CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/07

[2008] ZACC 10

MERAFONG DEMARCATION FORUM	First Applicant
ISRAEL MOLEPE MOGALE	Second Applicant
PAUL NGWANE	Third Applicant
PAUL THABANE MOSENOGI	Fourth Applicant
JOHANNES MOTSUMI	Fifth Applicant
TEBOGO JEREMIAH DANIEL	Sixth Applicant
PEARL KHANYILE	Seventh Applicant
ALFRED MOTLOUNG	Eighth Applicant
MXOLISI BLESSING DILIMA	Ninth Applicant
MICHAEL MADULUBE	Tenth Applicant
TELEKI JOHANNES MATHIKGE	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
PREMIER OF GAUTENG PROVINCE	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, GAUTENG PROVINCE	Fifth Respondent
GAUTENG PROVINCIAL LEGISLATURE	Sixth Respondent

PREMIER OF NORTH WEST PROVINCE	Seventh Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT, NORTH WEST PROVINCE	Eighth Respondent
NORTH WEST PROVINCIAL LEGISLATURE	Ninth Respondent
MUNICIPAL DEMARCATION BOARD	Tenth Respondent
MERAFONG CITY LOCAL MUNICIPALITY	Eleventh Respondent
WEST RAND DISTRICT MUNICIPALITY	Twelfth Respondent
SOUTHERN DISTRICT MUNICIPALITY	Thirteenth Respondent
SPEAKER OF THE NATIONAL ASSEMBLY	Fourteenth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifteenth Respondent
ELECTORAL COMMISSION	Sixteenth Respondent

Heard on : 20 September 2007

Decided on : 13 June 2008

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] The applicants challenge the validity of a constitutional amendment, brought about by the Constitution Twelfth Amendment Act of 2005 (Twelfth Amendment). The Twelfth Amendment changed provincial boundaries, including the boundary between the provinces of Gauteng and North West. One part of the Merafong City

Local Municipality (Merafong) was thus relocated from Gauteng to North West, where the other part of the same municipality was located before the passing of the Twelfth Amendment. The applicants ask this Court to declare that the Gauteng Provincial Legislature failed to comply with its constitutional obligation to facilitate public involvement in its processes leading up to the approval of the Twelfth Amendment Bill[1] (Bill) by the National Council of Provinces (NCOP). In the alternative, they seek a declaration that the Legislature failed to exercise its legislative powers rationally when it voted in support of the relevant parts of the Twelfth Amendment Bill in the NCOP. According to the applicants, the relevant parts of the Twelfth Amendment and the Cross-boundary Municipalities Laws and Repeal Related Matters Act (Repeal Act)[2] are therefore inconsistent with the Constitution[3] and invalid.

[2] The first applicant is an organisation which, according to its founding document, campaigns "for democracy to prevail in Merafong." It consists of members of the community drawn from political organisations, taxi associations, the women's movement, students, trade unions, churches, businesses and professionals, including teachers, nurses and lawyers. Its primary purpose is "to fight and defeat the undemocratic move by government to transfer Merafong from Gauteng to North West." The second applicant is the spokesperson for the first applicant and the third to eleventh applicants are members of the community.

[1] B33B-2005.

[2] Act 23 of 2005.

[3] Constitution of the Republic of South Africa, 1996.

[3] The respondents are the President of the Republic of South Africa, the relevant national and provincial cabinet members, the two houses of Parliament, the premiers and legislatures of the two provinces involved, the three affected municipalities, the Municipal Demarcation Board (Demarcation Board)[4] and the Electoral Commission.[5] The application is opposed by most of the respondents.[6]

[4] This judgment begins by dealing with a number of preliminary issues. Next, it sets out the applicable constitutional and statutory framework, after which the facts are briefly summarised. The questions of whether the Gauteng Provincial Legislature fulfilled its duty to facilitate public involvement and whether the Legislature acted rationally in mandating its delegates to support the Bill in the NCOP are then addressed.

[5] In the course of carefully considering the complex questions raised by this application, further evidence and submissions were considered to be necessary, and were called for on two occasions in directions from the Chief Justice and furnished by

[4] The Municipal Demarcation Board is an independent and impartial body whose function is to determine municipal boundaries in accordance with the Local Government: Municipal Demarcation Act 27 of 1998 and other appropriate legislation enacted in terms of chapter 7 of the Constitution.

[5] The Electoral Commission is provided for in sections 190 and 191 of the Constitution and established by section 3 of the Electoral Commission Act 51 of 1996. Its functions include the management of national, provincial and municipal elections, ensuring that elections are free and fair and declaring election results. The Commission is further regulated by the Electoral Act 73 of 1998.

[6] The application is opposed by the first to ninth respondents. The tenth, fourteenth, fifteenth and sixteenth respondents do not oppose the application, intending to abide the Court's decision. The remaining respondents, the eleventh to thirteenth, did not file any opposition nor appeared before this Court.

the parties. The steps (referred to below in context) necessarily caused some delay in the finalisation of this matter.

[6] Several judgments have also been written in this matter by my colleagues. I have had the privilege of reading these and briefly set out the essential points of agreement and the differences between the judgments.

[7] Ngcobo J and I agree on the issue of the facilitation of public involvement. On the question whether the Gauteng Provincial Legislature exercised its powers rationally we largely agree and differ only in approach and emphasis. I also associate myself with the views expressed in the judgment of Skweyiya J.

[8] Moseneke DCJ and I agree that the Gauteng Provincial Legislature fulfilled its duty to facilitate public involvement. Sachs J disagrees on this point. The disagreement between Moseneke DCJ and me relates to the inquiry into the rationality of the Legislature's conduct. Moseneke DCJ (with whom Madala J agrees in his judgment) concludes that the conduct was irrational, because the Legislature misconceived its constitutional obligations and misconstrued the consequences of the exercise of its powers under the Constitution. I am unable to find that the conduct of the Legislature was irrational. The basis of our disagreement can for convenience be summarised as threefold. We disagree on the rationality standard to be applied in this matter. I recognise that legislative conduct must be rational, but, in my respectful view, the judgment of my esteemed colleague goes beyond a constitutionally

appropriate application of the requirement of rationality. We furthermore disagree as to the Gauteng Provincial Legislature's understanding and appreciation of its constitutional powers and obligations. I do not hold that the Legislature materially misunderstood its constitutional role.

[9] Lastly, but perhaps most importantly, we disagree on a fundamental aspect regarding the geographical area and the community at the core of this application, namely whether it deals with the location of the whole of Merafong (the Merafong City Local Municipality), or only with the part of Merafong that was located in Gauteng before the adoption of the Bill. The judgment of my colleague distinguishes between "Merafong-Gauteng" and "Merafong-North West". His starting point is that the applicants seek an order that the part of the Twelfth Amendment that transferred "Merafong-Gauteng" to North West is inconsistent with the Constitution and thus invalid. After recounting the views put forward by the community and analysing the reasoning of the Portfolio Committee of the Gauteng Provincial Legislature as well as the deliberations in the Select Committee of the NCOP, he arrives at a conclusion which results in the division of Merafong into two parts.

[10] In my view, this division is not in accordance with what the applicants or the people of Merafong have been calling for, or with any decision of the Gauteng Provincial Legislature or its structures, or with any constitutional or legislative demand. This case is not about only one part of Merafong, or only those members of the Merafong community who happened to live on the Gauteng side of the boundary

between Gauteng and North West immediately before the Twelfth Amendment. It is about the entire geographical area and all the people of what is in the papers referred to as the Merafong City Local Municipality, or Merafong City, or simply Merafong. The detail of these points of disagreement is addressed below, when specific issues are being dealt with.

Preliminary issues

[11] A number of preliminary issues must be dealt with before proceeding to the merits. These are the applicants' direct approach to this Court, the applicants' application to amend their notice of motion, the applications for condonation of the late filing of papers and the applicants' delay in bringing this application.

[12] Only this Court may decide the constitutionality of an amendment to the Constitution.[7] The applicants therefore had to approach this Court directly. The relevant parts of the Repeal Act have to be considered together with the Twelfth Amendment. It is therefore in the interests of justice to allow the applicants direct access to this Court insofar as their attack on the constitutionality of the Repeal Act is concerned.

[7] Section 167(4)(d) of the Constitution.

[13] The applicants apply for the amendment of their notice of motion.[8] The amendment is not likely to cause any prejudice. The application is not opposed and should be granted.

[14] The applicants and several respondents seek condonation for the late filing of papers.[9] The non-compliance with the relevant prescribed time periods is explained in affidavits and does not prejudice anyone. None of the applications is opposed. Condonation should be granted.

[15] It is desirable that a challenge to the constitutional validity of legislation – and constitutional amendments in particular – be brought timeously.[10] The respondents submitted that the applicants had unreasonably delayed bringing this application, especially in view of the fact that they approached this Court directly. Counsel for the

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[8] The amended notice of motion seeks a declaration—

> "1. . . . that the Provincial Legislature of Gauteng 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 Constitution Twelfth Amendment Act of 2005 which concerns the Merafong City Local Municipality in the province of Gauteng pursuant to section 74(8) of the Constitution alternatively, in approving the said part of the Twelfth Amendment the Sixth Respondent failed to exercise its legislative powers rationally.
> 2. That part of the Constitution Twelfth Amendment Act of 2005 which transfers that part of the area of Merafong City Local Municipality (CBLC8) from the province of Gauteng to the province of North West is declared to be inconsistent with the Constitution and invalid.
> 3. That part of the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 which relates to the area described in prayer 2 above, is declared inconsistent with the Constitution and invalid.
> 4. That the First, Second, Third and Sixth Respondents be ordered to pay the costs of this application."

[9] The applicants and the first to ninth respondents sought condonation for the late filing of their written submissions, while the first to third, sixth and seventh respondents sought condonation for the late filing of their answering affidavits. In addition, the sixth respondent sought condonation for the late filing of its notice of intention to oppose.

[10] See *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 216; 2006 (12) BCLR 1399 (CC) at 1467A-B (*Doctors for Life*) where it is stated that an applicant must launch an application of this kind as soon as practicable after the bills have been promulgated.

respondents, however, did not insist during oral argument that the delay should bar the applicants from approaching this Court. The delay is troublesome. Considerable time lapsed after the passing of the Twelfth Amendment and the delivery of this Court's judgments on which the applicants rely.[11] The location of Merafong has been hotly disputed. It calls for a speedy determination. Yet, the delay has been explained by the applicants' legal representative, and though regrettable, it should not prevent the matter from being considered by this Court in the present instance. An unsuccessful attempt was also made in the Pretoria High Court to interdict the local government elections, before the applicants approached this Court. The applicants furthermore do not represent individual interests, or the interests of the organizations only, but views widely held in the community of Merafong.

Constitutional framework

[16] The nine provinces of South Africa and their boundaries are recognised in the Constitution.[12] Any change of a provincial boundary thus requires a constitutional

[11] See *Doctors for Life* above n 10; *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) (*Matatiele 1*); and *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele 2*).

[12] Sections 103(1) and (2) of the Constitution (prior to the Twelfth Amendment) stated:

> "(1) The Republic has the following provinces:
> (a) Eastern Cape
> (b) Free State
> (c) Gauteng
> (d) KwaZulu-Natal
> (e) Mpumalanga
> (f) Northern Cape
> (g) Northern Province
> (h) North West
> (i) Western Cape.
> (2) The boundaries of the provinces are those that existed when the Constitution took effect."

amendment. The Bill was enacted for this purpose.[13] It also altered the basis for the determination of provincial boundaries from magisterial districts to municipal areas.[14]

[17] Like all other bills, a bill amending the Constitution must be passed by Parliament, which consists of the National Assembly and the NCOP.[15] The procedure for constitutional amendments is set out in section 74 of the Constitution. A bill that alters provincial boundaries must be passed by the National Assembly with a two-thirds majority. It must furthermore be passed by the NCOP with a supporting vote of at least six of the nine provinces.[16]

[18] Section 74(8) states that if a bill or any part of the bill concerns only a specific province or provinces, the NCOP may not pass the bill or the relevant part, unless it has been approved by the legislature or legislatures of the provinces concerned.[17] A province may therefore effectively veto the part of the bill related to the boundaries of

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[13] According to its Preamble, the purpose was "to re-determine the geographical areas of the nine provinces of the Republic of South Africa".

[14] See *Matatiele 1* above n 11 at para 47. In *Matatiele 1*, this Court analysed the constitutional and statutory framework pertaining to provincial boundary changes and the significance thereof for local government.

[15] Section 42(1) of the Constitution. See the full text of section 42 below n 26.

[16] Section 74(1) deals with the amendment of section 1 and section 74(2) with the amendment of Chapter 2 (the Bill of Rights). Section 74(3) then states:

> "Any other provision of the Constitution may be amended by a Bill passed—
> (a) by the National Assembly, with a support 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."

[17] Section 74(8) states:

> "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."

that province. The meaning and implications of section 74(8) are more fully discussed below, where the question of the rationality of the Gauteng Provincial Legislature's conduct is considered.

[19] Section 118(1)(a) of the Constitution requires provincial legislatures to facilitate public involvement in the legislative and other processes of the legislatures and their committees.[18] This provision mirrors sections 59(1)(a) and 72(1)(a) of the Constitution regarding the National Assembly and NCOP respectively.[19]

[20] This Court held in *Matatiele 2*[20] that section 74(8) applies to the Twelfth Amendment.[21] Although the boundaries of all provinces are affected by it, section 74(8) is applicable because the wording of the section states that it applies if any part of the bill concerns only a specific province or provinces.

[21] The majority of this Court in that case also decided that provincial legislatures had to facilitate public involvement in accordance with section 118(1)(a), in the process of considering bills that alter provincial boundaries provided for in section 74(8). This Court found that the Legislature of the Eastern Cape complied with section 118(1)(a). The Legislature of KwaZulu-Natal, however, was declared to have

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[18] Section 118(1)(a) states:

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

[19] See also the preceding majority judgment in *Doctors for Life* above n 10 at paras 73-5 on section 72(1)(a), regarding the NCOP.

[20] Above n 11.

[21] Id at paras 18-32.

failed to comply with its obligations to facilitate public involvement. Consequently, the part of the Twelfth Amendment transferring Matatiele from KwaZulu-Natal to the Eastern Cape was declared invalid, as was the relevant part of the Repeal Act.

[22] In *Matatiele 2* the reasons for the veto provision in section 74(8) and for the need to facilitate public involvement were stated as including the following: when a constitutional amendment alters provincial boundaries, whole communities may, by the stroke of the proverbial pen, be relocated from one province to another, even though not physically.[22] They may involuntarily end up in another province. A proposed boundary alteration threatens an important and not easily reversible change to the provincial status of a clearly defined section of the Republic. The fundamental right of a citizen to enter, remain in and reside anywhere in the Republic is also at stake.[23] The attachment of people to provinces in which they live should not be underestimated. The very identity of people may be affected. Significant practical factors are also relevant, including the structures and personnel responsible for service delivery.

