

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

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

CCT 73/05

Decided on 27 February 2006

MEDIA SUMMARY

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

The applicants, Matatiele Municipality and a diverse group of business people, educators, associations and non-governmental entities are challenging the constitutional validity of the Twelfth Amendment and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act. In terms of these laws the boundary between KwaZulu-Natal and the Eastern Cape was altered so that the area which was previously the Matatiele Local Municipality was transferred from KwaZulu-Natal to the Eastern Cape; new municipal boundaries were created as a consequence. The applicants argued that these laws change the boundary of Matatiele Municipality and its composition and transfer it to the Eastern Cape without complying with the procedure set out in the Constitution. The applicants argued that in doing so, Parliament took over the functions which the Constitution has reserved for an independent authority, the Municipal Demarcation Board.

The President, Minister of Provincial and Local Government and the Minister of Justice and Constitutional Development, who are amongst the respondents, opposed the application. Parliament later joined the proceedings also to oppose the application. They argued that in passing the Twelfth Amendment, Parliament had complied with the procedures set out in the Constitution. In addition, they argued that Parliament was entitled, in the exercise of its powers to alter provincial boundaries, to interfere with municipal boundaries if this was necessary to re-draw provincial boundaries. The other respondents, who included Members of Executive Council of the Eastern Cape and KwaZulu-Natal for Local Government, the Premiers of KwaZulu-Natal and the Eastern Cape, the Municipal Demarcation Board and certain affected municipalities, did not actively participate in the proceedings.

In view of the urgency of the matter, the Court decided to hear the case on 14 February 2006 before the start of its first term, which normally starts on 15 February. Today the Court gives judgment on one aspect of the challenge to the constitutional validity of the Twelfth Amendment, namely, whether in re-drawing the provincial boundaries, Parliament unlawfully took over the functions of the Municipal Demarcation Board. It does not finally decide whether the Twelfth Amendment and

the Repeal Act are constitutional. These issues will be decided after the Court has heard further argument, in particular from KwaZulu-Natal legislature, whether the procedures set out for the passing of the Twelfth Amendment were complied with.

Ngcobo J, in a judgment concurred in by Chief Justice Langa, Deputy Chief Justice Moseneke, and Justices Madala, Mokgoro, Nkabinde, O'Regan, Sachs and Van der Westhuizen; found that the Municipal Demarcation Board is an independent authority which is vested with the power to draw municipal boundaries. He held that in entrusting this power upon an independent authority, the Constitution seeks to guard against political interference in the process of creating municipal boundaries. For this reason, in the performance of its duties to determine municipal boundaries, the Board should be able to do so without being constrained in any way by the national and provincial governments. However, he found that the power of the Board to determine municipal boundaries is limited by the authority of Parliament to re-draw provincial boundaries. Ngcobo J held that Parliament has the constitutional authority to interfere with municipal boundaries if this is necessary to perform its duty to re-draw provincial boundaries. He concluded that the Twelfth Amendment did not therefore violate the Constitution in interfering with municipal boundaries in the course of re-drawing the provincial boundaries.

Ngcobo J, however, said that that was not the end of the matter. He found that the evidence before the Court raised doubts whether the legislature of KwaZulu-Natal had followed the correct procedures in considering and approving the Twelfth Amendment. He further found that unlike other provinces that were affected, the record shows that the legislature of KwaZulu-Natal did not hold public hearings with the people of Matatiele. This, Ngcobo J found, raised questions about the applicability, meaning and scope of sections 74(8) and 118(1)(a) of the Constitution, and that these provisions are crucial to a decision whether the Twelfth Amendment was passed in accordance with the procedures set out in the Constitution. Ngcobo J said that in the light of this, the Court was entitled to investigate whether or not the provincial legislature of KwaZulu-Natal had followed the correct procedure in considering and approving the Twelfth Amendment, notwithstanding the admission that was made on behalf of the applicants that such procedures had been complied with. He said that the Court is not bound by a concession made by a legal representative if it considers the concession to be wrong in law.

Accordingly he directed that provincial legislature of KwaZulu-Natal should be joined as a party to the proceedings and be afforded the opportunity to submit evidence and submissions on whether it was required to comply with the provisions of section 118(1)(a) of the Constitution and if so, whether it complied with these provisions and if not, what is the effect of non-compliance with these provisions on the validity of the Twelfth Amendment. He also directed that the Electoral Commission should also be joined as a party and be given the opportunity to file an affidavit and written submissions on these questions as well. He further directed the other parties to make similar submissions and that the speakers of the other provinces, if they so wish, may also submit submissions. To this extent he fixed the date for the next hearing as 30 March 2006.

Ngcobo J said that the elections must, in the meantime, proceed as planned. He said that the Court was not in a position to make an order stopping the elections as it did

not have full information on the extent to which such an order may affect the affected municipalities and this might raise complex issues relating to the administration of the municipalities. In saying this, Ngcobo J said that the Court was not unmindful of the concerns of the people of Matatiele, which concerns are legitimate. He said the Court understands that the people of Matatiele want to know whether they will remain in KwaZulu-Natal or they go to the Eastern Cape. He made it clear though, that the Court was not deciding the validity of the Twelfth Amendment, nor was it deciding whether the people of Matatiele should relocate to the Eastern Cape. What the Court is saying is that the position must remain as it is until a final decision can be made on the constitutional validity of the Twelfth Amendment. It is only then that the fate of the people of Matatiele will finally be decided.

Skweyiya and Yacoob JJ agree that the Twelfth Amendment is not invalid on the grounds relied upon by the applicants. They however hold that it is not in the interests of justice to postpone the case for the purpose of investigating the issue whether the procedure set out in section 74(8) of the Constitution has been complied with and whether section 118(1) of the Constitution is engaged. They hold that the likelihood of the applicants benefiting from this course is far too small to justify the further investigation and the consequent delay.

They agree however that the Minister should be required to furnish the Court with particulars of the motivation for the provincial boundary change between the provinces of KwaZulu-Natal and the Eastern Cape.

In a separate judgment, O'Regan J concurs in the judgment and order of Ngcobo J. She states that although it would often not be in the interests of justice for the Court to consider a legal issue not relied upon by the applicant, in a case where the redrawing of provincial boundaries is at issue, it is important not to raise a matter of that sort and leave it undetermined.

In a concurring judgment Sachs J expressed his concern at the lack of candour shown by the government concerning the governmental objective to be served by relocating Matatiele to the Eastern Cape, stating that the legitimacy of legislation came not from awe but from openness.