(a) demarcate municipal boundaries contrary to the provisions of the Constitution. And I express no opinion on this issue.

[108] The repeal Act was enacted in the wake of, first, the abolition of cross-boundary municipalities and, second, the establishment of a new method of defining provincial boundaries, which was by reference to municipal boundaries. Its declared purpose is to "provide 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". It was therefore enacted to give effect to the Twelfth Amendment.

[109] Like the Twelfth Amendment, the Repeal Act contains parts that deal with specific provinces. If the part of the Twelfth Amendment that concerns KwaZulu-Natal is invalid, it follows that that part of the Repeal Act which concerns KwaZulu-Natal must suffer the same fate.

[110] Although the focus of the applicants' challenge went beyond those parts of the Repeal Act that concerned KwaZulu-Natal province, in the course of oral argument, counsel for the applicants made it clear that the applicants were only interested in those parts of the Repeal Act that affected Matatiele. This attitude on the part of the applicants is borne out by the respondents that they cited, namely, the municipalities that will be affected by the order declaring invalid that part of the Repeal Act which affects Matatiele.

[111] In any event, a constitutional challenge to the Repeal Act as a whole would have consequences for all the provinces that had cross-boundary municipalities as well as the municipalities affected. These provinces and municipalities were not joined as parties to these proceedings. In these circumstances, a constitutional challenge to the entire Repeal Act cannot be entertained.

Costs

[112] The costs should follow the result in this case. The applicants have in the end been successful. However, they did not succeed in their original contention that the Twelfth Amendment is inconsistent with the provisions of section 155(3)(b) of the

Constitution. This contention was argued during the first hearing and was dismissed by the Court on 27 February 2006. This must be reflected in the order for costs. The respondents should not be ordered to pay the costs incurred in relation to the first hearing. Nor should they be required to bear the costs of joining the provincial legislatures of KwaZulu-Natal and the Eastern Cape, and the Electoral Commission.

[113] The President, the Minister of Provincial and Local Government, the Minister of Justice and Constitutional Development, Parliament and the provincial legislature of KwaZulu-Natal actively resisted the application. They should accordingly bear the costs of these proceedings. Those costs are to exclude the costs incurred during the hearing on 14 February 2006 and those associated with the joinder of the provincial legislatures of KwaZulu-Natal and the Eastern Cape, and the Electoral Commission. The applicants are entitled to the costs of two counsel.

Order

[114] In the event, I make the following order:

(a) It is declared that the provincial legislature of KwaZulu-Natal has failed to comply with its constitutional obligation, envisaged in section 118(1)(a) of the Constitution, to facilitate public involvement in considering and approving that part of the Twelfth Amendment which concerns the province of KwaZulu-Natal pursuant to section 74(8) of the Constitution.

(b) That part of the Constitution Twelfth Amendment of 2005 which tranfers 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.

(c) That part of the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 which relates to 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, is declared inconsistent with the Constitution and therefore invalid.

(d) The orders in paragraph (b) and (c) above are suspended for a period of eighteen months.

(e) The first, second, third and fourteenth respondents, and the provincial legislature of KwaZulu-Natal are ordered to pay the costs of these proceedings, such costs to include the costs of two counsel. These costs shall exclude the costs of the hearing on 14 February 2006 and those associated with the joinder of the provincial legislatures of KwaZulu-Natal and the Eastern Cape, and the Electoral Commission, in respect of which each party shall pay their own costs.

(f) Should it be apparent that Parliament will not be able to adopt a new constitutional amendment altering the boundary of the province of

KwaZulu-Natal before the expiry of the period of suspension of the order of invalidity in paragraph (d) above, any interested person or organisation, including any party in this case, may apply to this Court for a further suspension of the declaration of invalidity and/or other appropriate relief.

(g) If Parliament decides not to proceed with the alteration of the boundary of KwaZulu-Natal, or if the provincial legislature of KwaZulu-Natal vetoes a proposed constitutional amendment that alters the boundary of its province, the Speaker of the National Assembly and the Chairperson of the National Council of Provinces must, on notice to interested parties, approach this Court for guidance on the consequences of the invalidity of that part of the Twelfth Amendment that concerns the boundary of KwaZulu-Natal.

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

SKWEYIYA J:

[115] Having chosen to concur with Yacoob J in his judgment in *Doctors for Life International*,[1] as I feel that the position taken by him is the correct approach to the matter, I find it appropriate to briefly state my position on this matter.

[116] I would also hold that reasonable 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[2] has accordingly not been shown to have been invalidly adopted.

[117] I also say nothing with regard to the validity of the Repeal Act for the reasons advanced by Yacoob J in his judgment in the present case.[3]

[118] Accordingly, I dissent from the majority judgment written by Ngcobo J as laid out above, and associate myself with the judgment of Yacoob J.

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[1] *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05 as yet unreported judgment, 17 August 2006.

[2] The Constitution Twelfth Amendment Act of 2005.

[3] Yacoob J judgment at para 127.

VAN DER WESTHUIZEN J:

[119] I concur in the dissenting judgment of Yacoob J in this matter, for the reasons stated by him. In addition to the reasons put forward by Yacoob J and by me in *Doctors for Life International*[1], I wish to mention something specifically on section 74 of the Constitution, dealing with Bills amending the Constitution.