[23] It must be added that the history of South Africa is – sadly – one of the balkanisation of our country, as well as of the separation and the forcible removal and relocation of our people. This often happened in order to entrench and to further differentiate and discriminate between races, between urban and rural, between rich

[22] Id at paras 79-81.

[23] Section 21(3) of the Constitution states: "Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic."

and poor and between classes of citizens. Therefore the struggle against colonialism and the apartheid regime's Bantustan policy was also a struggle for one united country, as well as for the recognition of the dignity of individuals and communities.

[24] When democracy was about to dawn and a new constitutional dispensation was negotiated, the question of whether South Africa should be a unitary state, or a federation, or a variation of any of these, was hotly debated. The Constitution embodies a carefully crafted balance. South Africa is one, sovereign, democratic state[24] and South Africans enjoy a common citizenship.[25] This has been achieved at a great cost over generations. But our country has nine constitutionally entrenched provinces with inhabitants who may well strongly identify with the province in which they live. Thus the boundaries, powers, or functions of provinces may not easily be altered. In the event of a proposed alteration, any one province has the power to block that aspect of an amendment in the NCOP, as the body which specifically represents the provinces, to ensure that provincial interests are taken into account in the national sphere.[26]

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[24] See, for example, section 1 of the Constitution: "The Republic of South Africa is one, sovereign, democratic state", founded on values which include human dignity, universal adult suffrage, a national common voters roll, responsiveness and openness.

[25] Section 3(1) of the Constitution.

[26] Sections 42(1)-(4) of the Constitution set out the role of the National Assembly and the NCOP:

> "(1) Parliament consists of—
> (a) the National Assembly; and
> (b) the National Council of Provinces.
> (2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.
> (3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.
> (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly

[25] When provincial boundaries are at stake, national and regional needs and perceptions must often be balanced against each other. Government must be open and responsive to the wishes of communities, which may not necessarily be adequately represented in national elections and could therefore find expression in localised resistance. But it also must act in the national interest, be loyal to those who voted it into office and strive to realise the constitutional ideal of achieving the equitable distribution of resources across the country and between provinces.[27]

[26] The meaning of the concept of the facilitation of public involvement – as it appears in sections 59(1)(a), 72(1)(a) and 118(1)(a) – was explained in *Doctors for Life*[28] and *Matatiele 2*.[29] The requirement to facilitate public involvement is in line with the contemplation in the Constitution of elements of participatory democracy, in addition to representative democracy.[30] Participatory and representative democracy must be seen as mutually supportive. Public involvement also enhances responsible citizenship and legitimate government. It furthermore accords with the constitutional

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> by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."

[27] *Mashavha v President of the Republic of South Africa and Others* [2004] ZACC 6; 2005 (2) SA 476 (CC); 2004 (12) BCLR 1243 (CC) at para 57:

> "Effective regulation and effective performance do not only include procedural and administrative efficiency and accuracy, but also fairness and equality, for example as far as the distribution and application of resources and assistance are concerned. A system which disregards historical injustices and offends the constitutional values of equality and dignity could result in instability, which would be the antithesis of effective regulation and performance."

[28] Above n 10 at paras 118-129, 204.

[29] Above n 11 at paras 36-40, 45.

[30] *Doctors for Life* above n 10 at paras 110-7, 205, 234-7; *Matatiele 2* above n 11 at para 40.

principle of co-operation and communication between national and provincial legislatures, as institutionalised in the NCOP.[31]

[27] The obligation to facilitate public involvement may be fulfilled in different ways.[32] It is open to innovation. Legislatures have discretion to determine how to fulfil the obligation. Citizens must however have a meaningful opportunity to be heard. The question for a court to determine is whether a legislature has done what is reasonable in all the circumstances. In determining whether the legislature acted reasonably, this Court will pay respect to what the legislature assessed as being the appropriate method. The method and degree of public participation that is reasonable in a given case depends on a number of factors, including the nature and importance of the legislation and the intensity of its impact on the public. In the process of considering and approving a proposed constitutional amendment regarding the alteration of provincial boundaries, a provincial legislature must at least provide the people who might be affected a reasonable opportunity to submit oral and written comments and representations.

Statutory framework

[28] In addition to the constitutional setting dealt with above, additional statutes form part of the legal framework regarding provincial boundaries and the situation of municipalities. In terms of the Local Government: Municipal Demarcation Act, the Municipal Demarcation Board determines (and may re-determine) boundaries for

[31] See more complete references and quotations below [75]-[81] and n 54-60.

[32] *Doctors for Life* above n 10 at paras 118-129; *Matatiele 2* above n 11 at paras 50-68.

municipal areas for the whole of the country.[33] In terms of the Municipal Structures Act the Member of the Executive Council for Local Government in a province must establish a municipality in each municipal area which the Demarcation Board has demarcated in a province.[34] Furthermore, the Repeal Act was enacted to repeal laws providing for cross-boundary municipalities and to deal with the consequences of the Twelfth Amendment's abolition of cross-boundary municipalities. However, this case revolves mainly around the relevant constitutional provisions and the procedures leading up to the passing of the Twelfth Amendment. The effect on other legislation is consequential.

Factual history

[29] A brief factual background to the dispute before this Court is provided, without detailed references to all relevant legislation, documentation and events. In 2000 the Merafong City Local Municipality was established within the West Rand District Municipality. The smaller part of Merafong, the southern part, fell in North West, whilst the larger part fell in Gauteng. Therefore both Merafong and the West Rand District Municipality were cross-boundary municipalities. The applicants allege that 74% of Merafong's 308 237 inhabitants live in Gauteng. This is not denied by the respondents, with the exception of the sixth respondent which provides no alternative figure.

[33] See section 21(1) of the Local Government: Municipal Demarcation Act 27 of 1998.

[34] See section 12(1) of the Local Government: Municipal Structures Act 117 of 1998.

[30] According to an explanatory memorandum published with the Twelfth Amendment Bill on 26 August 2005, numerous problems have been experienced with the administration of cross-boundary municipalities since their establishment. Consequently, the Presidential Co-ordinating Council resolved on 1 November 2002 that the notion of cross-boundary municipalities should be done away with and that all municipalities fall within one province or the other. The Twelfth Amendment Bill gave effect to this resolution and, in doing so, located the total area of Merafong in North West.[35]

[31] On 16 November 2005 the Speaker of the Gauteng Provincial Legislature formally referred the matter to the Local Government Portfolio Committee (Portfolio Committee), a committee of the Legislature. On 17 November 2005 the Portfolio Committee resolved to engage in a joint public hearing session with the North West Provincial Legislature, in order to receive written and oral presentations from the affected communities. The Portfolio Committee decided on 18 November 2005 to adopt a plan of action in relation to a public hearing, to be held on 25 November 2007.

[32] Prior to the public hearing written memoranda were received from a number of stakeholders, including political parties and community organisations. The submissions were directed to the Gauteng Provincial Legislature, as well as to the NCOP and other governmental role-players. The Speaker of the Gauteng Provincial

[35] This appears from Schedule 1A to the Twelfth Amendment Bill, which incorporated Map 27, detailing the Southern District Municipality (DC40), of the Schedule to Notice 1594 of 2005 published in GG 27937 of 19 August 2005. The Twelfth Amendment Act incorporates the same Map, redesignated Map 5 of Schedule 1 to Notice 1998 of 2005 published in GG 28189 of 31 October 2005.

Legislature referred the submissions to the Portfolio Committee. Further written submissions were handed over by individuals, community organisations, political parties and trade unions in the course of the public hearing. As pointed out in the detailed account in the judgment of Moseneke DCJ, vehement opposition to the incorporation of Merafong into North West emerged in various forms over a period of time.

[33] The joint public hearing was indeed held on 25 November 2005 and was well attended. The Merafong community agreed in principle with the phasing out of cross-boundary municipalities. However, the overwhelming majority of people was opposed to the incorporation of Merafong into North West. They regarded themselves as inseparably part of Gauteng. A minority, amongst them the African National Congress Youth League, supported the inclusion of Merafong in North West.

[34] On 29 November 2005 the Portfolio Committee considered the Bill together with a report on the views expressed by the public. It adopted a "negotiating mandate". According to the minutes, Gauteng would support the Bill, "on condition that the municipal area of Merafong is included in the municipal area of the West Rand District Municipality of the Gauteng Province." Before this conclusion, the following is also stated:

> "The Portfolio Committee on Local Government—
>
> - in principle, supports the phasing-out of cross-boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005];

- in light of the outcome, impact assessment and analysis of the public hearing submissions, agrees with the inclusion of the geographical area of Merafong municipality into the West Rand District municipality in the Gauteng Province;
- recommends to the House, amendment to Schedule 1A of the Constitution Twelfth Amendment Bill [B33B-2005], to provide for the inclusion of the municipal area of Merafong into the municipal area of the West Rand District Municipality of the Gauteng Province."

[35] The Portfolio Committee thus appeared to agree with the view expressed by the majority of the Merafong community at the public hearing that the phasing-out of cross-boundary municipalities had to be supported, but that the entire municipality of Merafong had to be located in Gauteng. An amendment to the Bill would be required to locate Merafong in Gauteng. This negotiating mandate was never considered by the full Gauteng Provincial Legislature.[36]

[36] Following the negotiating mandate, the Portfolio Committee sent a delegate, Mr Shiceka, to the NCOP to negotiate the suggested amendment. On 30 November 2005,

[36] In the interests of greater clarity regarding factual events and the procedures that followed the adoption of the negotiating mandate, the Chief Justice issued further directions to the parties on 6 December 2007. The parties responded to the directions, which were as follows:

"1. The sixth and fifteenth respondents are required to file on or before 14 December 2007 the record of proceedings relating to the consideration and the conferral of the negotiating mandate and the final voting mandate of the Gauteng Provincial Legislature relating to the Twelfth Amendment Bill, by the following bodies:
   (a) The Local Government Portfolio Committee of the Gauteng Provincial Legislature;
   (b) The Gauteng Provincial Legislature;
   (c) The Select Committee on Security and Constitutional Affairs of the National Council of Provinces;
   (d) The National Council of Provinces (including any documents submitted by the Gauteng Provincial Legislature).
2. The sixth and fifteenth respondents are required to file any documents consulted or produced in the course of the abovementioned proceedings, including:
   (a) Any resolution of the Gauteng Provincial Legislature conferring voting authority on the province's delegation to the National Council of Provinces;
   (b) Any proof of the delegation's authority to cast votes submitted by the Speaker of the Gauteng Provincial Legislature to the Chairperson of the National Council of Provinces."

at a meeting of the Select Committee on Security and Constitutional Affairs,[37] he proposed that the NCOP amend the Bill by incorporating Merafong into Gauteng rather than North West. He was informed that the NCOP could not amend the Bill. The legal advisor of the Department of Provincial and Local Government, Dr Bouwer, stated that in terms of the law the provinces cannot affect amendments on the Bill and could only veto the whole or part of the Bill. Advocate Razaard, the State Law Advisor, said that there were no provisions in the Constitution for effecting amendments in a section 74(8) bill after being passed by the National Assembly, and that a provincial legislature can either adopt or reject the part that directly affects it.

[37] Following the meeting with the NCOP Select Committee, the Portfolio Committee of the Gauteng Provincial Legislature met to reconsider its mandate and to formulate a final voting mandate. The Portfolio Committee produced a report, entitled "Final Voting Mandate on Constitution Twelfth Amendment Bill [B33B-2005]" (final voting mandate). In this document it is stated that, after deliberation, the Portfolio Committee had reviewed its position, notwithstanding the views of the public. The document then sets out the Committee's reasons for the change in position. With these considerations in mind, the Portfolio Committee adopted the final voting mandate, which provided that Gauteng would vote in support of the Bill in the NCOP. The contents of and reasoning behind the final voting mandate are discussed more fully below, where the rationality of the Legislature's conduct is dealt with.

[37] The Select Committee on Security and Constitutional Affairs is a committee of the NCOP which provides oversight on bills affecting constitutional affairs.

[38] The Portfolio Committee's report on the final voting mandate was forwarded to the Gauteng Provincial Legislature and debated by the Legislature on 6 December 2005. The final voting mandate subsequently was adopted and a letter from the Speaker, reflecting the adoption of the report and the report itself, were forwarded to the Chairperson of the NCOP on 6 December 2005.

[39] In the NCOP Gauteng voted in support of the Bill and it was passed. It came into force on the President's order on 1 March 2006.[38] Thereafter the Demarcation Board demarcated the whole of Merafong into the Southern District Municipality in North West. The Repeal Act regulated the process and consequences of the relocation.

Issues

[40] The applicants contend that the Gauteng Provincial Legislature failed to comply with the requirement to facilitate public involvement and, in the alternative, that it acted irrationally. These complaints are to some extent separate from one another, but are also overlapping and inter-related. For the purposes of this analysis, the two attacks are dealt with separately. They are however also considered cumulatively in reaching a conclusion.

[41] The two main issues therefore are whether the Gauteng Provincial Legislature—

[38] Proclamation No R8 of 2006, published in GG 28568 on 27 February 2006.

(a) complied with its obligation to facilitate public involvement when it considered and approved that part of the Twelfth Amendment which concerned Merafong; and

(b) exercised its legislative powers rationally.

These two main issues raise a number of further questions which are defined and addressed below.

Was public involvement facilitated?

[42] The applicants state in their founding papers that they seek relief similar to that ordered in *Matatiele 2*.[39] It must be said at the outset that the conduct of the Gauteng Provincial Legislature in this case differs vastly from the conduct of the KwaZulu-Natal Provincial Legislature in *Matatiele 2*. The KwaZulu-Natal Provincial Legislature considered public hearings to be required, but none took place and written representations were never invited. In contrast, the conduct of the Gauteng Provincial Legislature in this case was indeed similar to that of the Eastern Cape Provincial Legislature, which was found in *Matatiele 2* to have complied with section 118(1)(a).

[43] The applicants accept that the public hearing was publicised, oral and written submissions were made before the hearing took place and the community's views were stated at the hearing. People were given an opportunity to be heard. Their public involvement complaint revolves, in the first place, around the allegation that the process of public involvement was not meaningful, because the final outcome was

[39] Above n 11 paras 90-100, 114.

always a done deal. They argue that the National Executive Committee (NEC) of the African National Congress (ANC) had decided earlier that Merafong would go to North West. Secondly, they submit that the Portfolio Committee's change of position between the negotiating mandate and the final voting mandate, without further consultation with the community, was unreasonable.

[44] In support of the first submission, the applicants refer to passages from the majority judgment of Ngcobo J in *Doctors for Life*, emphasising the need for citizens to be involved in public affairs, to identify with institutions of government and to become familiar with laws.[40] Public participation strengthens the legitimacy of legislation in the eyes of the people. It is an important counterweight to secret lobbying and influence-peddling.

