CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 40/08
[2011] ZACC 27

In the matter of:

MOUTSE DEMARCATION FORUM	First Applicant
WILLIAM MOTHIBA RAMPHISA	Second Applicant
MPUTLE MAKIDLA	Third Applicant
KINNY MMAKOLA	Fourth Applicant
GIVEN PHIRI	Fifth Applicant
CHRISTINA PHATLANE	Sixth Applicant
FANIE MOTSELE MOGOTJI	Seventh Applicant
ELIONA MATLOU	Eighth Applicant
BANGISWANE MTHOMBENI	Ninth Applicant
FRIEDA RAKWENA	Tenth Applicant
LAWRENCE DITSHEGO	Eleventh Applicant
BAFANA ZACHIARIA DUBE	Twelfth Applicant
THOMAS MAPULE	Thirteenth Applicant
TEFO PETER MATHIBEDI	Fourteenth Applicant
ROSLINA STHEBE	Fifteenth Applicant
HAPPY MAHLANGU	Sixteenth Applicant

and

PRESIDENT OF THE REPUBLIC

OF SOUTH AFRICA	First Respondent
MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT	Second Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
PREMIER OF MPUMALANGA PROVINCE	Fourth Respondent
MEC FOR LOCAL GOVERNMENT, MPUMALANGA	Fifth Respondent
SPEAKER OF MPUMALANGA PROVINCIAL LEGISLATURE	Sixth Respondent
PREMIER OF LIMPOPO	Seventh Respondent
MEC FOR LOCAL GOVERNMENT, LIMPOPO	Eighth Respondent
SPEAKER OF LIMPOPO PROVINCIAL LEGISLATURE	Ninth Respondent
MUNICIPAL DEMARCATION BOARD	Tenth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Eleventh Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Twelfth Respondent
GREATER MARBLE HALL LOCAL MUNICIPALITY	Thirteenth Respondent
ELIAS MOTSOALEDI LOCAL MUNICIPALITY	Fourteenth Respondent
GREATER SEKHUKHUNE DISTRICT MUNICIPALITY	Fifteenth Respondent
DR JS MOROKA LOCAL MUNICIPALITY	Sixteenth Respondent
NKANGALA DISTRICT MUNICIPALITY	Seventeenth Respondent
ELECTORAL COMMISSION	Eighteenth Respondent

Heard on : 10 March 2011

Decided on : 23 August 2011

JUDGMENT

JAFTA J:

Introduction

[1] This is an application for direct access brought in terms of section 167(4)(d) and 167(6)(a) of the Constitution.[1] It is a constitutional challenge to a part of the Constitution Twelfth Amendment Act of 2005 (Twelfth Amendment) and to the Cross-Boundary Municipalities Laws Repeal and Related Matters Act (Repeal Act).[2] The applicants challenge these two enactments to the extent that they authorise the relocation of the areas known as Moutse 1 and Moutse 3 from the province of Mpumalanga to the province of Limpopo. Although these areas fall under different local municipalities, they are part of the Greater Sekhukhune

[1] Section 167(4)(d) provides:

> "Only the Constitutional Court may—
>
> (d) decide on the constitutionality of any amendment to the Constitution".

Section 167(6)(a) 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".

[2] Act 23 of 2005.

District Municipality (Sekhukhune Municipality) situated in the province of Limpopo.

[2] Before the impugned laws were enacted, the boundaries of Sekhukhune Municipality straddled the provinces of Mpumalanga and Limpopo. This municipality and other similarly placed municipalities were described as cross-boundary municipalities.[3] They were established in terms of section 155(6A) of the Constitution[4] and the Local Government: Cross-Boundary Municipalities Act.[5]

[3] *Matatiele Municipality and Others v President of the Republic of South Africa and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) (*Matatiele I*) at para 12.

[4] Section 155(6A) provided:

> "If the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundary—
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> (a) that municipal boundary may be determined across the provincial boundary, but only—
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> (i) with the concurrence of the provinces concerned; and
>
> (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality within that municipal area: and
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> (b) national legislation may—
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> (i) subject to subsection (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
>
> (ii) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
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> (iii) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a)."

[5] Act 29 of 2000.

[3] Since their establishment, cross-boundary municipalities have been difficult to administer. They were jointly administered by Members of the Executive Councils (MECs) responsible for local government in the provinces whose boundaries they straddled. The joint administration was, however, limited to the exercise of executive authority falling within the portfolios of local government. Legislation and executive authority, exercised by other departments, were administered separately by the responsible MECs. This resulted in different provincial legislation applying to the same municipality.[6]

[4] The application of different pieces of legislation resulted in different standards of service delivery. This made it difficult to have in place a workable administrative and legislative system that was conducive to creating sustainable municipalities. As a result, there was generally poor service delivery in these municipalities. National government had to intervene to provide support in half of the 16 established cross-boundary municipalities.[7]

[5] In November 2002 national government took a decision to abolish cross-boundary municipalities. This decision was implemented by enacting the Twelfth Amendment and the Repeal Act, which introduced three changes. First, a new criterion for determining provincial boundaries was established. Instead of

[6] Memorandum to the President's Co-ordinating Council (PCC) which was to be held on 1 November 2002 regarding Administration of Cross-Boundary Municipalities.

