SACHS J ABRIDGED JUDGMENT (CONCURRING)

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

95. I concur with the judgment of Ngcobo J. However, I wish to make observations about an aspect of this case which has caused me considerable concern. It relates to the paucity of information from the government as to the objectives intended to be served by the relocation of Matatiele from KwaZulu–Natal to the Eastern Cape.

96. Our country has moved a long way since Stratford CJ said that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will.''

97. For a decade we have now lived in a constitutional democracy in which all power, whether legislative, executive or judicial, has had to be exercised in keeping with the Constitution. In the eloquent words of Mahomed AJ:

> "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and

disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

98. The spirit of the Constitution to which he referred is not a ghostly presence that attaches itself to the text. Rather, it is immanent in the text itself, which clearly establishes the structures, overall design, above all the fundamental values of the Constitution. These founding values are set out in section 1 which provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) Non-racialism and non-sexism.

(c) Supremacy of the constitution and the rule of law.

(d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

As this Court emphasized in *UDM*, these founding values have an important place in our Constitution, informing the interpretation of the Constitution and the law, and setting positive standards with which all law must comply in order to be valid.

99. A founding value of particular relevance in the present matter is that of a multi-party system of democratic government to ensure accountability, responsiveness and openness. In *President of the Republic of South Africa v UDM*[5] this Court pointed out that a legislature has a very special role to play in such a democracy. It is the law-maker consisting of the duly elected

representatives of all the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. The Court continued:

> "On the other hand, the Constitution as the supreme law is binding on all branches of government and no less on the Legislature and the Executive. The Constitution requires the courts to ensure that all branches of government act within the law. The three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law."

One of the key ingredients of partnership is candour, and it is the absence of openness on the part of government as required by section 1 of the Constitution, that lies at the centre of my concern.

100. There is an information deficit that impedes resolution of an important issue in the present case. It relates to another area where a foundational value is directly engaged, namely, the rule of law. Fundamental to the rule of law is the notion that government acts in a rational rather than an arbitrary manner. As this Court said in *Prinsloo*:

> "[T]he constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. . . . This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation. In Mureinik's celebrated formulation, the new constitutional order constitutes 'a bridge away from a culture of authority . . . to a culture of justification'."[7] (footnotes omitted)

Our Constitution accordingly requires that all legislation be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.

101. The threshold for demonstrating rationality is low. All that it requires is a showing that some legitimate governmental purpose be served by the measure. The problem with the record in the present matter is that whereas there is an abundance of material dealing with re-configuring provincial boundaries so as to eliminate cross-boundary municipalities, there is very little indeed from which to discern the governmental objective behind transferring Matatiele to the Eastern Cape. Nor are there clear pointers in the statute itself.

102. Despite receiving repeated requests during argument for information on the purpose of relocating Matatiele to the Eastern Cape, counsel for the government refrained from casting additional light on the topic. The stance counsel adopted boiled down to asserting that the legislature itself thought that the relocation was necessary, and involved a legislative choice, the wisdom of which is not now open to question by the Court.

103. Before dealing with whether this posture adopted by counsel was constitutionally correct, an observation needs to be made about the manner in which Matatiele was fitted into the scheme of the Twelfth Amendment. It would seem from the record that Matatiele was dealt with as a legislative add-on to the Amendment, which was intended essentially to grasp another nettle, namely, the problems created by divided provincial government responsibility for service delivery to cross-boundary municipalities. Yet the particular governmental purpose that could legitimately underlie re-making borders so as to eliminate cross boundary municipalities, would on the face of it appear to bear no immediately apparent relationship to a measure which relocates a municipality whose services have in fact been administered solely by the KZN provincial government.

104. Counsel for the government acknowledged that Matatiele was not established formally as a cross-boundary municipality. He contended, however, that it was "a cross-boundary jurisdictional enclave similar to a cross-boundary municipality." He claimed that the undisputed evidence showed that it was common cause that the Maluti area and the municipality of Matatiele constituted a cohesive and integrated community, adding that this was motivated by the Trengove Commission report which in 1996 had recommended (by 3 votes to 2) that Matatiele be joined with Maluti in the Eastern Cape. The relevant sections of the Trengove Commission's report recommendation of nearly ten years ago were not placed before us. Nor was I able to find out why it had not been acted upon.

105. Of greater significance, however, was the fact that as recently as October 2005 an independent statutory body, namely the Municipal Demarcation Board, had considered and rejected the proposal that was later incorporated into the Twelfth Amendment. It is important to bear in mind that it was Parliament itself which in fulfilment of its responsibility under section 155 (3) (b) of the Constitution established the Demarcation Board as an independent body. It was Parliament which carefully set out the qualifications of Board's members so as to ensure expertise and independence. Moreover, Parliament meticulously laid down the criteria to be followed by the Board in making its determinations. The twelve statutory criteria are listed in Ngcobo J's judgment and need not be repeated. What has to be underlined is that Parliament deliberately chose, in keeping with the Constitution, to establish an independent authority to prevent municipalities from being demarcated along party political lines or in response to constraints imposed by national or provincial governments. One would expect, then, that government would give an explanation why, on the very specific facts of this case, it was adopting legislation which in respect of Matatiele Municipality ran counter to the express determination of the Board.

106. This legislative contradiction of a determination made by a body tasked by the Constitution to establish coherent municipalities according to objective criteria, may not in itself be sufficient to establish that the measure lacks rationality. Yet it leaves an information void that only government can fill. Although the objective of linking Matatiele with Maluti is placed before us, virtually nothing is said about why the conjoined areas should be located in the Eastern Cape rather than in KZN. The Court is thus left in darkness as to the very issue that lies at the heart of the dispute it is called upon to resolve.

107. In this respect the Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and to the courts, desirable though that always is. It is a question of maintaining respect for the constitutional injunction that our democratic government be accountable, responsive and open. Furthermore, it is consistent with ensuring that the courts can function effectively, as section 165(4) of the Constitution requires. In the present matter the courts should not find themselves disempowered by lack of information from making a determination, if needs be, as to whether the provincial relocation of Matatiele Municipality is rationally sustainable.

108. It might well be that government could without strain pass the test of showing that the relocation of Matatiele to the Eastern Cape is in fact rationally connected to a legitimate government purpose. On the papers as they stand, however, and bearing in mind the strong contra-indications from the Demarcation Board, the paucity of information makes it difficult to decide whether or not a legitimate public purpose is being served by this particular

boundary change. It is difficult to hold that the purpose is legitimate if one does not know what the purpose is.

109. The notion that 'government knows best, end of enquiry', might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution. This Court has frequently acknowledged the wide legislative mandate given by the Constitution to Parliament. Democratically elected by the nation, Parliament is the engine-house of our democracy. One cannot but be mindful of the intense time-tabling pressures to which it is subjected in a period of institution-building and transformation. Yet the more significant the work that Parliament undertakes and the greater the pressures under which it operates, the stronger the need for government to provide an explanation for the introduction of legislation; robustness need not be equated with opaqueness.

110. As this case demonstrates, far from the foundational values of the rule of law and of accountable government existing in discreet categories, they overlap and reinforce each other. Openness of government promotes both the rationality that the rule of law requires, and the accountability that multi-party democracy demands. In our constitutional order, the legitimacy of laws made by Parliament comes not from awe, but from openness.