[45] They also rely on the concurring judgment of Sachs J in that case, which highlights the assurance that people or groups who have been victims of historical silencing will be listened to, and the need for people to feel that they have been given a real opportunity to have their say and that they are taken seriously.[41] Whereas here

[40] Above n 10 at para 115:

> "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 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."

[41] Id at para 235:

the people were given an opportunity to say what they wished to, they were not taken seriously, the argument goes, and the opportunity to be heard was not meaningful.

[46] The applicants, furthermore, rely on a passage from my minority judgment in the same case warning against the mechanical holding of cosmetic public hearings in situations where the will of the majority party will in any event necessarily prevail.[42] This statement, however, must be understood within the context of the minority's disagreement with the majority of this Court in *Doctors for Life*. The minority held that whereas section 118(1)(a) created an obligation for the legislature to facilitate public participation in its processes, it was not intended to result in the possible constitutional invalidity of specific legislation. It expressed scepticism about the practical meaning of requiring public involvement with regard to every piece of legislation and about the workability of the yardstick of reasonableness.[43] The applicants of course based their case on the majority judgments in *Doctors for Life* and *Matatiele 2*. The respondents did not argue that these judgments were incorrectly decided and that they should not be followed. This matter must therefore be dealt with according to the standards and guidelines set out in the majority judgments.

> "All parties interested in legislation should feel that they have been given a real opportunity to have their say, that they are taken seriously as citizens and their views will receive due consideration at the moments when they could possibly influence in a meaningful fashion."

[42] They quote the following from *Doctors for Life* above n 10 at para 244(10):

> "If the will of the Parliamentary majority will in the end mostly prevail in any event, and all that is required is to 'involve' the public by, for example, mechanically holding public hearings for every piece of legislation – or to make sure that hearings are not promised as in this case – participatory democracy would appear to be quite cosmetic and empty, in spite of any idealistic and romantic motivation for promoting it."

[43] See eg the views of Van der Westhuizen J in *Doctors for Life* above n 10 at para 244 and Yacoob J at paras 246-339 of the same judgment.

[47] According to the applicants, the NEC of the ANC decided at the end of 2004 to incorporate Merafong into North West. They rely on a document from the ANC's website to prove this allegation, in the face of the denial by the Minister of Provincial and Local Government (the second respondent) in his answering affidavit. The applicants submit that the government was consequently never open to be persuaded by the views of the people of Merafong. Political pressure might have forced the Gauteng Provincial Legislature to change its position between the negotiating mandate and the final voting mandate. This, according to the applicants, is borne out by the respondents' reluctance to provide reasons for the change that occurred, in spite of the strong arguments against incorporation into North West presented by members of the community.

[48] On this point counsel for the Premier of North West (the seventh respondent) argued that, assuming that it is factually correct that the NEC of the ANC and the Government were not open to persuasion, this was irrelevant for the question of whether the Gauteng Provincial Legislature complied with its obligation to facilitate public involvement. If it were indeed a political reality that the leadership of the ANC caused the Twelfth Amendment to be passed in the NCOP, this reality did not mean that the Legislature did not meet its obligation to facilitate public involvement.

[49] On the facts of this case it cannot be said that the Gauteng Provincial Legislature was not open to be persuaded by the views expressed by the community. These views were recorded and discussed in considerable detail, for example in the

above-mentioned final voting mandate. Furthermore, the negotiating mandate embodied the views expressed by the majority, namely that the phasing out of cross-boundary municipalities must be supported, but that Merafong must be located in Gauteng. The public meeting was not a cynical charade, but held in good faith. After the public hearing the Portfolio Committee actually appeared to agree with the majority of the community. However, the reality of the future proceedings in the NCOP was also accepted; hence the mandate was to negotiate, rather than to take a final position on how to vote. This necessarily implied the possibility of a change.

[50] On the available evidence, it is not possible to determine whether and to what extent the final voting mandate and the debate in the NCOP Select Committee were directly or indirectly influenced by previously formulated policies of the ruling party. One would also not know how the party leadership came to adopt its policy position and to what extent it might have resulted from a consideration of public interests or of the views of the majority. The passages from the *Doctors for Life* majority judgment,[44] referred to by the applicants, state reasons for constitutionally obliging legislatures to facilitate public involvement. But being involved does not mean that one's views must necessarily prevail. There is no authority for the proposition that the views expressed by the public are binding on the legislature if they are in direct conflict with the policies of Government. Government certainly can be expected to be responsive to the needs and wishes of minorities or interest groups, but our constitutional system of government would not be able to function if the legislature

[44] Above n 10 at para 115.

were bound by these views. The public participation in the legislative process, which the Constitution envisages, is supposed to supplement and enhance the democratic nature of general elections and majority rule, not to conflict with or even overrule or veto them.

[51] To say that the views expressed during a process of public participation are not binding when they conflict with Government's mandate from the national electorate, is not the same as cynically stating that the legislature is not required to keep an open mind when engaging in a process of that kind. Public involvement cannot be meaningful in the absence of a willingness to consider all views expressed by the public.

[52] If it is correct that the submissions of the community were indeed taken into account, as I conclude, the focus has to shift to the change in the Portfolio Committee's position between the negotiating mandate and the final voting mandate. The adoption of the negotiating mandate in the language quoted above[45] creates the impression that the Portfolio Committee agreed with the community and formulated the negotiating mandate on the assumption that the Bill could be substantively amended in the NCOP to include Merafong in Gauteng. As is shown below, this was not possible. Did this misconception render the consultation process unreasonable? Furthermore, were the members of the Committee obliged to report back to the community of Merafong during the few days between the deliberations in the NCOP

[45] See above [34].

and the formulation of the final voting mandate? Did they fail to act reasonably in not doing so?

[53] It was not submitted on behalf of the applicants that the consultation was unreasonable because the Gauteng Provincial Legislature or its Portfolio Committee did not fully appreciate the legal position as to amendments to the Bill in the NCOP at the time of the consultation. Nor could it be so argued persuasively. The facilitation of public involvement is aimed at the legislature being informed of the public's views on the main issues addressed in a bill, not at the accurate formulation of a legally binding mandate. Consultation requires the free expression of views and the willingness to take those views into account. This did happen.

[54] The applicants' contention that the Gauteng Provincial Legislature or the Portfolio Committee was at fault for not reporting back to the community emerged mainly during oral argument. In response to a suggestion from the bench, counsel for the applicants argued that when the Gauteng delegates realised that they were not able to fulfil their mandate and amend the Bill in the NCOP, they should have returned to the Merafong community to explain and again to consult them, before finally mandating their delegation to the NCOP. He submitted that the failure to do so was not reasonable – and thus fell short of the requirements set out in *Doctors for Life* and *Matatiele 2* – and also not rational.[46]

[46] See above [26]-[27]; *Doctors for Life* above n 10 at paras 118-29; and *Matatiele 2* above n 11 at paras 50-68.

[55] From the perspective of respectful dialogue and the accountability of political representatives it might well have been desirable to report to the people of Merafong that it was impossible adhere to the position taken by the Portfolio Committee in the negotiating mandate. To the extent that the community was given the impression that the Committee agreed with them and that an understandable expectation was created that their views would prevail, it was possibly disrespectful not to return to inform them of subsequent events. The question, though, is whether the omission to consult again after the alteration of the Portfolio Committee's negotiating mandate amounts to a failure to facilitate public involvement in the processes of the Gauteng Provincial Legislature.

[56] In my view the failure to report back to the Merafong community does not rise to the level of unreasonableness which would result in the invalidity of the Twelfth Amendment which was otherwise properly passed by Parliament. It cannot result in a finding that Gauteng failed to take reasonable measures to facilitate public involvement, as required by sections 72(1)(a) and 118(1)(a) of the Constitution.

[57] This Court has invoked reasonableness as a standard by which a court ought to determine whether the measures taken or methods followed by a legislature comply with the obligation to facilitate public involvement. In this case no one argues that the calling for submissions and the public hearing were not reasonable measures. The question raised is whether the further measures taken or not taken by the Gauteng

Provincial Legislature in the continuation of its relationship with the community were reasonable.

[58] The Portfolio Committee was well aware of the strong views of the majority of the Merafong community. There was agreement on the need to do away with cross-boundary municipalities. On the issue of whether Merafong should be located in Gauteng or North West, the conflict between the contents of the Bill and the majority view was stark. The Portfolio Committee decided to change its position as a result of the deliberations in the Select Committee of the NCOP, where Gauteng's representative learned that an amendment to the Bill, to include Merafong in Gauteng, was not possible.

[59] If they had gone back to Merafong to explain the situation to the people, a better understanding might have been fostered, but it is unlikely that the majority would have been sufficiently impressed by the explanation to change their strongly held views. If they agreed to the incorporation into North West, the Bill would in any event have been passed. If they persisted in their original position, the Gauteng Provincial Legislature still would not have been bound by their view and would in all likelihood have proceeded to vote in favour of the passing of the Bill. The possibility of the Portfolio Committee being persuaded anew by views of which it was already fully aware, is indeed small. In all probability little would have been achieved by another round of exchanging views, other than to inform and perhaps educate the community. Whereas speculation about the likely outcome of further consultation is

not ultimately decisive, the fact is that the community had a proper opportunity to air their views. The previous decisions of this Court, on which the applicants rely, do not require an ongoing dialogue. In fact, continuing discussion which does not result in a changed outcome, could strengthen possible perceptions that the consultation was not meaningful.

[60] In this case possibly discourteous conduct does not equal unconstitutional conduct which has to result in the invalidity of the legislation. Politicians, who are perceived to disrespect their voters or fail to fulfil promises without explanation, should be held accountable. A democratic system provides possibilities for this, one of which is regular elections.

[61] I am unable to conclude that the Gauteng Provincial Legislature failed to facilitate public involvement in its procedures leading to its support for the Twelfth Amendment in the NCOP.

Did the Gauteng Provincial Legislature exercise its legislative powers rationally?

The rationality standard

[62] The exercise of public power has to be rational. In a constitutional state arbitrariness or the exercise of public power on the basis of naked preferences cannot pass muster. Judgments of this Court suggest that, objectively viewed, a link is

required between the means adopted by the legislature and the end sought to be achieved.[47]

[63] The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature. Provided a legitimate public purpose is served, the political merits or demerits of disputed legislation are of no concern to a court. In *Pharmaceutical Manufacturers* Chaskalson P made it clear that the rationality standard does not mean that courts can or should substitute their opinions for the opinions of those in whom the power has been vested.[48] A court cannot interfere with a decision simply because it disagrees with it, or considers that the power was exercised inappropriately.

[64] The question of the rationality of the Twelfth Amendment was left undecided in *Matatiele 2*.[49] In *UDM 2* it was held that rationality is a minimum requirement for the exercise of public power and that the *Pharmaceutical Manufacturers* qualification

[47] See eg *United Democratic Movement v President of the RSA and Others* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 68 (*UDM 2*).; *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) at para 45; *Pharmaceutical Manufacturers of SA and Another: In Re Ex Parte President of the RSA and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85 (*Pharmaceutical Manufacturers*); *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 36.

[48] *Pharmaceutical Manufacturers* above n 47 at para 90.

[49] Above n 11 at para 101.

"applies also and possibly with greater force to the exercise by Parliament of the powers vested in it by the Constitution, including the power to amend the Constitution".[50] In view of the finding below on rationality in the light of the facts of this case, it is not necessary to take this specific point any further.

[65] The respondents argue that it is eminently rational to do away with cross-boundary municipalities. The applicants agree with the idea of abolishing cross-boundary municipalities and do not attack the rationality of the Twelfth Amendment as a whole, but only the part of it that locates Merafong in North West. Furthermore, the fact that it is rational for the whole municipality to be located in a single province, does not necessarily mean that the province should be in North West, rather than Gauteng, counsel for the applicants specifically contended.

[66] The applicants raise two different issues in their rationality attack. Their counsel argued that the abandoning of its mandate by the Gauteng delegation to the NCOP was the *first leg* of their rationality argument. Gauteng's change of mind was irrational, because no proper reason was shown for this change of position. The *second leg* relates to the merits of the decision to locate Merafong in North West, embodied in the Twelfth Amendment, including issues of service delivery, Merafong's closeness to Gauteng's economic hub and especially the issue of a province's equitable share of revenue from the National Revenue Fund.

[50] *Pharmaceutical Manufacturers* above n 47 at para 68.

Did the Gauteng Provincial Legislature appreciate its constitutional powers and did it misconstrue the consequences of its decision?

[67] As to the *first leg* of the rationality attack, the applicants argue that the reasons provided for the change of stance on the amendment do not make sense and are, in fact, not reasons at all. According to the applicants, they did not know what happened when the Gauteng Provincial Legislature decided on its final voting mandate. They called for the verbatim record of the Legislature's debate when the final voting mandate was decided, but this was not supplied. According to the applicants, the debate resulting in the decision is as important as the decision itself and the failure to make it available shows a lack of forthrightness on the part of the Legislature. The documents filed in response to the December directions calling for records and documentation should go some way in addressing the applicants' need.

[68] In order to clarify questions around the Portfolio Committee's apparent change of mind, and especially on the Legislature's understanding of its constitutional role, the Chief Justice issued further directions to call for written submissions.[51] The parties responded to these directions.

[51] The relevant part of the directions, issued 24 January 2008, stated:

> "The parties are required to file written argument on whether:
>
> (a) The Gauteng Legislature was mistaken in law when it accepted that it was constitutionally impermissible to mandate its representatives in the National Council of Provinces to vote only against the incorporation of Merafong into the North West Province; and
>
> (b) If this was a mistake whether the mistake vitiates the decision to confer a mandate on its representatives in the National Council of Provinces to vote in favour of the constitutional amendment as a whole; and
>
> (c) What should the appropriate remedy be if the decision to confer a mandate were to be set aside."

[69] According to the applicants, the Gauteng Provincial Legislature accepted that it could only mandate its representatives in the NCOP to vote either yes or no in respect of the Bill. Gauteng was therefore of the opinion that it was open to them either to support or to veto the Bill as a whole, and that it was not an option to propose any amendments to the Bill. This view possibly resulted from the legal advice given to the Select Committee, as well as from the fact that the legislation was rushed or "fast-tracked" through Parliament. According to the applicants, the Legislature was mistaken in law and the mistake vitiated its decision to support the Bill in the NCOP.

[70] The Gauteng Provincial Legislature argued that it was not its contention that it was constitutionally impermissible to mandate its representatives in the NCOP to vote only against the incorporation of Merafong into North West. It was not mistaken in law. The Premier of North West (the seventh respondent) and the North West Provincial Legislature (the ninth respondent) also submitted that the Gauteng Provincial Legislature did not accept that the only constitutionally permissible course would be to mandate its representatives to vote on the Twelfth Amendment Bill in its entirety.

[71] The first question requiring attention is whether the rationality test thus far recognised by this Court allows for an investigation of the Gauteng Provincial Legislature's possibly mistaken understanding of the law. After addressing this, I deal with the constitutional position regarding amendments and voting in the NCOP in the case of a bill that amends the Constitution by changing provincial boundaries.