[7] *Matatiele I* above n 3 at para 16.

defining provincial boundaries with reference to magisterial districts, the impugned laws define them with reference to municipal demarcation maps. Second, the Twelfth Amendment repealed parts of the Constitution[8] that authorised the establishment of cross-boundary municipalities. Similarly the Repeal Act annulled legislation in terms of which these municipalities were established. Lastly, the impugned laws located each of the cross-boundary municipalities within the boundaries of a single province.[9] This resulted in some areas being relocated from one province to another along with the municipality under which they fell.

[6] Communities in some of the relocated areas were dissatisfied with the transfer and decided to challenge the validity of the impugned laws. These laws were the object of constitutional attacks in a number of cases. The first challenge related to Matatiele.[10] Thereafter a similar constitutional challenge was mounted concerning Merafong.[11]

[7] In these cases, as in the present matter, the validity of the impugned laws was challenged on the grounds of irrationality and the provincial legislatures'

[8] It repealed sections 155(6A) and 157(4)(b) of the Constitution.

[9] Schedule 1A to the Twelfth Amendment.

[10] This attack spawned two reported cases: see *Matatiele I* above n 3 and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (No2) [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele II*).

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

failure to facilitate public participation in the legislative process that resulted in the passing of these laws. The same grounds were raised in *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others*.[12] This case was a sequel to the initial cases in relation to Matatiele, which found the provisions unconstitutional for lack of public consultation and gave Parliament 18 months to cure the defect. The case was concerned with whether the Thirteenth Amendment to the Constitution, passed to cure the defect, was constitutional.

The parties

[8] The first applicant is Moutse Demarcation Forum (Forum), an organisation established to represent the community of Moutse in opposing the relocation of the areas from Mpumalanga to Limpopo. The second to sixteenth applicants are residents of Moutse. They bring this application in their own interest as well as in the public interest.

[9] The first respondent is the President of the Republic of South Africa. The second to eighteenth respondents are organs of state at national, provincial and local spheres of government. They are cited in their official capacities. But only the following respondents oppose the relief sought: the Minister for Provincial and Local Government (Minister); Speaker of Mpumalanga Provincial Legislature;

[12] [2010] ZACC 5; 2010 (6) BCLR 520 (CC).

Premier of Limpopo (Premier); MEC for Local Government in Limpopo; and Speaker of Limpopo Provincial Legislature.

Background

[10] The constitutional challenge raised by the applicants is motivated primarily by their opposition to the relocation of their areas from Mpumalanga to Limpopo. They claim that the redetermination of provincial boundaries which resulted in the relocation perpetuates apartheid-era boundaries. These boundaries were then drawn to advance ethnic residential segregation which formed the cornerstone of the apartheid policy of separate development.[13] By separating the area called Siyabuswa from Moutse and placing the latter in Limpopo, the applicants asserted that the redetermination of provincial boundaries concerned has the effect of breaking up contiguous areas that have a shared history and infrastructure.

[11] Apart from claiming that the procedure prescribed for legislating enactments like the impugned laws was not followed, the applicants contended that these laws are irrational. It is necessary to briefly set out the history of Moutse so as to illuminate these arguments.

[13] *Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at paras 41-2.

[12] According to the applicants the community of Moutse has been in occupation of the area since 1780. They are predominantly a Sepedi speaking community. They have, as their neighbour, an isiNdebele speaking community occupying the area known as Siyabuswa.

[13] In accordance with the apartheid government's legislation that promoted the policy of separate development,[14] ethnically based homelands were established for Africans who were classified in terms of language and culture.[15] Africans were later assigned citizenship of a homeland established for the ethnic group under which they were classified.[16]

[14] Under this scheme the homeland of Lebowa was established for the Sepedi speaking people. In 1972 Moutse was incorporated into it. It is, however, not clear from the papers how Moutse was then configured: whether it was a single contiguous area or not. But in court judgments it was described as a district.[17]

[15] Siyabuswa became part of the homeland of KwaNdebele which was established for the Ndebele ethnic group. However, this homeland comprised a

[14] Id at paras 42-3. In terms of this policy each racial group was allocated land to occupy and any development pertaining to each group could be undertaken within its segregated area.

[15] The Promotion of Bantu Self-Government Act 46 of 1959, now repealed, divided Africans into 8 ethnic groups.

[16] The Bantu Homelands Citizenship Act 26 of 1970, now repealed.

[17] *Government of Lebowa v Government of the Republic of South Africa and Another* 1988 (1) SA 344 (A) and *Mathebe v Regering van die Republiek van Suid-Afrika en Andere* 1988 (3) SA 667 (A).

small territorial area and because there was a minority group of Ndebele speaking people in Moutse, the apartheid government sought to increase the territory by excising Moutse from Lebowa and incorporating it into KwaNdebele. This decision was opposed by the community of Moutse and the government of Lebowa which successfully challenged the incorporation of Moutse into KwaNdebele.[18]

[16] Following the abolition of the homelands and their reincorporation into the greater South Africa, the interim Constitution listed Moutse as comprising three districts: Moutse 1; Moutse 2 and Moutse 3.[19] These areas were described as districts created in terms of the Magistrates' Courts Act[20] and they formed part of the province of the Eastern Transvaal, later renamed Mpumalanga Province.[21]

[17] The interim Constitution contemplated that defining certain areas as part of one province or the other was contentious. Section 124 provided for the alteration of provincial boundaries where specified areas described as contentious were involved.[22] The districts of Moutse 1, 2 and 3 were listed in Part 2(i) of Schedule

[18] Id.

[19] Part 1 of Schedule 1 to the interim Constitution Act 200 of 1993.