[120] Unlike sections 59(1)(a) and 72(1)(a), which state that the National Assembly and the National Council of Provinces (NCOP) must facilitate public involvement in their processes, section 74 is located under the heading "National Legislative Process". It therefore deals squarely and specifically with the process of passing Bills amending the Constitution – as sections 73, 75, 76 and 77 deal with all Bills, ordinary Bills not affecting provinces, ordinary Bills affecting provinces and money Bills.

[121] Section 74 thus sets out in detail all the procedural requirements and steps for the passing of constitutional amendments. As argued by counsel for the Speaker of the KwaZulu-Natal Legislature there is no need, or in fact justification, to impose additional procedural requirements from a formulation in another provision of the Constitution onto the procedure set out in section 74.

[1] *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05, as yet unreported.

[122] Subsections (5) and (6) of section 74 specifically provide for public involvement in the process of amending the Constitution.[2] Amongst other things, it calls for publication in the Government Gazette of particulars of the proposed amendment for public comment and for the submission of any comments received from the public and the provincial legislatures to the Speaker of the National Assembly and the Chairperson of the NCOP.

[123] These and other subsections of section 74 were added to the constitutional text by the Constitutional Assembly, in order to comply with Constitutional Principles II and XV of the interim Constitution, after the text had been referred back to the Assembly by this Court.[3] The Court then found that section 74 complied with the two Constitutional Principles in that special procedures – meaning more stringent procedures in comparison with those required for other legislation – were indeed

[2] Section 74(5) states:

> "At least 30 days before a Bill amending the Constitution is introduced in terms of section 73 (2), the person or committee intending to introduce the Bill must–
>
> (a) publish in the national *Government Gazette*, and in accordance with the rules and orders of the National Assembly, particulars of the proposed amendment for public comment;
>
> (b) submit, in accordance with the rules and orders of the Assembly, those particulars to the provincial legislatures for their views; and
>
> (c) submit, in accordance with the rules and orders of the National Council of Provinces, those particulars to the Council for a public debate, if the proposed amendment is not an amendment that is required to be passed by the Council."

Section 74(6) states:

> "When a Bill amending the Constitution is introduced, the person or committee introducing the Bill must submit any written comments received from the public and the provincial legislatures-
>
> (a) to the Speaker for tabling in the National Assembly; and
>
> (b) in respect of amendments referred to in subsection (1), (2) or (3) (*b*), to the Chairperson of the National Council of Provinces for tabling in the Council."

[3] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 at paras 152-6 and 159.

prescribed for constitutional amendments.[4] This is a further indication that the procedure for constitutional amendments is fully set out in section 74.

[4] Ex *Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC); 1997 (1) BCLR 1 (CC); at paras 52 and 71.

YACOOB J:

[124] This is a very short judgment aimed at setting out the somewhat unusual position in which I find myself in this case. Although the decision in *Doctors for Life International*[1] was handed down yesterday and this judgment is being handed down today, they were both considered by the Court side by side. I dissented in *Doctors for Life International* on the basis of my view that the national legislative process described in section 76 of our Constitution did not require public involvement as a prerequisite to its validity. The majority held in that case that reasonable public involvement was a prerequisite to the validity of legislation passed in terms of section 76 of the Constitution.

[125] It is necessary for me to decide whether to write this judgment on the basis that I am bound by the decision in *Doctors for Life International* delivered yesterday or whether to do so on the basis that both judgments were considered together. I have decided to follow the latter course.

[126] In the circumstances, the minority finding in *Doctors for Life International* obliges me, for substantially the same reasons to dissent in relation to this judgment too. I would therefore hold that reasonable public involvement is not a prerequisite to the validity of constitutional amendments effected in terms of section 74(3) read with

[1] *Doctors for Life International v The Speaker of the National Assembly and Others* CCT 12/05 as yet unreported judgment, 17 August 2006.

section 74(8) of the Constitution and that the Twelfth Amendment Act[2] has accordingly not been shown to have been invalidly adopted.

[127] I have also decided to say nothing about the validity of the Repeal Act[3] despite the fact that a conclusion that the Twelfth Amendment Act is not invalid would ordinarily require me to enter upon this subject. I do not do so because the decision of the majority has declined to deal with the question and I do not wish to pre-empt the course of proceedings in relation to the constitutional validity of the Repeal Act should they be brought in another court.

[2] The Constitution Twelfth Amendment Act of 2005.

[3] The Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005.

For the applicants:	AJ Dickson SC and AA Gabriel instructed by Austen Smith Attorneys.
For the first to third respondents:	I Semenya SC, V Maleka SC, N Mayet and P Nkutha instructed by the State Attorney, Johannesburg.
For the fourteenth and fifteenth respondents:	KD Moroka SC and K Pillay instructed by the State Attorney, Johannesburg.
For the sixteenth and seventeenth respondents:	NM Arendse SC and JI Hendriques the State Attorney, KwaZulu-Natal and Bisho.
For the eighteenth respondent:	JC Heunis SC and GA Oliver instructed by L Mbanjwa Inc.