Thereafter the alleged misconception of the law on the part of the Gauteng Provincial Legislature is investigated by reference to the available evidence.

[72] In terms of this Court's existing jurisprudence on rationality, as well as in view of the nature and functions of a legislature, an investigation into the correctness or otherwise of the Gauteng Provincial Legislature's understanding of the law and of all the consequences of its decisions is not unproblematic. It will be recalled that this Court has on a number of occasions required that public power be exercised rationally, rather than arbitrarily or based on mere preference. This Court has also emphasised though that a court cannot interfere with a decision simply because it disagrees with it or because the power was exercised inappropriately.[52]

[73] A legislature is a deliberative body with a large number of members and often relies on recommendations of sub-structures 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

[52] Above at [62]-[63] and n 47.

decision does not necessarily amount to arbitrariness or naked preference, the evils identified in this Court's above-quoted previous decisions on rationality.[53]

[74] For the purposes of this judgment I assume – in view of the contents of the documents reflecting the negotiating and final voting mandates and particularly the change that occurred between the two mandates – that an enquiry into the question of the Gauteng Provincial Legislature's appreciation of its constitutional role may be legitimate and useful. This is not to say that any mistake or inaccurate formulation that can be detected in the documentation of its proceedings and deliberations would point to the absence of rationality as required by this Court. I therefore limit my assumption to the question whether the Legislature materially misunderstood its powers and obligations under the Constitution.

[75] Before turning to the Legislature's understanding of its constitutional role in the constitutional amendment process, we must clarify the constitutional position regarding the powers of a provincial legislature to propose amendments or to vote against a bill of the kind of the Twelfth Amendment, or a part of it, in the NCOP. This is necessary especially in view of the conflation of concepts and the confusion that appear in the submissions of some of the parties. A close look at the relevant parts of sections 74, 75 and 76 of the Constitution is required.

[53] Above n 47.

[76] Section 75 deals with ordinary bills not affecting provinces. After being passed by the National Assembly, the bill must be referred to the NCOP. The NCOP must then pass the bill, pass the bill subject to amendments by it, or reject the bill. In the case of an amendment, the bill must be reconsidered by the National Assembly.[54]

[77] Section 76 deals with ordinary bills affecting provinces and provides for the referral of a bill to the NCOP, where the bill can be passed, amended or rejected. In the event of an amendment, the amended bill must be referred back to the National Assembly. If the Assembly refuses to pass the amended bill, it must be referred to the Mediation Committee.[55]

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[54] See in particular section 75(1), which reads:

> "When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 or 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
>
> (a) The Council must—
> (i) pass the Bill;
> (ii) pass the Bill subject to amendments proposed by it; or
> (iii) reject the Bill.
>
> (b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.
>
> (c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—
> (i) pass the Bill again, either with or without amendments; or
> (ii) decide not to proceed with the Bill.
>
> (d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent."

[55] Section 76(1) reads in relevant parts:

> "When the National Assembly passes a Bill referred to in subsection (3), (4) or (5), the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
>
> . . . .
>
> (c) If the Council passes an amended Bill, the amended Bill must be referred to the Assembly, and if the Assembly passes the amended Bill, it must be submitted to the President for assent.
>
> (d) If the Council rejects the Bill, or if the Assembly refuses to pass an amended Bill referred to it in terms of paragraph (c), the Bill and, where applicable, also the amended Bill, must be referred to the Mediation Committee, which may agree on—
> (i) the Bill as passed by the Assembly;
> (ii) the amended Bill as passed by the Council; or
> (iii) another version of the Bill.

[78] Section 74, on the other hand, deals with bills amending the Constitution. Section 74(3) specifically requires that a bill altering provincial boundaries be supported by six provinces.[56] Section 74(8) requires approval by the legislature of a province affected by a bill that alters provincial boundaries for the bill or the relevant part of it to be passed by the NCOP.[57]

[79] Rule 174(3) of the Joint Rules of Parliament states that if only a part of a bill requires the approval of a specific provincial legislature and the province refuses to grant the approval, that part of the bill lapses, but the rest of the bill may be proceeded with subject to amendments needed to remove the affected part of the bill.[58] In terms of Rule 174(4) the bill must be referred back to the National Assembly for reconsideration and amendment, in the event of this happening.[59]

(e) If the Mediation Committee is unable to agree within 30 days of the Bill's referral to it, the Bill lapses unless the Assembly again passes the Bill, but with a supporting vote of at least two thirds of its members.
(f) If the Mediation Committee agrees on the Bill as passed by the Assembly, the Bill must be referred to the Council, and if the Council passes the Bill, the Bill must be submitted to the President for assent.
(g) If the Mediation Committee agrees to the amended Bill as passed by the Council, the Bill must be referred to the Assembly, and if it is passed by the Assembly, it must be submitted to the President for assent.
(h) If the Mediation Committee agrees on another version of the Bill, that version of the Bill must be referred to both the Assembly and the Council, and if it is passed by the Assembly and the Council, it must be submitted to the President for assent."

[56] See above n 16.

[57] See above n 17.

[58] Rule 174(3) states:

> "If only a part of the Bill requires the approval of a specific provincial legislature or legislatures and that legislature or any or all of those legislatures refuse to grant such approval, that part of the Bill lapses, but the rest of the Bill may be proceeded with subject to amendments needed to remove the affected part of the Bill."

[59] Rule 174(4) states: "If a Bill referred to in subrule (3) has already been passed by the Assembly, the Bill must be referred back to the Assembly for reconsideration and amendment in terms of the Assembly rules."

[80] Therefore, if a provincial legislature does not approve a bill altering its boundaries in the NCOP, the part related to the boundaries of that province must be severed from the bill and lapses. The rest of the bill may be proceeded with. However, the severance requires an amendment and the bill must be referred back to the National Assembly for that amendment to be made. The amendment referred to here is the formal amendment that is required for the severance.

[81] Unlike sections 75 and 76, section 74 does not provide for substantive amendments in the NCOP and for referral back to the National Assembly to consider these amendments. Although the NCOP fulfils an important function in the protection of provincial interests, there is no scope for debate and for substantive amendments as far as bills altering provincial boundaries are concerned. The reason is of course the mandated nature of the process.[60] Delegates to the NCOP vote on the basis of provincial mandates. They cannot agree to support an amendment which they have not been mandated by their provincial legislatures to support.

[82] It is therefore clear that the Gauteng Provincial Legislature could not propose an amendment to the Twelfth Amendment Bill in the NCOP to provide for the inclusion of Merafong in Gauteng instead of in North West. What was apparently envisaged when the negotiating mandate was agreed to was not possible, namely to support the Bill, but to ensure that Merafong would be in Gauteng. Gauteng could

[60] See eg Woolman et al *Constitutional Law of South Africa*, 2nd ed. Original Service 07-06 (Juta, Cape Town 2007) 17-5: "Such debate would, for the most part, be irrelevant to the legislative process because delegates are voting on the basis of provincial mandates."

indeed effectively veto the part of the Bill that altered its boundaries, which would then have to be severed and would lapse, while the rest of the Bill might have been proceeded with. Furthermore, if more than three provinces voted against the Bill, the entire Bill could not have been passed, in terms of section 74(3)(b)(ii).[61] The legal advice given to the Legislature's delegate to the NCOP does not seem to be at odds with this position.[62]

Was the Gauteng Provincial Legislature's final decision to support the Twelfth Amendment Bill based on a materially correct appreciation of its constitutional role? Did it materially misunderstand its constitutional powers and obligations?

[83] One could refer to a number of sources to find the answer to this question, including statements by different office-bearers of the Gauteng Provincial Legislature. The language used is not necessarily precise and the contents of the statements are not always consistent. This underlines the above-mentioned difficulties in trying to establish the motivation or legal knowledge of a legislature. The final voting mandate is, however, specifically put forward in the Legislature's answering affidavit as demonstrating the factors that informed the Portfolio Committee's final recommendation. It differed from the negotiating mandate. I take the two mandates as the basis for the enquiry.

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[61] Above n 16.

[62] There might be differences of opinion as to the exact practical working of this process envisaged by the Constitution and whether a province has more than one vote in the NCOP (namely, a vote on the part of the Bill affecting its boundaries and a vote on the Bill as a whole), or only one vote (for or against the Bill) which would amount to either approval or a veto of the part affecting its boundaries. In my view a province has only one vote, namely for or against the Bill as a whole. A vote in favour of the Bill is a formal manifestation of the province's approval of the part affecting the province's boundaries and of support for the Bill as a whole. This "approval" is given by the provincial legislature and – in this case – was stated in a letter to the NCOP. A vote against the Bill amounts to non-approval and thus a veto of the part affecting the province's boundaries. The precise position is not crucial for the outcome of this enquiry though.

[84] One disagreement between the judgment of Moseneke DCJ and mine relates to the Portfolio Committee's position in the negotiating mandate. My colleague's judgment interprets the negotiating mandate to mean that the Portfolio Committee conditioned its approval of the Bill on the inclusion of only "Merafong-Gauteng" in Gauteng. In my view, the Portfolio Committee sought an amendment to the Bill to include all of the Merafong City Local Municipality in Gauteng. My understanding is based on the contents of the document, the public submissions preceding it, the presentation of the applicants' case and the debate in the Select Committee of the NCOP.

[85] In the negotiating mandate, the Portfolio Committee concluded that the effect of the Bill would "be the exclusion of the Merafong Municipality from the Gauteng Province and its inclusion into the North West Province". The effect of the Bill would of course have been that the part of Merafong in Gauteng would become part of North West. But the Portfolio Committee clearly did not intend its reference to "Merafong Municipality" to be confined solely to "Merafong-Gauteng". As stated earlier, the Merafong City Local Municipality has been, since its inception, a cross-boundary municipality straddling both Gauteng and North West. A distinction is not made between the two parts of Merafong. The Portfolio Committee's attention is addressed to the entire municipality. The negotiating mandate concludes that the Gauteng Provincial Legislature should support the Bill "on condition that the municipal area of

Merafong is included in the municipal area of the West Rand District municipality of the Gauteng Province."

[86] The community's written submissions, which culminated in the negotiating mandate, in large part also advocated that the entire municipality be located in Gauteng. For example, the community made the following recommendation:

> "The Merafong City Local Municipality, taking all relevant factors into account, and after consultation with the community, herewith submit a fully motivated request that, should action be taken to do away with cross-boundary municipalities, the total area of jurisdiction be included in the Gauteng Province."

[87] The Khutsong/Carletonville community[63] believed that "Merafong should form part of Gauteng on both Municipal and Provincial Boundary." Included within the submission is an additional recommendation to allow Khutsong/Carletonville to remain in Gauteng. Taken together, these two recommendations appear to suggest that the citizens of Khutsong were concerned that the entire municipality be located in Gauteng, with special concern for their own community, Khutsong. This interpretation is supported by a further submission from the Khutsong/Carletonville community, which recommended that—

> "it is evident that Merafong City Local Municipality forms an integral and integrated part of the West Rand and therefore Gauteng Province and a separation of [these] areas will have a substantial negative impact on the economic, social and institutional stability and development of the area as a whole."

[63] The Khutsong/Carletonville area was located in the southern part of Merafong, formerly located within the Gauteng Province.

[88] Many community submissions recounted the creation of the cross-boundary municipality, Merafong Local City Municipality. The Wedela community, in North West,[64] submitted in writing:

> "[T]he movement of people and goods between Wedela [located in North West] and Carletonville [located in Gauteng] is such that Wedela could by right be viewed as a suburb of Greater Carletonville and hence the integration of the two municipalities into Merafong City in 2000."

The submission concluded with an identical recommendation that "Merafong should form part of Gauteng on both Municipal and Provincial Boundary."

[89] Terminology such as that Merafong must "remain" in Gauteng of course appears in the papers. This does not mean that only "Merafong-Gauteng" is referred to. In fact, the "inclusion" of Merafong in Gauteng is also referred to in the papers and "Merafong-Gauteng" was of course already in Gauteng, before the Twelfth Amendment. It is understandable that the expression of the community's wishes would be focused more on the larger part of Merafong and the majority of its population, situated in Gauteng before the Twelfth Amendment, than on the smaller part and the minority in North West. This does not mean, though, that the community of Merafong wanted its minority to be cut off from the rest and left in a province which they regard as unacceptable.

[64] Wedela is located within the northern part of Merafong which has always been in North West.

[90] My understanding of the case presented on behalf of the applicants is also not that they were seeking a division of Merafong through an order declaring the part of the Twelfth Amendment that transferred only "Merafong-Gauteng" to North West inconsistent with the Constitution and invalid. In Prayer 1 of their amended notice of motion,[65] a declaration is after all sought that the Gauteng Provincial Legislature failed to comply with its constitutional obligation to facilitate public involvement. This is the main relief claimed. Prayer 2 seeks a declaration that the relevant part of the Twelfth Amendment is therefore unconstitutional and invalid. The process of consultation, which the applicants submit amounts to insufficient facilitation of public involvement, never dealt with the Gauteng part of Merafong only. The public hearing was in fact a joint venture between Gauteng and North West and submissions were made by and on behalf of those Merafong residents who were at that stage residing in North West. If the consultation process fell short of meeting constitutional requirements, I cannot understand how it could render only the part of the Twelfth Amendment that relocates "Merafong-Gauteng" invalid, without affecting the part relating to Merafong in North West. It is the boundary between Gauteng and North West which is at stake.

[91] The wording of the applicants' amended notice of motion is somewhat confusing. Prayer 1 refers to the part of the Twelfth Amendment "which concerns the Merafong City Local Municipality in the province of Gauteng", whereas it is well-known that this municipality was a cross-boundary municipality in both Gauteng and

[65] Above n 8.

North West. Prayer 2 mentions "that part of the area of Merafong City Local Municipality (CBLC8) from the province of Gauteng to the province of North West", but, as stated above, it is difficult to see how only that part could be unconstitutional, within the context of the applicants' case as a whole.

[92] In the applicants' founding affidavit the following statement appears:

> "The Applicants support the well motivated conclusion therein (par4 thereof) that Merafong City Local Municipality forms an integral and integrated part of the West Rand and therefore Gauteng Province and a separation of these areas will have a substantial negative impact on the economic, social and institutional stability and development of the area as a whole."

[93] The Minister believed that the applicants intended this paragraph to state the following:

> "The applicants appear to accept that there was no logical basis to re-draw the boundaries of North West and Gauteng Provinces in a way which would have divided *Merafong* into two or more separate areas that were located into different provinces. The applicants expressly accept that a separation of *Merafong* into different areas would have a substantially negative impact on the economic, social and institutional stability, as well as the development of *Merafong* as a whole. This is significant, because *Merafong* would have had to be located, in its entirety, either in Gauteng or North West Provinces. It was logically necessary to re-draw the boundaries of Gauteng and North West Provinces in a way which located *Merafong*, in its entirety in one or other province."

This statement was not denied by the applicants in the replying affidavit, even though the prior and subsequent paragraphs were expressly disavowed.