[20] Act 32 of 1944.

[21] Section 13 of the Constitution of the Republic of South Africa Second Amendment Act 44 of 1995.

[22] Section 124(2) and (3)(a) of the interim Constitution provided:

> "(2) The areas of the respective provinces shall be as defined in Part 1 of Schedule 1: Provided that the establishment of the Northern Cape as a separate province, the establishment in the area of the Eastern Cape of one province, and the inclusion

1 to the interim Constitution as areas in which a referendum could be held for purposes of altering provincial boundaries by relocating them from one province to the other.

[18] Following a meeting in April 1996 between the community of Moutse and a government delegation led by the then Deputy President, the community agreed to remain in the province of Mpumalanga. When the Constitution came into force it defined provincial boundaries as those that existed at the time it came into effect. This meant that the three districts of Moutse remained in Mpumalanga Province and formed part of the municipalities established by that province. Moutse 1 fell under the Greater Marble Hall Local Municipality, Moutse 2 became part of the Dr JS Moroka Local Municipality and Moutse 3 fell within the municipal area of the Greater Groblersdal Local Municipality.

[19] The Greater Marble Hall Local Municipality and the Greater Groblersdal Local Municipality were located in the Sekhukhune Municipality. Following the decision to abolish cross-boundary municipalities, the relocation of the entire Sekhukhune Municipality into the province of Limpopo had the effect of

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of the areas specified in paragraphs (a) to (f) and (i) to (n) of Part 2 of Schedule 1 within the provinces as defined in Part 1 of Schedule 1, shall be subject to alteration in accordance with this section.

(3)(a) A referendum may be held in terms of this section in each of the areas specified in paragraphs (a) to (n) of Part 2 of Schedule 1 (hereinafter referred to as an affected area) to determine the views of the voters ordinarily resident in such area regarding an issue referred to in subsection (5) or (6).”

transferring Moutse 1 and 3 from Mpumalanga to Limpopo. This relocation was achieved through the impugned laws whose effect was, among other things, to change provincial boundaries.

[20] Consistent with the requirement that approval of provincial legislatures of the affected provinces be obtained,[23] the Constitution Twelfth Amendment Bill was submitted to the relevant legislatures. They in turn were obliged to facilitate public involvement in their legislative processes.[24] The details of the public consultation process followed by the Provincial Legislature of Mpumalanga are set out in [51] to [56] below.

Issues

[21] The constitutional attack mounted against the impugned laws is based on two grounds. First, the applicants contend that these laws are irrational in so far as they alter the provincial boundaries of Mpumalanga and relocate Moutse 1 and Moutse 3 to Limpopo. Although in their papers the applicants contended that the Twelfth Amendment is irrational because it cannot achieve the purpose of improving service delivery in the areas concerned, in oral argument they eschewed any reliance on this basis. Instead they argued that the Twelfth Amendment is irrational because it perpetuates boundaries drawn by the apartheid government.

[23] The provisions of section 74(3)(b)(ii) are set out in [45] below.

[24] Section 118 of the Constitution binds provincial legislatures to facilitate public participation in their business. The text of section 118 is quoted at [47] below.

[22] Second, the applicants argued that the Mpumalanga Provincial Legislature failed to adequately facilitate public involvement in the process leading up to the decision to support the Constitution Twelfth Amendment Bill. Before I consider these issues I must deal with two preliminary matters.

Leave to file a supplementary affidavit

[23] The applicants seek leave to file an affidavit deposed to by their attorney, which sets out the chronology of events that occurred after the application was lodged. They ask that this affidavit be admitted into the record for the narrow purpose of explaining the delay and showing which parties were responsible for the delayed hearing of the matter. The respondents do not object to the admission of the affidavit, as it will cause them no prejudice. In these circumstances leave to file the supplementary affidavit must be granted.

The delay in launching this application

[24] Although the rules of this Court do not stipulate the timeframe within which a case based on the absence of public consultation should be brought to Court, these cases must be instituted as soon as possible after the legislation has been passed.[25] This is even more so where the challenge is directed at an amendment of

[25] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*).

the Constitution.[26] Parties who claim to have been denied the opportunity to participate in a legislative process cannot sit back and years after the impugned laws were enacted seek to challenge their validity on the ground of non-compliance with provisions requiring public participation.

[25] The rule that requires that these challenges be brought to Court without delay was laid down in *Doctors for Life International v Speaker of the National Assembly and Others.*[27] In that case this Court stated that it will consider challenges based on a failure to facilitate public participation only where: (a) an applicant has sought and been denied the opportunity to be heard on the Bill; and (b) the application has been brought as soon as practicable after the Bill has been passed.[28]

[26] The Speaker of the Mpumalanga Provincial Legislature contended that the applicants should be barred from raising the present challenge after a period in excess of two years from the date on which the Twelfth Amendment came into force. She argued that records relating to the relevant public hearings could not be located and that the memories of witnesses had faded. She submitted that it would

[26] *Merafong* above n 11 at para 15.

[27] Above n 25.

[28] Id at para 216.

be impractical to reverse processes undertaken after the amendment came into operation.

[27] Although the applicants delayed in raising the challenge in this Court, the respondents were alerted quite early to the fact that the applicants were challenging the constitutional validity of the Twelfth Amendment. Shortly after the amendment came into operation the applicants, acting in person instituted proceedings in the North Gauteng High Court, Pretoria. These proceedings were later withdrawn on the advice of their lawyers who were instructed within a reasonable time to launch a challenge in this Court. But the lawyers delayed because they preferred to wait for the judgment in *Matatiele II* which was pending in this Court. Upon delivery of that judgment they proposed a settlement of this matter based on the judgment. In their reply the respondents stated that they were awaiting legal opinion on the proposal.

[28] The delay in raising a challenge to the constitutional validity of legislation is undesirable and may in appropriate cases lead to the Court refusing to determine the merits of the matter. In this case, however, it will not be in the interests of justice to non-suit the applicants on this ground. The respondents were well aware of the impending challenge. They were able to put up evidence on what occurred during the consultation process. Moreover, the blame for the delay can be attributed to the applicants' lawyers only.

[29] More importantly, in his affidavit the Minister stated that should the government be so persuaded it would be willing to reconsider the disputed boundaries. Therefore it would not be impractical to reverse the boundary change on the strength of the impugned amendments.

[30] It is now convenient to consider the grounds on which the constitutional validity of the Twelfth Amendment is challenged.

To the extent that the Twelfth Amendment transfers Moutse 1 and 3 to Limpopo – is it irrational?

[31] The question whether the Twelfth Amendment is rational or not must be answered with reference to the well established rationality standard. In this regard the enquiry is whether there is a rational connection between the impugned provision and the legitimate government purpose sought to be achieved.[29]

[32] Recently in *Law Society of South Africa and Others v Minister for Transport and Another*,[30] this Court reaffirmed the rationality test in these terms:

[29] *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 25-6; *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at para 36.

[30] [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC).

> "It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.
>
> It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this account, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad."[31] (Footnote omitted.)

[33] In their written argument the applicants contended that the provincial border that separates Moutse from Siyabuswa is irregular and follows no natural contour. The arbitrariness of the border arises, so they said, from the fact that the boundary was adopted during the apartheid era in furtherance of the policy of separate development.

[34] As the Twelfth Amendment perpetuates a boundary of the apartheid era, the argument continued, there should be compelling reasons which justify maintaining that boundary. The respondents have failed, they concluded, to advance a sufficient justification for retaining the apartheid-era boundary.

[31] Id at paras 34-5.

[35] However and most importantly, the applicants do not dispute that the main purpose of the Twelfth Amendment is to abolish cross-boundary municipalities and transform them into economically viable and sustainable municipalities. The respondents advanced this objective as the purpose served by the Twelfth Amendment. But the applicants argued that it constitutes a general purpose, the advancement of which is insufficient to make the Twelfth Amendment rational. Relying on *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)*,[32] the applicants submitted that the generic purpose put forward by the respondents does not meet the rationality standard.

[36] In *Van der Merwe* this Court said:

> "[T]he Fund formulated the government purpose pursued by section 18(b) no higher than the need to regulate patrimonial consequences of marriage. It is indeed so that matrimonial property law, whether of common law or statutory variety, pursues at a generic level, the object of regulating proprietary consequences of marriage. That does not mean, however, that when the constitutional validity of a specific rule of the law of matrimonial property is in issue, the generic purpose overrides the specific purpose of the rule of law under challenge. A court remains obliged to identify and examine the specific government object sought to be achieved by the impugned rule of law or provision. In other words, we are obliged to look at the specific purpose of section 18(b) even though the general purpose of regulating property arrangements in marriage may not in itself be open to constitutional doubt. For present purposes, the question is not whether it is constitutionally authorised to

[32] [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC).

> regulate patrimonial consequences of marriage by law, but whether a specific part of the scheme is constitutionally tolerable."[33] (Footnote omitted.)

[37] Reliance on *Van der Merwe* is misplaced. It is clear from the statement quoted that the Fund in that case sought to advance, as a purpose served by a particular statutory provision, the general object of every matrimonial property law. The minister responsible for the administration of the impugned provision had advanced a different purpose which she claimed the provision served. This Court considered whether the impugned provision was rationally related to that purpose. The Court held that the provision drew an impermissible differentiation between spouses married in and out of community of property in respect of the right to recover damages suffered as a result of bodily injury caused by the other spouse.

[38] The present case is distinguishable from *Van der Merwe.* Here there is nothing to suggest that the Twelfth Amendment aims at perpetuating apartheid-era boundaries for their own sake. At the hearing, this drove counsel for the applicants to concede that it cannot, on the basis of the evidence on record, be claimed that the drafters of the Twelfth Amendment had deliberately sought to maintain the apartheid-era boundary. Therefore, the question of generic and specific purposes does not arise.

[33] Id at para 33.

[39] Nevertheless the applicants argued that in seeking to achieve the purpose advanced by the respondents, the Twelfth Amendment unwittingly perpetuates the apartheid-era boundary. Relying on *Zondi v MEC for Traditional and Local Government Affairs and Others*,[34] the applicants submitted that a law which, on its face, is not constitutionally objectionable, may still be invalid if it causes consequences that are inconsistent with the Constitution. In accordance with this principle, they argued that the Twelfth Amendment is invalid because it perpetuates the apartheid-era boundary.

[40] It is true that a statutory provision may be declared invalid if its effect is inconsistent with the Constitution, even if on its face it appears to be constitutionally compliant. In *Zondi* this Court stated:

> "A statute can be held to be invalid either because its purpose or its effect is inconsistent with the Constitution. If a statute has a purpose that violates the Constitution, it must be held to be invalid regardless of its actual effects. The effect of legislation is relevant to show that although the statute is facially neutral, its effect is unconstitutional."[35]

[41] The reliance on *Zondi* is also misplaced. The applicants did not point to any provision in the Constitution with which the impugned boundary is

[34] [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC).