[94] The final voting mandate, under the heading "Committee Position after Consideration of the Negotiating Mandates by the NCOP Select Committee",[66]

[66] The final voting mandate reads:

> "The Portfolio Committee's Negotiating Mandate indicated that Gauteng will support the Constitution Twelfth Amendment Bill on condition that the municipal area of Merafong is included in the municipal area of the West Rand District Municipality of the Gauteng Province. In the absence of any indication whether the Gauteng Legislature has adopted or rejected the Constitution Bill in terms of section 74(8), this signals a qualified support for the Constitution Bill.
>
> Provinces can only adopt or reject the Constitution Bill in terms of Section 74(8) of the Constitution say (aye or nay). The legislative processes applicable to the Constitution Bill does not allow for amendments to be effected in the NCOP.
>
> Subsequent to deliberations and negotiations by the select committee and the diverse positions advanced, the portfolio committee in considering the substance of the issues raised, notwithstanding the views of the public, reviewed their initial position based on the following—
>
> 1. The committee supports the phasing out of cross boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005], cross boundary municipalities have proved difficult to administer with negative consequences on the delivery of services.
>
> 2. Gauteng supports the creation of viable and sustainable municipalities with a proper revenue base.
>
> 3. Implications of Gauteng not supporting the Constitution Twelfth Amendment Bill [B33B-2005].
>
>   - If the veto of the Gauteng Province applies to the whole Constitution Bill as it relates to cross-boundary municipalities, the Cross-Boundary Municipalities Laws Repeal Bill will have to be withdrawn from Parliament, and the local government elections would be conducted within the current municipal configuration, i.e. with cross-boundary municipalities.
>
>   - If the notion of a narrow interpretation is applied to the provisions of the Constitution Bill which may be vetoed by a province, the implications are just as extensive as if the whole Constitution Bill is rejected. Lets for argument sake say Gauteng can only veto (reject) the part of the proposed Schedule 1A that defines its territory; it will mean that the authorisation to have cross-boundary municipalities is revoked, whilst the current boundary of Gauteng remains the same. The result of this would be that not only West Rand District but also Tshwane, Ekhuruleni and Metsweding would be affected. These municipalities (and their local municipalities where applicable) would have to be disestablished and those areas of the municipalities in question that fall in Gauteng. The cross-boundary areas falling in the other provinces would likewise have to be re-demarcated into the new municipalities.
>
>   - The overall complication would be that the current boundaries of Gauteng are still determined with reference to magisterial districts, which are not used or referred to in the Constitution Twelfth Amendment Bill. Consequently, amendments that would be required in

describes the position taken at the time of the negotiating mandate as the Portfolio Committee's "qualified support" for the Bill. According to the Committee, the negotiating mandate indicated that Gauteng would support the Bill on condition that the municipal area of Merafong be included in the municipal area of the West Rand District Municipality in Gauteng. The final voting mandate then states that the Portfolio Committee – subsequent to deliberations and negotiations in the Select Committee and after hearing diverse positions that were advanced – reviewed their initial position, notwithstanding the views of the public. The Portfolio Committee thus recognised that they changed their view, and that their newly adopted position did not correspond with the views expressed by the majority of the community before the formulation of the negotiating mandate.

[95] The statement in the final voting mandate that provinces can only adopt or reject the Bill in terms of section 74(8) and "say (aye or nay)" has been criticised as an indication of a misconception on the part of the Portfolio Committee. However, the next sentence in the same paragraph provides the context. It states that amendments in the NCOP are not permissible. This is of course correct, as illustrated above.[67] Gauteng had to vote for or against the Twelfth Amendment Bill. As explained above,[68] the part altering its boundaries would have been severed and lapsed, if it voted against it. It could not vote conditionally.

> the Constitution Bill to address Gauteng's position may be such that it would not be possible to finalise the bill for the Local Government Elections, thus, elections would be conducted within the current municipal configuration."

[67] Above [75]-[82].

[68] Above [82].

[96] The document then refers to the deliberations and negotiations in the NCOP Select Committee and to the Portfolio Committee's consideration of the substance of the issues raised. The change of position was based on a number of reasons. The first two are nothing new, namely that the Committee supports the phasing-out of cross-boundary municipalities and that Gauteng supports the creation of viable and sustainable municipalities with a proper revenue base.

[97] The document then deals with a third reason, namely the implications of Gauteng not supporting the Twelfth Amendment Bill. It then makes three points.

[98] The first of the three points is that if Gauteng's "veto" applies to the whole Bill as it relates to cross-boundary municipalities, the Cross-boundary Municipalities Laws Repeal Bill would have to be withdrawn from Parliament and the local government elections would be conducted within the existing municipal configuration with cross-boundary municipalities. This statement is heavily criticised by Moseneke DCJ, but I do not agree with the criticism. The wording in the final voting mandate may be less than accurate. Of course, Gauteng on its own could not "veto" the Bill as a whole. However, if three or more other provinces also opposed the Bill, it could not be passed. Furthermore, the Portfolio Committee recognised that opposition to the Bill may have consequences. Read within the context of a proper understanding of section 74(8), and the rest of the final voting mandate, this statement cannot be said to

indicate a materially wrong understanding on the part of the Committee of its constitutional powers.

[99] The document secondly deals with "a narrow interpretation" and talks of a "veto" or rejection of the part of the proposed Schedule 1A that defines Gauteng's territory. It recognises its power to veto or cause the severance of the part of the Twelfth Amendment affecting its boundaries. It states that the result would be that the basis for cross-boundary municipalities would be revoked, but the current boundary of Gauteng would remain the same. The consequences are then described.

[100] Thirdly, the document notes that municipal boundaries in Gauteng would still be determined with reference to magisterial districts and elections would be conducted "within the current municipal configuration", which was actually changed for the rest of the country by the Twelfth Amendment.

[101] With these considerations in mind, the Portfolio Committee adopted the final voting mandate, which provided:

> "In terms of Section 65 of the Constitution, the Local Government Portfolio Committee recommends that the House confer authority on the head of its delegation to the NCOP, to **Vote in Support** of the Constitution Twelfth Amendment."

[102] It cannot be said that the Portfolio Committee laboured under a material misconception of its constitutional powers and obligations. In substance it was clearly aware of its power to cause the severance of the part of the Twelfth Amendment Bill

that affected its boundaries, or effectively to veto that part. It considered this option and decided against it. The view of the applicants that the Committee was mistaken results from a conflation of the concepts of a substantive amendment in the NCOP (which was impossible), the power to vote for or against the Bill (which the Gauteng Provincial Legislature had), and the power of effectively vetoing a part of the Bill (which the Portfolio Committee realised was possible and indeed considered).

[103] In his judgment, Moseneke DCJ goes further than the applicants in questioning the rationality of the Gauteng Provincial Legislature's conduct. He expresses the view that Gauteng could have supported the Bill, but declined to support that part of the Bill relating to the incorporation of "Merafong-Gauteng" into North West. The twin objectives of terminating cross-boundary municipalities and defeating the redrawing of its boundaries could have been achieved simply by voting in favour of the Bill, while declining to support that part of the Bill which affected its boundary. It was not necessary to turn away from the negotiating mandate. The judgment states that a veto related to the municipal area of Merafong is localised and discrete and cannot possibly affect the municipal boundaries of the rest of Gauteng. The effect of the veto would be no more than that the part of the area of Merafong City Local Municipality that fell within the municipal area of the West Rand District Municipality would remain in Gauteng, which is what the amendment sought to achieve. The judgment criticises the Portfolio Committee's exposition of the possible consequences of a veto. It finds

aspects of the Committee's reasoning startling and evident of a baseless grandiose notion of the legal consequences of the veto.[69]

[104] For a number of reasons I am respectfully unable to agree. As indicated above, neither the negotiating mandate, nor the submissions expressing the will of the people of Merafong that were reflected in the negotiating mandate, were aimed at the division of Merafong into two parts to be located in different provinces. Furthermore, the negotiating mandate did not state separate twin objectives of supporting the phasing-out of cross-boundary municipalities, while at the same time preserving the existing boundary through Merafong between Gauteng and North West. It did not express support for the principle of doing away with cross-boundary municipalities at the cost of dividing Merafong. It rather expressed support for the principle of phasing-out cross-boundary municipalities and, consequently, called for the inclusion of the whole of the Merafong municipal area into Gauteng, because it agreed with the submissions of the community. This is clear from the wording of the negotiating mandate.

[105] The option, which Moseneke DCJ is of the view the Gauteng Provincial Legislature ought to have followed, would require a province to have several votes in the NCOP regarding a bill altering provincial boundaries. In addition to its vote on the Bill as a whole, it would have to vote on the part of the Bill altering its boundaries, and if more than one boundary is altered or if its boundaries are altered in more than one place, on each and every one of those. (The boundary on which this application is

[69] See [181]-[191] of the Moseneke judgment.

focused is indeed not the only alteration of Gauteng's boundaries affected by the Twelfth Amendment.) In my view, this is not envisaged by sections 74(3) and (8) of the Constitution which refer to a bill or the relevant part of a bill that alters provincial boundaries. The legal advice given by Dr Bouwer and Advocate Razaard also did not state this to be a possibility. Dr Bouwer specifically pointed out that if Gauteng did not support "the question of Merafong", the result would be that part of Merafong would fall in Gauteng and the other part would be demarcated to another municipality somewhere in North West. The delegate of Gauteng was made aware of this consequence.[70]

[106] Furthermore, to fault the Gauteng Provincial Legislature for not considering a perceived option which was not presented to it by the people of Merafong, namely to divide Merafong into two different municipalities in two provinces, and to tie this to the Portfolio Committee's change of position after the negotiating mandate, goes beyond this Court's view of the standard of rationality. The earlier-mentioned decisions of this Court make this clear.

Consequences of a veto

[107] The criticism that the Portfolio Committee materially misunderstood the constitutional position also goes to the Committee's evaluation of the *consequences* of the options they considered, and not only to their appreciation of their *powers* or

[70] In the same debate Mr Shiceka said that the people wanted the status quo to remain. However, from the rest of the document, it is clear that he misunderstood the concept of a cross-boundary municipality and thus the status quo. He confused geographical area with service delivery.

obligations under the Constitution. This is a different matter. The first question is whether this Court is in a position to judge properly on this aspect on the papers before us. I am not convinced that it is. In their written submissions and their oral argument before this Court, the applicants did not specifically attack the Gauteng Provincial Legislature's evaluation of the consequences of, for example, the severance of the part of the Twelfth Amendment Bill altering Gauteng's boundaries. The respondents did not argue the point either. Further directions were issued twice since argument was heard in this matter, calling for records and other documents and for written argument on whether the Legislature was mistaken in law on a very specific point. None of these directions called for argument on the correctness or otherwise of the Legislature's evaluation of the consequences.

[108] A range of possible undesirable consequences regarding cross-boundary municipalities, the boundaries of Gauteng, the ripple effect on other municipalities, and even provinces and local government elections are mentioned in the final voting mandate. A proper analysis of these possibilities is no simple matter and requires a detailed analysis of the Bill, Schedule 1A to the Bill, the maps referred to in the Schedule (some of which are not included in the papers) and perhaps information on the legislative purpose behind using these particular maps instead of references to the municipalities themselves. The other legislation which has been passed could be of great significance. The role of the Demarcation Board, including the motivation behind its changed decisions and the exact timing of demarcation, is also relevant.

(The record currently includes only press releases.) Several of the above may be open to different constructions or interpretations.

[109] In my view it would not be in the interests of justice, if at all possible, to determine this complex set of issues without the benefit of further argument specifically on this point. Insofar as I am, on the papers before us, able to judge on the consequences, I am unable to find the statements in the final voting mandate, inelegantly worded as they are, to reflect a material misunderstanding of the legislature's constitutional powers or obligations. An analysis of the contents and structure of the Bill, the other applicable legislation and the relevant maps leads me to conclude that if the part of the Bill relating to Gauteng were indeed severed, Merafong would have remained a cross-boundary municipality, other municipalities as well as the local government elections would not have been left untouched, and the people of Merafong might indeed have experienced very negative consequences.

The rationality of the decision to locate Merafong in North West

[110] This brings me to the *second leg* of the applicants' rationality attack, namely the merits of the decision to locate Merafong in North West. The public's proposal that Merafong belongs in Gauteng centred around a number of submissions, summarised in the final voting mandate. It was said to be better for the effective delivery of services for Merafong to fall within Gauteng. The Gauteng Department of Social Development already had offices in Khutsong and Carletonville. Health and emergency services were alleged to be inadequate in North West. Education in North

West was alleged to be lagging behind. The capacity of local government structures to implement water and sanitation services as well as an expanded public works programme was questioned. Much emphasis was furthermore placed on Merafong's links to Gauteng as the economic hub of South Africa and indeed the Southern African region.

[111] Arguments in favour of locating Merafong in North West were also mentioned in the document. On the economic front it was stated that Merafong depends heavily on the neighbouring town of Potchefstroom in North West. Merafong received correctional, health, taxi registration, telephone and electric services from North West. Merafong's location in North West was better suited for the macro-economic strategy of North West, which is based on an economy dependent on natural resources, namely mining, agriculture and tourism.

[112] Counsel for the applicants did not pursue all these points in oral argument. In fact, they conceded that the obvious need for effective service delivery does not necessarily mean that Merafong cannot be located in North West, where attempts are indeed being made to improve service delivery. They stressed the importance of people's emotional attachment to a province, and the effect of a provincial boundary change on the dignity of the people involved, as recognised in *Matatiele 1*.

[113] In their oral submissions, counsel for the applicants focused on the argument advanced by the Government that locating Merafong in North West would increase

the population of North West and thus its equitable share of revenue from the National Revenue Fund. Equitable share of revenue is regulated by sections 213,[71] 214[72] and 227[73] of the Constitution. The applicants argued that although voluminous papers were filed on this aspect, it was never offered publicly as a reason and was not part of

[71] Section 213(3) states that a province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

[72] Under the heading "Equitable shares and allocations of revenue" section 214 states:

> "(1) An Act of Parliament must provide for—
> (a) the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
> (b) the determination of each province's equitable share of the provincial share of that revenue; and
> (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.
> (2) The Act referred to in subsection (1) may be enacted only after the provincial governments, organised local government and the Financial and Fiscal Commission have been consulted, and any recommendations of the Commission have been considered, and must take into account—
> (a) the national interest;
> (b) any provision that must be made in respect of the national debt and other national obligations;
> (c) the needs and interests of the national government, determined by objective criteria;
> (d) the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
> (e) the fiscal capacity and efficiency of the provinces and municipalities;
> (f) developmental and other needs of provinces, local government and municipalities;
> (g) economic disparities within and among the provinces;
> (h) obligations of the provinces and municipalities in terms of national legislation;
> (i) the desirability of stable and predictable allocations of revenue shares; and
> (j) the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria."