[35] Id at para 90.

inconsistent. The fact that it may coincide with a boundary drawn by the apartheid government does not, in and of itself, render the Twelfth Amendment inconsistent with the Constitution. When the interim Constitution came into force, it adopted municipal boundaries that were defined by the apartheid regime. It was this definition of municipal boundaries that led to the establishment of cross-boundary municipalities. In some areas the magisterial districts, in accordance with which municipal boundaries were defined, straddled provincial boundaries.

[42] As stated earlier, the three Moutse areas were described as separate districts in the interim Constitution. Later they fell under different local municipalities, even though they remained within the province of Mpumalanga. None of them was placed in the same municipality with Siyabuswa. The applicants do not object to these municipal boundaries. Nor do they challenge the demarcation that places Siyabuswa under a different municipality. Instead what they are opposed to is the relocation of the two Moutse areas to Limpopo.

[43] Although in *Matatiele II*[36] the question relating to the rationality of the Twelfth Amendment was left undecided, it was decided in *Merafong.*[37] In the latter case this Court held that the objects of the Twelfth Amendment were: (a) to introduce new criteria for the determination of provincial boundaries; (b) to

[36] *Matatiele II* above n 10 at para 101.

[37] *Merafong* above n 11 at paras 264-8.

abolish cross-boundary municipalities; and (c) to create viable and sustainable municipalities. The Court held that there was a rational connection between the Twelfth Amendment and these objectives which were considered to be legitimate. The applicants did not argue that *Merafong* was wrongly decided. It follows that the present rationality challenge too must fail.

[44] Before I consider the other ground on which the constitutional validity of the Twelfth Amendment is challenged, it is convenient to set out briefly the constitutional setting. In essence the applicants assert that the procedure prescribed by the Constitution for its amendment was not followed by the Mpumalanga Provincial Legislature.

The constitutional scheme

[45] Section 74 of the Constitution prescribes procedural requirements to be met when the Constitution is amended. It stipulates the supporting vote required both in the National Assembly and the National Council of Provinces (NCOP) when passing a Bill that amends the Constitution. Amendments to different parts of the Constitution require different degrees of the supporting vote in the two houses of Parliament. For present purposes subsections (3) and (8) are relevant. Subsection (3) provides:

> "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."

[46] But if the amendment Bill concerns one province or specific provinces, it may not be passed by Parliament unless the legislature of the province concerned has approved it. This is clear from section 74(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."

[47] The approval required by section 74(8) must follow a legislative process involving public participation in terms of section 118(1) of the Constitution. This section obliges provincial legislatures to facilitate public participation in their business, irrespective of whether it is a legislative or some other process. Section 118(1) provides:

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

(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."

[48] The importance of the rights conferred on citizens and the corresponding obligation imposed upon provincial legislatures by section 118(1) were underscored by this Court in *Matatiele II*. In that case the Court said:

> "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 Speaker of the National Assembly and Others*, 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."[38] (Footnotes omitted.)

[49] However, the meaning and scope of the obligation to facilitate public participation were defined in *Doctors for Life*. While accepting that Parliament and provincial legislatures have a discretion to determine how best to facilitate

[38] *Matatiele II* above n 10 at para 40.

public participation in a given case, this Court laid down what is required in order to comply with the duty. The Court 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 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."[39] (Footnote omitted.)

[50] It is against this backdrop that the second ground, on which the validity of the Twelfth Amendment is challenged, must be evaluated.

Did the Mpumalanga Provincial Legislature act reasonably in facilitating public participation?

[51] The determination of this question requires that the steps taken by the Provincial Legislature, leading up to the approval of the Twelfth Amendment, be

[39] *Doctors for Life* above n 25 at para 129.

retraced. In this, we must bear in mind that, unlike in *Matatiele II* and *Doctors for Life*, the complaint here is not that the Provincial Legislature failed completely to facilitate public participation but that the facilitation was inadequate.

[52] The Bill, as section 74 of the Constitution requires, was submitted for approval to provincial legislatures of the affected provinces, including Mpumalanga Province. Upon receipt of the Bill, the Speaker of the Provincial Legislature in Mpumalanga referred it to the relevant Portfolio Committee. She pointed out in her referral that approval of the Bill by the Provincial Legislature was required as it could not be passed by the NCOP without its approval.

[53] The Portfolio Committee decided to hold public hearings in the areas most affected by the changes to the provincial boundaries. It identified three affected municipalities. These were Ehlanzeni District Municipality, Kungwini Municipality and Sekhukhune Municipality which incorporates both Moutse 1 and 3. The first hearing was held at KaBokweni in Ehlanzeni District Municipality on 4 November 2005. It was followed by a hearing at Thaba Chweu on 10 November 2005. Two hearings were held on 28 November 2005 for Sekhukhune Municipality at Greater Tubatse and Matlerekeng Community Hall in Moutse 1.

[54] On 29 November 2005 the Portfolio Committee met to consider the submissions made at the public hearings until then and compiled a report for the

Provincial Legislature. Meanwhile the applicants came to know that the public hearings had come to an end. The Forum immediately sent a letter to, among others, the Premier and MEC for Local Government and Housing, requesting that a public hearing also be held in Moutse 3. When no hearing was organised on the suggested date, the Forum organised a march to the Union Buildings in Pretoria on 6 December 2005.

[55] On the same date, the Portfolio Committee invited the Forum to a public hearing to be held in Dennilton on 8 December 2005. Dennilton is in Moutse 3. Following this hearing, the Portfolio Committee compiled a fresh report incorporating reference to the representations made at the Dennilton hearing. The report recommended to the Provincial Legislature that the Bill be approved. On 12 December 2005 the report was considered and adopted by the Provincial Legislature, which mandated its representative in the NCOP to vote in favour of the Bill.

[56] The applicants argued that the steps taken by the Provincial Legislature fell short of what is required by section 118(1) of the Constitution, as they were inadequate and unreasonable. This argument rests on three pillars. The first is that the community of Moutse constitutes a discrete group which should have been afforded the opportunity to make representations on the Bill. The second pillar is that the public hearings held were unreasonable and did not adequately facilitate

the community's participation. The third pillar is that the Provincial Legislature was not apprised of and did not have regard to the views and concerns of the Moutse community. I deal with each of these submissions in turn.

Does Moutse constitute a discrete group?

[57] The phrase "discrete group" was first used by this Court in *Matatiele II*. It was employed to describe a group of people who are directly affected by an alteration of provincial boundaries as a result of being located where the change is effected. For example, this may occur if an area is relocated from one province to the other. In that context, both the relocated group and the residents of the municipality it joins in the other province constitute discrete groups, which the respective provincial legislatures are expected to hear before the changes are approved. The phrase is used in contradistinction to the wider community in a province.

[58] It is the direct impact the proposed change has on the group that gives rise to a reasonable expectation to be heard. In *Matatiele II* this Court said:

> "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."[40]

[59] On the definition of the term outlined above, all communities living on the affected border between Limpopo and Mpumalanga constitute discrete groups. Without a doubt they include the communities of Moutse 1 and 3.

[60] There is, however, a further consideration warranting that the communities of Moutse 1 and 3 should have been afforded a hearing before the impugned legislation was approved. It is their history, the details of which are set out above. In April 1996 these communities concluded an agreement with the government, in terms of which they gave up their claim to be placed under the province of Gauteng. They accepted the arrangement that their areas would remain in Mpumalanga. Notwithstanding this persistent communication of their grievance to government, no public hearing was scheduled for Moutse 3 before a protest march to the Union Buildings that took place on 6 December 2005. But this oversight was later corrected by arranging a hearing on 8 December 2005.

Was the public hearing of 8 December 2005 inadequate?

[61] For the opportunity afforded to the public to participate in a legislative process to comply with section 118(1), the invitation must give those wishing to

[40] *Matatiele II* above n 10 at para 68.

participate sufficient time to prepare. Members of the public cannot participate meaningfully if they are given inadequate time to study the Bill, consider their stance and formulate representations to be made. In *Doctors for Life* this Court said in relation to notice:

> "Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made. Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions."[41]

[62] Two principles may be deduced from the above statement. The first is that the interested parties must be given adequate time to prepare for a hearing. The second relates to the time or stage when the hearing is permitted, which must be before the final decision is taken. These principles ensure that meaningful participation is allowed. It must be an opportunity capable of influencing the decision to be taken. The question whether the notice given in a particular case complies with these principles will depend on the facts of that case.

[63] In this case the adequacy of the notice must be assessed with reference to the following facts. The Forum has been raising the objection to relocation for a long period of time. Public meetings and political rallies where the issue was

[41] *Doctors for life* above n 25 at para 171.

discussed were convened by the Forum. Memoranda and letters articulating the reasons for opposing the relocation to Limpopo were sent to various organs of state. In short this has been an ongoing process.

[64] Moreover, when the applicants received notice of the 8 December 2005 meeting, they did not complain at the time that the notice was inadequate nor did they request more time to prepare. It may well be that if they had raised concerns about the adequacy of the notice, the Provincial Legislature would have reconsidered the date. This did not happen because nobody raised the issue and the hearing proceeded on the footing that the interested parties were ready.

[65] Notably, the relatively short notice was equal to the period within which the applicants had requested a hearing in their letter of 30 November 2005. This demonstrates that had the request been acceded to the applicants would have been ready for the hearing. It follows that they should have been ready for a subsequent hearing upon the same notice period. Accordingly this complaint cannot succeed.

[66] Much was made of the fact that the hearing of 8 December 2005 lasted for about two hours. Because this hearing was attended by a large group of people, the applicants submitted that the Portfolio Committee should have allocated more time to hear and consider the community's representations. But this argument loses sight of the fact that, although more than 500 people attended,

representations were made on behalf of organisations and not individuals. This much is clear from the minutes of the hearing, the accuracy of which the applicants did not dispute.

[67] The Forum, which represented the applicants, was given the opportunity to make representations through its chairperson. The applicants do not contend that the Forum was precluded from completing its oral presentation. Significantly the minutes show that the hearing ended when there were no further representations. Therefore, the argument that the hearing itself was inadequate has no merit.

Was the Provincial Legislature informed of the community's views?

[68] Relying on *Merafong*,[42] the applicants argued that while the Provincial Legislature was entitled to rely on the advice of the Portfolio Committee, each member of the Legislature must ultimately make up his or her own mind on the issue. Accordingly, it was submitted, each member must have been properly apprised of the public's views and reasons for supporting or opposing the amendment. The report presented to the Provincial Legislature could not, it was argued, serve this purpose because it failed to fully and faithfully disclose the community's concerns on the relocation of the Moutse areas to Limpopo Province. Nor did it inform members of the Provincial Legislature about the political history

[42] *Merafong* above n 11.

of Moutse. It was submitted that because of the inadequacy of the report, the Provincial Legislature has failed adequately to facilitate public participation.