[73] Under the heading "National sources of provincial and local government funding" section 227 states:

> "(1) Local government and each province—
> (a) is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and
> (b) may receive other allocations from national government revenue, either conditionally or unconditionally.
> (2) Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.
> (3) A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction, except when the transfer has been stopped in terms of section 216.
> (4) A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution, that are additional to its requirements envisaged in the Constitution."

the public discourse. The Merafong community would have strongly objected to this argument, on its merits, if they had had the opportunity to do so.

[114] Before succumbing to the temptation to enter the debate on the merits raised by *second leg* of the applicants' rationality attack, one must be mindful of this Court's earlier-mentioned jurisprudence on rationality.[74] What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are however available, namely to locate Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. It is not for this Court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is.

[115] In the circumstances I am unable to conclude that the Gauteng Provincial Legislature exercised its legislative powers irrationally.

Conclusion

[74] Above [62]-[64] and n 47.

[116] The applicants have not shown that the Gauteng Provincial Legislature failed to facilitate public involvement, or acted irrationally, in supporting the Twelfth Amendment Bill in the NCOP. The Legislature created a reasonable opportunity for the public to express its views and those views were taken into account. It also did not exercise its powers irrationally. Based on the submissions of the public, the Portfolio Committee formulated a negotiating mandate and indeed negotiated accordingly. After being informed of the legal position, the Committee considered the available options and decided on a final voting mandate. The Committee explained its change of position. The Legislature debated the issue and took a decision. It did not materially misunderstand its constitutional role. The merits of its decision also do not indicate irrational conduct. The application cannot succeed.

Costs

[117] The applicants brought an important constitutional issue to this Court and were assisted by a public interest law institution with a history of campaigning for the recognition and protection of human rights. They should not be ordered to pay the respondents' costs.

Order

[118] The following is therefore ordered:

(1) The application to amend the applicants' notice of motion is granted.

(2) The applications for condonation for the late filing of papers are granted.

(3) The application for direct access is granted.

(4) The application is dismissed.

Langa CJ, Mpati AJ, Ngcobo J, Skweyiya J and Yacoob J concur in the judgment of Van der Westhuizen J.

MOSENEKE DCJ:

Introduction

[119] This application for direct access in terms of section 167(4)(e) of the Constitution,[1] concerns a constitutional challenge to a part of the Constitution Twelfth Amendment Act (Twelfth Amendment).[2] The applicants seek an order declaring that the Provincial Legislature of Gauteng (Provincial Legislature or sixth respondent) has failed to comply with its constitutional obligation, as envisaged in section 118(1)(a) of the Constitution,[3] to facilitate public involvement in the legislative processes of considering and approving that part of the Twelfth Amendment which concerns the Merafong City Local Municipality. As I explain later, this municipality is a cross-boundary municipality that straddles the borders of Gauteng and North West Provinces. For ease of reference, I shall allude to the cross-boundary municipality as

[1] Section 167(4)(e) provides that:

> "Only the Constitutional Court may—
> (e) decide that Parliament or the President has failed to fulfil a constitutional obligation".

[2] Constitution Twelfth Amendment Act of 2005 was adopted on 6 December 2005.

[3] Section 118(1)(a) provides that:

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

Merafong and to its constituent municipal areas on each side of the boundary as Merafong-Gauteng and Merafong-North West, respectively.

[120] In the alternative, the applicants ask us to declare that, in approving the impugned provisions of the Twelfth Amendment, the Provincial Legislature failed to exercise its legislative powers rationally.

[121] The consequential relief they seek is an order that the part of the Twelfth Amendment that transferred Merafong-Gauteng to the Province of North West is inconsistent with the Constitution and invalid. They also urge us to hold that the provisions of the Cross-boundary Municipalities Laws Repeal and Related Matters Act (the Repeal Act)4 are inconsistent with the Constitution and invalid. The Repeal Act is a statute which was enacted to give effect to the Twelfth Amendment and thus contains stipulations that regulate the transfer of Merafong-Gauteng to North West Province.

[122] I have had the distinct benefit of reading the majority judgments of my colleagues, Van der Westhuizen J and Ngcobo J. I also had the pleasure of reading the judgment of my brother Skweyiya J. The judgments find no merit in and dismiss the application for declaratory and consequential relief. They hold that the Provincial Legislature took reasonable steps to facilitate public involvement in the legislative process related to the passage of the Twelfth Amendment. They also dismiss the

[4] Act 23 of 2005.

alternative claim that the Provincial Legislature failed to exercise its legislative power rationally.

[123] As the majority judgments of Van der Westhuizen J and Ngcobo J do, I am inclined to accept that the steps taken by the Provincial Legislature to procure the participation of the people of Merafong, albeit in unseemly haste, in the legislative processes that led to the passage of the Constitution Twelfth Amendment Bill (Bill) are reasonable and do pass constitutional muster. However, I part ways with their respective judgments on whether the Provincial Legislature acted rationally in the exercise of its legislative powers conferred by section 74(8) of the Constitution,[5] when it approved the constitutional Amendment, which alters its provincial boundaries. It also gives me pleasure to acknowledge the respective judgments of Sachs J and Madala J. They are elegantly crafted and persuasive. Whilst I part ways with Sachs J on whether the Provincial Legislature took reasonable steps to facilitate public involvement in the legislative process related to the passage of the Twelfth Amendment, I respectfully support the conclusion reached by both judgments that the Provincial Legislature failed to exercise its legislative power rationally and that its decision to support the passage of the Twelfth Amendment Act is a constitutional nullity.

[5] It states:

> "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".

[124] In my judgement, when the Provincial Legislature abandoned its decision not to approve the Bill and resolved to support the Bill, it acted without a proper appreciation of its powers and duties and therefore irrationally. Its decision does not meet the rationality standard imposed by our Constitution. In my view, the decision of the Provincial Legislature to approve the Bill is therefore invalid. This would mean that the relevant portion of the Twelfth Amendment6 would be inconsistent with the Constitution to the extent that it permits the incorporation of Merafong-Gauteng into North West.

[125] In this judgment I propose first to recite the facts. Happily, the facts are brief and largely undisputed.[7] Thereafter, I describe the operative constitutional framework within which the impugned decision of the Provincial Legislature was taken. Third, I test the decision for rationality. And last, I consider what may be an appropriate remedy.

Background and facts

[126] The Constitution Second Amendment Act of 1998,8 inserted section 155(6A) into the Constitution. The new constitutional provision authorised the establishment of municipalities across provincial boundaries if the concerned municipalities could not feasibly be established within the boundaries of one province in accordance with

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[6] Above n 2.

[7] The single most important dispute of fact has no relevance to the present rationality enquiry. It relates to the allegation by the applicants that at the end of 2004 the National Executive Committee of the majority party in Parliament and in the Provincial Legislature, the African National Congress, had already resolved to incorporate Merafong-Gauteng into the Province of North West.

[8] Act 87 of 1998.

the criteria set by the Constitution.[9] The provision makes it plain that a cross-boundary municipality may be determined only with the concurrence of the provinces concerned and only after national legislation has authorised the establishment of a municipality within that municipal area.

[127] The national legislation that gave effect to section 155(6A) of the Constitution Second Amendment Act was the Local Government: Cross Boundary Municipalities Act (Cross boundary Municipalities Act).[10] The schedule to that legislation described the municipal areas which have been demarcated by the Municipal Demarcation Board (Demarcation Board)[11] and in regard to which authority to establish cross-boundary municipalities had been given. Merafong appears in the schedule as a local municipality whose municipal area runs across the boundaries of the provinces of Gauteng and North West.

[128] In October 2000, the provinces of Gauteng and North West issued notices, as required by law, establishing a local municipality known as Merafong City Local

[9] The criteria are prescribed by section 153(a) and (b) of the Constitution read together with sections 24 and 25 of the Local Government: Municipal Demarcation Act 27 of 1998, which lay down the demarcation criteria.

[10] Act 29 of 2000.

[11] The Municipal Demarcation Board has been established in terms of the provisions of the Local Government: Municipal Demarcation Act 27 of 1998. Its primary function is to determine municipal boundaries in accordance with legislation enacted in terms of chapter 7 of the Constitution which regulates local government. In terms of section 21(1), the Municipal Demarcation Board must determine municipal boundaries within South Africa and may re-determine any municipal boundaries already determined. That function it may do on its own initiative or at the request of the Minister or an MEC for Local Government (section 22(a)(i) and (ii)). Section 24 prescribes demarcation objectives which are to (a) enable the municipality for that area to fulfil its constitutional obligations; (b) enable effective local governance; (c) enable integrated development; and (d) have a tax base as inclusive as possible of users of municipal services in the municipality. For a discussion of the relationship between the powers of the Demarcation Board and of Parliament to alter provincial boundaries see the majority judgment of Ngcobo J in *Matatiele Municipality v President of the RSA* [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) at paras 2, 42, 83 and 105 (*Matatiele 1*).

Municipality (Merafong). The municipal area of Merafong is described in a map contained in annexure E to the respective establishing notices and runs across the boundary of the provinces of Gauteng and North West.12

[129] The major geographical area of the newly determined cross-boundary municipality was situated in the north of Merafong and within the West Rand District Municipality located in Gauteng. In their founding papers, the applicants make the undisputed averment that Merafong had 308 237 inhabitants and nearly 74% of them were living in the residential areas of Carletonville and Khutsong situated within the Gauteng Province. The remaining 26% of the inhabitants were living in Fochville and Wedela which fell within the Southern District Municipality in North West. Once again, for the sake of clarity, I will refer to this part of Merafong as Merafong-North West.

[130] In 2006, the Twelfth Amendment introduced far-reaching constitutional and legislative changes in three important respects. First, it set a new criterion on how boundaries of our nine provinces are to be drawn.13 It will be remembered that before the Twelfth Amendment, boundaries of provinces were defined as those that existed when the Constitution took effect in 1996. In other words, they were to be

[12] The notices establishing the Merafong City Local Municipality issued by the provincial executives of the two provinces are Notice no. 6769 of 2000 (Gauteng) and Notice no. 329 of 2000 (North West) both of 1 October 2000 published in Provincial Gazettes Extraordinary of 1 October 2000. A later amending notice was issued on 4 December 2000 as Notice no. 8703 of 2003 (Gauteng). In particular the map indicating the location of Merafong before the Twelfth Amendment is to be found in annexure E of the Notice of 4 December 2000. For the history of the establishment of cross-boundary municipalities, also see *Matatiele 1* above n 11 at 12, 14-7.

[13] See the amended section 103(2) of the Constitution which now reads:

> "The geographical areas of the respective provinces comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A."

determined in the manner prescribed by the interim Constitution of 1993. It had drawn provincial boundaries with reference to magisterial districts. The Twelfth Amendment now defines provincial boundaries with reference to municipal demarcation maps. It provides that the geographical areas of the respective provinces are made up of the sum of the demarcated areas shown in maps of municipal areas described in the Notice listed in Schedule 1A to the Twelfth Amendment. Simply put, Schedule 1A allocates every defined municipal area to a province and the sum of the municipal areas in a province constitutes its boundary.

[131] Second, the Twelfth Amendment repealed all constitutional provisions that authorised cross-boundary municipalities.14 As its full name suggests, the Repeal Act also, as a consequence, rescinded all legislation that permitted cross-boundary municipalities.[15] The record before us documents rather well the history of cross-boundary municipalities and furnishes cogent reasons why this class of municipalities has caused more problems than it has resolved and why it had to be abolished. It is common cause that cross-boundary municipalities failed to facilitate adequate provision of municipal services to their residents. It is therefore appropriate to note at this early stage in the judgment that all government respondents and indeed all communities within Merafong agreed that cross-boundary municipalities should be terminated. To that extent, the communities of Merafong supported the passage of the Twelfth Amendment. As will shortly become plain, their disquiet lay elsewhere.

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[14] The repealed sections are sections 155(6A) and 157(4)(b) of the Constitution.

[15] Such statutes being: Local Government: Cross-boundary Municipalities Act 29 of 2000; The Re-determination of the Boundaries of Cross-boundary Municipalities Act 69 of 2000; and The Re-determination of the Boundaries of Cross-boundary Municipalities Act 6 of 2005.

[132] Third, and perhaps most crucially for present purposes, all parties accepted, in my view correctly so, that Schedule 1A of the Twelfth Amendment locates the total area of Merafong in one province, namely, North West. So to speak, it terminated the cross-boundary municipality by incorporating Merafong-Gauteng into one province, the Province of the North West. This outcome, Schedule 1A of the Twelfth Amendment achieves by listing the municipal area of Merafong described by Map No 5 of Schedule 1 to Notice 1998 of 2005[16] under the Province of North West. The annotation to Map 5 states expressly that:

> "Merafong City Local Municipality is to be excluded from the municipal area of the West Rand District Municipality and included in the municipal area of the Southern District Municipality. Westonaria is to remain in the West Rand District Municipality".

[133] It is now opportune to turn to the context within which the Provincial Legislature made the impugned decision to support the passage of the Twelfth Amendment. To that end, it may be useful to narrate the encounters between the majority of the residents of Merafong and certain state organs shortly before the adoption of the Twelfth Amendment.

[134] As the facts will shortly show, the interaction was distinguished by vehement and public opposition of the affected community to the incorporation of their residential areas into North West. The record is replete with copies of written

[16] Published in GG 28189, 31 October 2005.

submissions to national, provincial and local spheres of government detailing why the community wishes to remain within Gauteng. At least seven of their written submissions are found in the record. Often their resistance took the form of public gatherings or protest marches. The opposition played itself out well ahead of November 2005 when formal involvement of the community in the law-making process, as envisaged by section 118(1)(a) of the Constitution, took place. In other words, the Minister of Provincial and Local Government (Minister or second respondent) and the Provincial Legislature were well aware of the resistance of the majority of the affected communities to their incorporation into another province. It is so that the Bill was introduced and passed in the National Assembly on 15 November 2005, despite the protest and resistance of the overwhelming majority of the residents and formations of civil society concerned. I look at some of the facts more closely.

[135] On 19 August 2005, at the request of the Minister, the Demarcation Board, published proposals for the re-determination of boundaries of certain municipalities for comment by interested parties.17 In relation to Merafong, the published proposal incorporated all of Merafong-Gauteng into the Southern District Municipality in North West, keeping in mind that the rest of Merafong already fell within the Province of the North West. The proposal led to widespread and spontaneous mass protest in the Merafong community. Residents, supported by community formations, which included the labour federation Congress of South African Trade Unions (COSATU),

[17] The proposals were published in Gauteng and North West Provincial Gazettes Extraordinary dated 2 September 2005. The re-demarcation proposal relating to Map 27 in the Schedule to the Notice 3359 of 2005 (being a Gauteng Provincial Notice) states that Merafong-Gauteng and Westonaria Local Municipality are to be excluded from the West Rand District Municipality and included into the municipal area of the Southern District Municipality in North West.

political organisations such as local branches of the South African Communist Party (SACP) and African National Congress (ANC), non-governmental organisations, churches, taxi organisations and social movements, held a protest march leading to Westonaria on 24 September 2005, and to the Merafong municipal offices on 26 September 2005, where they submitted written representations against the incorporation.

[136] During October 2005, the chairperson of the Demarcation Board issued a statement in which he explained that the Demarcation Board had met to consider the written views and representations to it. In relation to its earlier proposal on Merafong, the statement explains that the written submissions "indicate overwhelming resistance to the inclusion of Westonaria and the City of Merafong into the Southern District Municipality". The statement continues to explain that "[t]he Board agreed with some motivations provided, and decided . . . to withdraw its re-determination". The statement concludes by confirming that "the City of Merafong Local municipality thus remains within the West Rand District municipality, and the boundaries of the Southern District municipality also remain unchanged".

[137] The applicants and the broader community welcomed the Demarcation Board's withdrawal of the proposed re-determination of the boundaries of Merafong. On 30 October 2005, they held a celebration march for what appeared then to be a final victory on the incorporation issue. The triumph was short-lived. Within a day of the celebratory march, on 31 October 2005, the Demarcation Board issued a formal notice

stating that it had received a fresh request from the Minister to publish a notice and maps reflecting his alternative proposals for re-determination of certain municipal boundaries.[18] In the case of Merafong, the Minister's fresh proposal amounted to a repetition of his stance that Merafong-Gauteng should be incorporated into North West.[19]

[138] The Minister's fresh proposals led to a new wave of community discontent and protest. At the request of the community, on 5 November 2005, applicants and a broad-based delegation from the community met with the Minister. The minute of the meeting suggests that the discussions were frank but inconclusive. Not one of the two sides appears to have made any concessions. The community reiterated its opposition to its incorporation into North West. The Minister urged the community delegation to go back and collectively create conditions for them to participate constructively in the imminent legislative process. They were advised to "watch the space and wait for parliamentary pronouncement". The Minister said that he was bound to take the relevant legislation to Parliament and that he would inform Parliament about the concerns of the residents of Khutsong.

[18] In terms of section 22 of the Demarcation Act, the Minister may request the Demarcation Board to consider re-determining the boundaries of any municipality. Also see above n 11 which sets out the functions of the Demarcation Board and the role the Minister may play in the demarcation or re-demarcation of municipal boundaries.

[19] In Schedule 1, Map 5 of Notice 1998 of 2005, the Minister proposes that "Merafong City Local Municipality is to be excluded from the Municipal area of the West Rand District Municipality and included in the municipal area of the Southern District Municipality." The only change in the new proposal by the Minister was that Westonaria was to remain in the West Rand District Municipality.

[139] As a sequel to the meeting with the Minister, between 6 and 17 November 2005, the applicants and the community convened a series of report-back gatherings with sectors of the community representing diverse interests such as labour, youth, education, transport, religion, business and political groupings. A collective memorandum of the sectoral forum was drawn and submitted to the Minister on 24 November 2005. The community repeated its stern opposition to being incorporated into North West. They expressed awareness and unhappiness that the Bill that provided for the incorporation of Merafong-Gauteng into North West, had been placed before and approved by the National Assembly. They urged the Local Government Provincial Portfolio Committee (Portfolio Committee) to discuss the Bill with the sectors of the Merafong community before the legislative process of the National Council of Provinces (NCOP) and also asked for public hearings so that they may put their contentions across.

[140] The heightened concern of the community of Merafong, as expressed in the memorandum, was well justified. The legislative process to decide their fate had started in earnest. In fact, on 15 November 2005, the National Assembly voted in favour of the Bill. On the same day, it was transmitted to the NCOP for its concurrence. The very following day, the Speaker of the Provincial Legislature referred the Bill to the Portfolio Committee for formal consideration. The Speaker then made it known in a formal notice that the consideration of the Bill before the NCOP was subject to firm time frames, which all built up towards 14 December 2005, when the NCOP would have a plenary session for the adoption of the Bill. The

respective provinces were to be briefed on the Bill on 21 and 22 November 2005. On 30 November 2005, the Select Committee on Security and Constitutional Affairs (Select Committee) of the NCOP was required to debate and consider negotiating mandates from the respective provinces followed by consideration of their final mandates on 12 December 2005. This also meant that the provincial legislatures had to receive representations from the public and formulate a negotiating mandate before the NCOP Select Committee session on 30 November 2005.

[141] In its sitting of 17 November 2005, the Portfolio Committee of the Provincial Legislature resolved that it would engage in a joint public hearing with the North West Provincial Legislature in order to receive representations from affected communities. Thereafter, each legislature would consider the outcome of the public hearings in its own legislature. After notice to the public, a joint public hearing was held on 25 November 2005. On all accounts, it was well attended and the Portfolio Committee received written as well as oral submissions and engaged extensively with the concerned communities.

[142] On 29 November 2005, the Portfolio Committee considered the detailed provisions of the Bill, as well as a report on an assessment of the views of the attendees of the public hearing. On the occasion, the Portfolio Committee adopted a written negotiating mandate to be tabled before the NCOP the following day.

The negotiating mandate

[143] The negotiating mandate is a document of seminal importance because it reveals in considerable detail the reasoning processes of the legislature. It contains full grounds upon which the Provincial Legislature adopted the negotiating mandate. The mandate first reviews the constitutional and legislative framework relevant to the Bill. Of significance is that section 74(8) of the Constitution is highlighted in bold letters. Also, the portion of the mandate quoting 74(8) provides that "the NCOP may not pass the bill or the relevant part unless it has been approved by the legislature or legislatures concerned" is not only in bold letters but it is boldly underlined. It seems to me that the mandate seeks to draw attention to the veto power and obligation of the Provincial Legislature under section 74(8) and to the fact that the Legislature itself was well aware of the provision.

[144] Next, the mandate examines the details of the provisions of the Bill and thereafter concludes that, in relation to Merafong, the effect of the Bill "will be the exclusion of Merafong Municipality from the Gauteng Province and its inclusion into the North West Province". The conclusion is correct. More precisely, the effect of the Bill was that Merafong-Gauteng would become part of the Province of North West. The mandate then turns to consider an overview and analysis of public hearings. It records views in support of the inclusion into Gauteng Province. The community concerns are grouped into a social development cluster and an economic development cluster.

[145] In relation to the social development cluster, the mandate draws attention to the dissatisfaction of the overwhelming majority of residents over the likely absence or lowering of the quality of a number of essential services, if they were to be transferred into North West. These essential services include the punctual and efficient provision of social grants and other related services; services offered by the Department of Home Affairs concerning the processing of official documentation such as birth, identity and death certification; health and emergency services; and education. The disquiet of the affected communities extends to the capacity of North West to deliver water and sanitation as well as expanded public works programmes from which the jobless make a living. Generally, the mandate notes that Gauteng is seen as having an advanced service delivery programme which will benefit the affected communities, provided they remain in Gauteng.

[146] The mandate reports on economic and commercial concerns. The first of these is both historical and sentimental. The affected communities say that they want to remain part of the economic hub of the country and of the southern region of Africa. They make the point that the development of Johannesburg as a "City of Gold" is as a result of the gold mines, including those in Merafong that have contributed to the gross domestic product and development of Gauteng. It is not inapposite to remember that the name "Merafong" means a "place of mining". Workers from Merafong, represented by labour organisations, embrace this contention and point to the fact that the people of Merafong have supplied labour in the gold mines for many decades and that, in turn, the mines have supplied mineral deposits to the Gauteng economy. They

raise an additional point that it would be unwise to merge two areas with scarce job opportunities. Merafong-Gauteng depends on a mining sector that is currently confronted by dwindling gold production and the North West relies on agriculture with limited employment vacancies. A merger of the two may indirectly deepen poverty in Merafong.

[147] The mandate records that a sizeable part of the Merafong population is employed within Gauteng. This, it is said, flows from the fact that Gauteng presents greater job opportunities. Also, the communities see their incorporation as imposing an additional financial burden on residents because important public institutions in North West are located in its capital town, Mafikeng, which, aside from other inconveniences, is far and this makes travel there from Merafong-Gauteng costly.

[148] The labour federation, COSATU, and some of its eight affiliates in the area, object to the incorporation on the ground that Merafong is economically linked to the city region of Gauteng through an extensive road and rail network which conveys people and manufactured goods and makes access to financial services possible. They argue that, in contrast, little manufactured goods or specialist support find their way from North West to Merafong-Gauteng.

[149] The mandate then turns to consider views in favour of the inclusion of Merafong-Gauteng into the North West Province. The notable party in support is the Merafong ANC Youth League. It sees Merafong-Gauteng as highly dependent on the

neighbouring town of Potchefstroom in North West and, in particular, on services related to correctional centres, health, electricity and telecommunications. It also thinks that Merafong-Gauteng is well suited for the macro-economic strategy of North West related to mining, agriculture and tourism. Wards 24 and 25 of the town Fochville are recorded as supporting the inclusion of Merafong-Gauteng into their Province. It is unclear from the mandate whether any reasons were furnished for this preference. No other party has been recorded as supporting the proposed incorporation.

[150] The mandate continues by setting out the key determining principles that have driven the Portfolio Committee to its conclusion. It records that an overwhelming majority of the people who attended the public hearing were opposed to the proposal to incorporate "due to the fact that they were not provided with substantive and compelling reasons" and that they considered themselves as being an inseparable part of Gauteng with no social and economic linkages with North West.

[151] The Portfolio Committee concludes the mandate with an exposition of its position and the terms of the negotiating mandate. The better course is to render the position of the Portfolio Committee in its own words. The mandate records that the Portfolio Committee—

- "in principle, supports the phasing-out of cross-border boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005];

- in light of the outcome, impact assessment and analysis of the public hearing submissions, agrees with the inclusion of the geographical area of Merafong municipality into the West Rand District municipality in the Gauteng Province;
- recommends to the House, amendment to Schedule 1A of the Constitution Twelfth Amendment Bill [B33B-2005], to provide for the inclusion of the municipal area of Merafong into the municipal area of the West Rand District municipality of the Gauteng Province."

[152] In the final paragraph of the document, the negotiating mandate reads that, subject to section 74(8) of the Constitution, the Bill will be supported "on condition that the municipal area of Merafong is included in the municipal area of the West Rand District municipality of the Gauteng Province."

Select Committee of the NCOP

[153] On 30 November 2005, one day after the adoption of the Gauteng negotiating mandate, it was presented to the Select Committee of the NCOP. Mr Shiceka represented Gauteng Province. In attendance were legal advisors: Mr Labuschagne from the Department of Justice, Dr Petra Bouwer and Adv Razaard, state law advisors, and Adv Kholong from the Department of Local Government. Although the minute of the proceedings of the Select Committee is not a model of clear language, it is nonetheless important and instructive.

[154] It appears from the minute that Mr Shiceka informed all that he presented the negotiating mandate of Gauteng Province and even furnished written copies of the mandate. He presented the negotiating mandate faithfully and with effusive

conviction. As he finished the presentation, a debate arose between members of the committee and the legal advisors. Dr Bouwer and Adv Razaard explained that the provinces whose boundaries are affected by the Bill have the power to adopt or reject that relevant part. But provinces may not effect amendments on the Bill as adopted by the National Assembly. Each provincial legislature must vote for or against the part of the Bill that affects it and thereafter vote for or against the rest of the Bill. Dr Bouwer explained that the problem with paragraph 10 of the negotiating mandate of Gauteng was that it did not say whether the Provincial Legislature had resolved to support or to veto the provision of the Bill on Merafong, or whether it sought to amend the Bill.[20] Dr Bouwer made a further and important statement that, if the Gauteng Legislature were to veto the stipulation that affected Merafong, its location would remain the same. Merafong-Gauteng situated within the West Rand Municipality would remain in Gauteng while Merafong-North West, situated within the Southern District Municipality, would remain in North West. I revisit this crucial matter later. At this stage, let it suffice to flag my view that the advice of the two law advisors appears correct.

[155] The minute shows that Mr Shiceka was not persuaded by Dr Bouwer's explanation on the law. And yet, in my view, the two were talking past each other. Although Mr Shiceka thought that Dr Bouwer was wrong on the law, he emphasised that Merafong-Gauteng must remain in Gauteng. In support of this contention, he told

[20] Paragraph 10 reads:

> "Subject to section 74(8) of the Constitution, the Portfolio Committee on Local Government will support the Bill on condition that the Municipal area of Merafong is included in the municipal area of the West Rand District municipality of the Gauteng Province."

the Select Committee that "Gauteng Province has undergone a scientific process on the issue" and that "[t]he popular view from affected communities is that the status quo should remain". He added that "[t]he legislature is an unfettered body" and "as an institution, listens to the views of the people as long as they are not in violation of any policies and principles it stands for." It should be pointed out here that the people of Merafong support, in principle, the elimination of cross-boundary municipalities. On the other hand, all what Dr Bouwer was saying was that, in order to avoid Merafong-Gauteng being incorporated into the Province of North West, Gauteng Province could simply exercise its veto in relation to that part of the Bill that related to Merafong. As I have intimated before, there is much to be said for that view.

[156] In the face of controversy, the Select Committee opted to defer the Gauteng issue without resolution. The Select Committee expressed concern that the North West Province had not informed the Select Committee of its formal attitude to the proposed alteration of its boundaries. Towards the end of the meeting, the law advisors again requested the Select Committee to remind delegates present that "[p]rovinces have to pass resolutions adopting or rejecting the Bill in respect of the parts of the Bill directly affecting them".

[157] Two days later, on 2 December 2005, the Portfolio Committee met. However, no discussion was pursued with regard to the proceedings before the Select Committee. The chairperson explained that it was necessary to wait for the minute of

the proceedings before the Select Committee before formulating a recommendation on a final mandate.

The final voting mandate

[158] Three days later, on 5 December 2005, a terse minute of the Portfolio Committee meeting records the adoption of the final voting mandate on the Bill "with no dissenting views". The text of the final voting mandate records that the Portfolio Committee recommended that the Provincial Legislature confer authority on its delegation to the NCOP to vote in support of the Bill.

[159] The following day, being 6 December 2005, the Provincial Legislature adopted the recommendation of the Portfolio Committee, without alteration, save that it was not adopted without dissent.[21] On 12 December, the Select Committee met to review final mandates from provinces. The record of proceedings shows that Mr Shiceka again represented the Gauteng Legislature. After a brief explanation, he confirmed that his mandate had changed and that his Province now supported the entire Bill. Two days later, on 14 December 2005, the Bill was agreed to in the NCOP, with all

[21] The Democratic Alliance opposed the recommended final mandate as it was of the opinion that the wish of the people of Merafong not to be incorporated into the North West Province had been disregarded, and that, as a result of this "rather flawed consultation process", the credibility of the Legislature had been tarnished and that more conflict would be stirred up in the area. Additionally, an ANC Member of the Portfolio Committee, Mr Moiloa, raised personal disquiet with the proposed decision and stated that, although he fully supported the decision instructing him, as a member of the ANC, to support the demarcation, he had now been asked to support another decision. He said that he was therefore opposed to the decision that was being taken.

nine provinces in favour. It is fair to record that a number of members of the NCOP did not support the Bill in some respects.[22]

Constitutional Framework

[160] There is no contestation amongst the parties about the constitutional provisions that regulate the constitutional amendment that is the concern of this case. The controversy is rather about whether the Provincial Legislature exercised the powers conferred on it rationally. It is thus not necessary to deal with the constitutional framework extensively. Section 74 of the Constitution regulates bills amending the Constitution. The target of the Twelfth Amendment is the definition of provincial boundaries determined by section 10323 which, in turn, forms part of chapter 6 of the Constitution. Chapter 6 regulates the power and duties of provinces.