[69] As appears below, this approach to the report containing a recommendation to the Provincial Legislature, is incorrect. It proceeds from an assumption that each member of the Legislature must have been fully informed of the reasons why the community of Moutse 3 opposed the relocation to Limpopo and that each member must have made up his or her mind on whether to support the legislation or not.

[70] It is true that in *Merafong* this Court affirmed that deliberative bodies like the legislatures often rely on recommendations made by their committees. In that case Van der Westhuizen J said:

> "A legislature is a deliberative body with a large number of members and often relies on recommendations of substructures like committees. It is not obliged to accept them. Each member makes up his or her own mind. It decides by way of a majority vote and does not normally furnish reasons for its decisions, as would be the case with administrative bodies. Many different levels of understanding and appreciation of the law and of the perceived consequences of its decisions may occur amongst its members. The exact understanding of every member of all relevant factors may not only be difficult to ascertain, but may indeed be irrelevant. An incomplete or even incorrect understanding of the law or of the consequences of a decision does not necessarily amount to arbitrariness or naked preference".[43] (Footnote omitted.)

[43] *Merafong* above n 11 at para 73.

[71] The statement quoted above on which the applicants rely does not lay down what should be contained in a report by a legislature's committee. Nor does it set out what must be considered by each member of the legislature before voting one way or the other. Indeed the remarks in the statement were made in a different context. They were made while determining whether the Gauteng Provincial Legislature had exercised its legislative power rationally.

[72] The cornerstone of the contention that the report was inadequate is the submission that the Portfolio Committee was obliged to relay to the Provincial Legislature fully and faithfully the representations made at the public hearings. Building on the argument, it was submitted that without a full and faithful exposition, the Provincial Legislature could not have had proper regard to public concerns. The applicants claimed that the source of this argument is the statement referred to above which was made in *Merafong.*

[73] The plain reading of the statement shows that *Merafong* does not impose an obligation on the Portfolio Committee to relay representations fully and faithfully. Instead the statement makes an observation on the general role played by committees of legislatures. As this Court cautioned in *Doctors for Life*:

> "[W]here the obligation requires Parliament to determine in the first place what is necessary to fulfil its obligation, a review by a court whether that obligation has been fulfilled trenches on the autonomy of Parliament to regulate its own affairs and thus the principle of separation of powers. This is precisely what the obligation comprehended in section 72(1)(a) does. While it imposes a primary obligation on Parliament to facilitate public involvement in its legislative and other processes, including those of its committees, it does not tell Parliament how to facilitate public involvement, but leaves it to Parliament to determine what is required of it in this regard."[44]

[74] In this case the mandate given to the Portfolio Committee was that it must facilitate public participation in the legislative process. The Portfolio Committee, of its own accord, decided to hold public hearings as a method of facilitating public involvement. Its mandate included receiving representations from the public, considering them and advising the Legislature on the Bill.

[75] The Portfolio Committee gave its written advice in the form of a report. It sets out, in summarised terms, the divergent views expressed at various public hearings. Without a doubt the report is, on the face of it, skeletal. But this can hardly be a sufficient basis for holding that the Provincial Legislature has acted unreasonably. The report must be viewed in the context of all relevant facts, including the mandate and the role played by the Portfolio Committee in the entire process. In this regard sight should not be lost of the fact that the Committee formed part of the decision-maker. If there was anything members of the

[44] *Doctors of Life* above n 25 at para 26.

Legislature required clarification on, they could easily have raised it with their colleagues in the Committee. If more information was required, it could have been called for. Yet no member complained about the inadequacy of the report.

[76] But there is another difficulty with the argument that the report was inadequate. It relates to proof of inadequacy.

[77] The applicants merely assert that the report does not "include a full and faithful discussion and consideration of, inter alia, the Moutse hearing of 8 December 2005." But nowhere in the papers do they set out the actual representations made at the hearing. Without this information it is impossible, in my view, to assess the inadequacy claimed.

[78] In the written argument the applicants attempted to show the inadequacy by referring to letters and memoranda sent to the Minister, the Portfolio Committee in the National Assembly and the Premier of Mpumalanga.[45] But there is no

[45] The applicants submitted:

> "5.38 Neither of [the extracts in the report] do justice to the myriad and complex concerns raised by the Moutse community, which appear in the written submissions attached to the founding affidavit. These include—
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> 5.38.1 Moutse's particular history under Apartheid;
>
> 5.38.2 The agreement reached concerning Moutse's incorporation into Mpumalanga rather than Gauteng ten years previously;
>
> 5.38.3 The failure of Sekhukhune District Municipality to manage its budget and implement policies, and the prejudice this had caused the community;

evidence that these documents were placed before the Provincial Portfolio Committee at the hearing on 8 December 2005, or at any other time. If they had been, the applicants' argument on the inadequacy of the hearing itself would have been seriously undermined.

[79] Moreover, it has not been established that members of the Legislature had no information at their disposal other than the report. Indeed, during the debate on the report a representative of the Democratic Alliance alluded to the history of Moutse in opposing the Twelfth Amendment Bill. The Bill was opposed by two political parties only: the Democratic Alliance and the Christian Party.

5.38.4 The lack of information provided to, and interaction with, the Moutse community by the municipality;

5.38.5 Concerns that the process of municipal and provincial demarcation was motivated by ulterior purposes and was not being pursued in a consultative manner;

5.38.6 Submissions that the geographical location of Moutse meant that it could more effectively be serviced by Mpumalanga;

5.38.7 Concerns around service delivery generally, and particularly in regard to—

5.38.7.1 the standards of water provision;

5.38.7.2 education;

5.38.7.3 access to magistrates' courts;

5.38.7.4 access to local state departments, including the traffic department, Home Affairs and Social Development;

5.38.7.5 access to and standards of hospitals and clinics; and

5.38.7.6 roads." (Footnote omitted.)

These factors are drawn from the letters and memoranda sent to other parties.

[80] On all the evidence before us, I am unable to assume that the members of the Legislature knew nothing from any other source. Even if they had the skeletal report of the Portfolio Committee only, that does not entitle a court to pronounce on the adequacy of the information at the disposal of a deliberative body such as the legislature before it makes a decision. Bearing in mind that the Provincial Legislature has a discretion to choose the method of facilitating public participation, it is undesirable for this Court to prescribe to the Legislature what a report to it should contain.

[81] As this Court observed in *Doctors for Life*, what was done by the legislature in fulfilment of the section 118(1) obligation, may only be reviewed if the action did not meet the standard of reasonableness. Laying down the test for review this Court said:

> "The question will be whether what Parliament has done is reasonable in all the circumstances. . . . 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 public affairs. . . . [T]his balance is best struck by this Court considering whether what Parliament does in each case is reasonable."[46]

[46] *Doctors for Life* above n 25 at para 146.

[82] In the present circumstances, I am not persuaded that the steps taken by the Provincial Legislature were unreasonable and that consequently it had failed to fulfil its obligation to facilitate public participation. The challenge based on this ground must also fail.

[83] The parties agreed that the outcome of the constitutional challenge to the Twelfth Amendment would determine the result in respect of the Repeal Act. The Constitution prescribes similar procedures that must be followed when enacting both laws. Accordingly the challenge against the Repeal Act must also fail.

Costs

[84] The failure of the application does not mean that the applicants must be mulcted with costs. The application was neither frivolous nor vexatious. The general rule in constitutional litigation between private parties and the State is that unsuccessful private litigants should not be ordered to pay costs unless they are guilty of conduct deserving censure by the Court.[47]

[85] On a number of occasions this matter could not proceed because the respondents had indicated their willingness to reconsider the disputed boundary and a political process to test the views of the affected communities by way of a

[47] *Biowatch Trust v Registrar, Genetic Resources, and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21 and 43.and *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

'referendum' was undertaken. The object of the political process is to find a resolution to the dispute, outside of the court proceedings. This Court allowed the parties to explore the political process and removed the matter from the roll on various occasions. This process is, however, taking a long time to finalise.

[86] It is the delay in finalising the political process which has led to postponements and removal of the matter from the roll. It was set down for hearing on 18 November 2008. On that date the Court granted a postponement to 17 March 2009. On the latter date the matter was again postponed to 21 May 2009. The Court was informed that the dispute had been taken to Cabinet and that the parties were awaiting Cabinet's decision. The Minister was directed to file an affidavit setting out Cabinet's decision.

[87] On 21 April 2009 the Minister filed an affidavit stating that Cabinet had considered it necessary to have a formal and comprehensive consultation process, covering every village in the affected areas. On 8 May 2009 the Minister brought an application for a further postponement of the matter. The applicants did not oppose it. On 15 May 2009 the matter was removed from the roll. On 8 September 2009, it was set down again for hearing on 5 November 2009 and the respondents were directed to report on developments in the political process by 12 October 2009.

[88] On 12 October 2009 the Minister filed an affidavit alleging that a 'referendum' had been held in the affected areas and that a report on the process was to be prepared. Once more, the matter was removed from the roll. Nothing happened until this Court issued directions calling on the parties to indicate whether they intended to pursue the case. By letter, the State Attorney informed the Court that the matter was to be placed before Cabinet in August 2010. The applicants requested that the matter be set down for hearing in November 2010. On 8 November 2010 the Court issued directions setting the matter down for 10 March 2011. At the hearing we were informed that the political process was still underway.

[89] I consider it fair to order the respondents to pay the costs occasioned by the postponements and the removal of the matter from the roll on 18 November 2008, 17 March 2009, 21 May 2009 and 5 November 2009. These should include the costs of all additional documents filed in this Court from the date of the first postponement until the date of the actual hearing. All these postponements were a direct consequence of the delay in finalising the political process. Control over that process vested in the Minister and therefore it is he who could have avoided the postponements and expedited the finalisation of the process.

Order

[90] The following order is made:

1. The applicants are granted leave to file a supplementary affidavit dated 14 February 2011.
2. The application is dismissed.
3. The Minister for Provincial and Local Government is ordered to pay the applicants' costs, including the costs of two counsel, occasioned by the postponements on 18 November 2008, 17 March 2009, 21 May 2009 and 5 November 2009, including the costs of the preparation and filing of all additional documents lodged in this Court from the date of the first postponement until the date of the actual hearing.

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

For the Applicants:	Advocate G Marcus SC; S Budlender; I Goodman instructed by Lawyers for Human Rights.
For the Second, Sixth, Seventh, Eighth and Ninth Respondents:	Advocate IV Maleka SC; S Yacoob instructed by the State Attorney.