[161] Since the constitutional Amendment with which we are concerned alters provincial boundaries, the procedure set by section 74(3) of the Constitution is to be followed. Section 74(3) provides that any provision of the Constitution may be amended by a bill passed by the National Assembly with the supporting vote of at least two thirds of its members and also by the NCOP with a concurring vote of at least six of our nine provinces. A proviso that bears repetition is that the amendment

[22] The Freedom Front Plus believed that the Bill created the impression that from time to time government changes the Constitution as it deems fit, and recorded that it was against the Bill as it set a precedent that could be used, misused or abused in future to amend certain boundaries for a political party's own benefit. The Democratic Alliance, too, did not support the Bill, saying that it was astounding that a twelfth amendment was being made to the Constitution "so over-hastily and under such pressure of time", and that with the strong reaction that had emerged from the affected community in this regard, it was clear that the consultation process was incomplete and unsuccessful.

[23] Before its amendment, section 103(2) of the Constitution provided that: "The boundaries of the provinces are those that existed when the Constitution took effect."

should relate to matters that affect the NCOP or that alter provincial boundaries and other matters related to provinces which are now not relevant.

[162] In the context of a bill amending the Constitution, the NCOP is a vital and decisive component of Parliament. Together with the National Assembly, it participates in the national legislative process directed at constitutional amendment as an indispensable partner.[24] It is appropriate to recognise that the NCOP represents the provinces and ensures that provincial interests are not overlooked in the national sphere of government. The Constitution envisages that the NCOP may do this mainly by participating in the national legislative process and by providing a national forum for open and public consideration of issues affecting provinces.[25] It is plain that if a constitutional amendment implicates a matter that affects the NCOP or alters vital interests of a province such as the integrity of its boundaries, the concurrence of the NCOP and of the province concerned are prerequisites for the proper adoption of a bill amending the Constitution. Section 74(8) confers, in explicit terms, a veto on a provincial legislature whose vital interests are affected by an amending bill.

[24] See in this regard section 42(1) and (2) of the Constitution which reads:

> "(1) Parliament consists of—
> (a) the National Assembly; and
> (b) the National Council of Provinces.
> (2) The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution."

[25] See section 42(4), which provides:

> "The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces."

[163] The rationale for the NCOP in our Constitution is described in clear terms by Murray and Simeon[26] when they say—

> "[t]he NCOP has a somewhat more limited, but also critical role. It represents South African citizens not directly, in their role as individual citizens, but indirectly, in their role as residents of the provinces which constitute one of the three spheres of government established by the Constitution. Its role is to represent the provincial perspective within the national Parliament. As such, it is a concrete expression of the commitment to 'co-operative government' set out in chapter 3 of the Constitution. 'Co-operative government' means that governing South Africa is to be seen as a partnership among the spheres of government. This in turn requires, among other things, that national legislation, rather than ignoring, or riding rough shod over the provinces, must be sensitive to provincial needs and concerns. It also means that provinces do not act alone or in isolation; rather they must be deeply integrated into the national legislative process. This is the underlying rationale for the NCOP."[27]

[164] I agree. What remains is to add that, in order for the bicameral character of our national legislative process to accomplish the tasks that the Constitution requires, the NCOP must be seen as more than a 'house of the provinces'. Its role is to ensure that Parliament is responsive to provincial interests and is supportive of the concerns which may afflict a particular province and its people. That is particularly true in relation to the protection of the territorial integrity of provinces because the altering of a provincial boundary tends to have an abiding impact and travels well beyond the redrawing of geographical lines. O'Regan J, in *Matatiele 1*, makes the point with telling clarity:

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[26] Murray and Simeon "From paper to practice: the National Council of Provinces after its First Year" (1999) 14 SAPR/PL 96. Also see Budlender "National Legislative Authority" in Woolman et al (eds) *Constitutional Law of South Africa* (2 ed) (Juta, Cape Town 2006).

[27] Id at 97.

> "It is quite plain that the redrawing of provincial boundaries is an intensely controversial matter upon which communities feel strongly and which has the potential to undermine the stability of our democracy and the legitimacy of local and provincial government in the areas where boundaries have been moved. Moreover, the redrawing of a boundary has a long-term effect that cannot easily be undone. A community whose town or neighbourhood is shifted from one province to another must live with that change for many years if not forever. The social, economic and political sensitivity of boundary changes, coupled with their essentially long-term character underlines the need for the process by which a boundary change is effected to be legitimate and constitutionally proper."[28]

[165] Another important observation is that the role of the NCOP, in relation to constitutional amendments under section 74, is legislative in character. Its concurrence is a prerequisite to adopting a bill amending the Constitution. However this legislative power is made possible by the deliberative and voting roles and powers of the provinces.[29] In other words, the deliberation and decision by the provincial legislature to vote for or against a bill amending the Constitution, and in particular provincial boundaries, is a legislative process. This means that the legislative power of a provincial legislature must be exercised subject to the dictates of the Constitution. The provincial legislature, like all organs of state, is bound by the rule of law and must act in a manner that is rational, accountable, responsive and open. This then brings me to the constitutional requirement of rationality in the legislative process.

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[28] Above n 12 at para 89.

[29] See section 65(1) of the Constitution which reads:

> "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."

Rationality

[166] The question must arise whether the Gauteng Provincial Legislature exercised its powers rationally as required by our Constitution. Initially, the Provincial Legislature, through the Portfolio Committee, resolved to support the Bill on condition that the municipal area of Merafong-Gauteng be included in the West Rand Municipality in the Gauteng Province. However, within days the Provincial Legislature decided to abandon its earlier resolve and to support the same Bill unchanged. For this the Provincial Legislature furnished reasons. The applicants contend that the decision of the Provincial Legislature falls short of the rationality test which every legislative process must satisfy. On the other hand, all government respondents contend that the Provincial Legislature was entitled to alter its views on whether to support the Bill and, what is more, it had good and rational grounds to do so.

[167] Our constitutional democracy is premised on founding values which include supremacy of the Constitution and the rule of law.[30] It is by now well settled that rationality is a minimum requirement for the exercise of public power.[31] This flows from the rule of law and the supremacy of the Constitution which are the founding values of a constitutional state. This Court has often warned that the state may not "regulate" in an arbitrary manner or manifest "naked preferences" that serve no

[30] Section 1(c) of the Constitution provides that:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (c) Supremacy of the constitution and the rule of law."

[31] *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* [2000] ZACC 1; 2000 (3) BCLR 241 (CC); 2000 (2) SA 674 (CC).

legitimate governmental purpose. In other words, wielders of public power – whether legislative, executive or administrative – are, at the very least, duty-bound to act rationally. About the purpose of the requirement of rationality in the exercise of public power, this Court has expressed itself, in *Prinsloo v Van der Linde and Another*,[32] in the following terms:

> "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'." (Footnotes omitted.)[33]

[168] Ackermann J, in S v Makwanyane,[34] makes a similar point with reference to the transition initiated by the founding values of our new constitutional democracy:

> "We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order."[35]

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[32] [1997] ZACC 5; 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC).

[33] Id at para 25.

[34] [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC).

[35] Id at para 156. See also *United Democratic Movement v President of the RSA and Others* (1) [2002] ZACC 33; 2002 (11) BCLR 1179 (CC); 2003 (1) SA 472 (CC) at paras 55, 58 and 68 (referred to in the judgments of my colleagues as *UDM 2*); *New National Party of South Africa v Government of the RSA and Others* [1999] ZACC 5; 1999 (5) BCLR 489 (CC); 1999 (3) SA 191 (CC) at paras 24-6; and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at paras 56-9.

[169] It must be clear from what has been articulated above that a power, once conferred, must be exercised in a manner which is rationally related to the purpose for which such power has been given. Whether that is so is a matter of objective evaluation in the light of all the relevant facts of a given case. In *Pharmaceutical Manufacturers*, Chaskalson P, explains the test in the following manner:

> "The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle."[36]

[170] At the same time, this Court has often cautioned that a resort to the rationality requirement is not a licence for a court to place its own preference above that of the public functionary properly charged with the power. In the words of Chaskalson P:

> "The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately."[37] (Footnote omitted.)

Was the decision of the Gauteng provincial legislature objectively rational?

[36] Above n 31 at para 86.

[37] Id at para 90.

[171] As a general rule courts should not attempt to second guess the legislature on the wisdom or otherwise of legislation properly adopted, nor should they speculate about the motives of the legislators or the understanding the legislators might have had of the legal consequences of a law they adopt. Here, however, we are confronted with a very specific situation in which the legislature was being called upon to assume a very specific legislative responsibility. It was not adopting a law of general application, but saying yes or no to the alteration of the boundaries of its province. Through the authorised activities of its Portfolio Committee, the Legislature had fulfilled its obligations to facilitate public involvement and had come to a reasoned and cogently motivated position based on public consultation. And in the final mandate the Legislature expressly spelled out its motivation for the change of approach. So one does not have to speculate about what it might have been. In these special circumstances, there is nothing inappropriate in judicial scrutiny of the understanding the Provincial Legislature had of the nature and ambit of the power it was constitutionally called upon to exercise.

[172] While ordinarily it may be inappropriate for a court to investigate why a deliberative body like the legislature adopted a particular position on a legislative measure; in this case, this Court has the power, and indeed the obligation, to investigate the reason for the change in attitude. If it were otherwise, the conclusion that the Gauteng Province acted irrationally would be irresistible.

[173] I have canvassed in some detail the reasons advanced by the Provincial Legislature for resolving not to support the Bill to the extent that it affects its boundaries related to Merafong. The reasons were comprehensive, well-worked and facially rational. They were crafted by the Portfolio Committee and embraced by a unanimous Provincial Legislature. That much is clear from the final mandate of the Provincial Legislature which expends considerable space explaining why it supported the negotiating mandate, in the first place, and why later it abandoned the negotiating mandate in favour of a decision to support the Bill as a whole and without the exercise of a veto. Equally clear is that the negotiating mandate was animated not only by the views of the communities affected by the re-drawing of the boundary but also by historical and socio-economic imperatives which the negotiating and final mandates record meticulously.

[174] What is significant is that the Legislature through its delegate to the NCOP emphasised that the Gauteng mandate on the incorporation of Merafong into Gauteng was "based on scientific research and views [of the community]." By its own admission therefore, Gauteng carefully considered the views of the community and their impact on the policy underlining the Bill and the need to eradicate cross-boundary municipalities. The final voting mandate explains that it was in—

> "[the] light of the outcome, impact assessment and analysis of the public hearing submissions [that it was decided to agree] with the inclusion of the geographical area of Merafong municipality into the West Rand District municipality in the Gauteng Province."

We have no reason to disbelieve the Provincial Legislature when it tells us that it carefully considered the pros and the cons of the inclusion of Merafong-Gauteng in the light of the people's views.

[175] A reversal of this position without any explanation, prima facie, points to arbitrary or irrational conduct. There must therefore be a rational ground for the reversal of its position. Indeed this was put in issue by the applicants. In the absence of such explanation, its conduct, to my mind, would constitute arbitrary conduct. This Court therefore has an obligation to examine the reasons advanced by the Provincial Legislature for the reversal of its position on the incorporation of Merafong into the Gauteng Province. The reasons they have furnished, objectively viewed, will determine whether they have acted arbitrarily or with good reason. It is to that enquiry that I now turn.

[176] The record suggests that we can gather reasons for the changed mandate from at least four sources. The final voting mandate adopted by the Provincial Legislature is the primary source of the reasons. The delegate of the Provincial Legislature, Mr Shiceka, also furnished grounds for the change when he appeared before the Select Committee of the NCOP on 12 December 2005. The transcript of the Portfolio Committee's proceedings of 5 December 2005 also reports on reasons for the change of the mandate furnished by the Chairperson of the Portfolio Committee, Ms Letwaba. And lastly, the Speaker, Mr Mdakane, has deposed to an answering affidavit on behalf of the Provincial Legislature. He too provides reasons for the change of mandate. A

cursory examination of the four sources of reasons for the change suggests that the reasons furnished are by no means consistent with each other. Be that as it may, the final voting mandate should suffice for purposes of this rationality review. This is so because the final voting mandate is the comprehensive and composite deed of the Legislature. At once, it contains the reasons for adopting the negotiating mandate and the grounds advanced for relinquishing it in favour of the final voting mandate.

[177] It is noteworthy that the contents of the final voting mandate is substantially the same as the original negotiating mandate, save for a new paragraph 10,[38] which

[38] "Committee Position after Consideration of Negotiating Mandates by the NCOP Select Committee

> The Portfolio Committee's Negotiating Mandate indicated that Gauteng will support the Constitution Twelfth Amendment Bill on condition that the municipal area of Merafong is included in the municipal area of the West Rand District Municipality of the Gauteng Province. In the absence of any indication whether the Gauteng Legislature has adopted or rejected the Constitution Bill in terms of section 74(8), this signals a qualified support for the Constitution Bill.
>
> Provinces can only adopt or reject the Constitution Bill in terms of section 74(8) of the Constitution by saying (aye or nay). The legislative processes applicable to the Constitution Bill does not allow for amendments to be effected in the NCOP.
>
> Subsequent to the deliberations and negotiations by the select committee and the diverse positions advanced, the portfolio committee in considering the substance of the issues raised, notwithstanding the views of the public, reviewed their initial position based on the following—
>
> 1. The committee supports the phasing out of cross boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005], cross-boundary municipalities have proved difficult to administer with negative consequences on the delivery of services.
>
> 2. Gauteng supports the creation of viable and sustainable municipalities with a proper revenue base.
>
> 3. Implications of Gauteng not supporting the Constitution Twelfth Amendment Bill [B33B-2005].
>
>   - If the veto of the Gauteng Province applies to the whole Constitution Bill as it relates to cross-boundary municipalities, the Cross-Boundary Municipalities Repeal Bill will have to be withdrawn from Parliament, and the local government elections would be conducted within the current municipal configuration, i.e. with cross-boundary municipalities.
>   - If the notion of a narrow interpretation is applied to the provisions of the Constitutional Bill which may be vetoed by a province, the implications are just as extensive as if the whole Constitution Bill is rejected. Let's for argument sake

records the position of the portfolio committee "after consideration of negotiating mandates" by the Select Committee. The final voting mandate states that the Legislature now knows that provinces can only adopt or reject the Bill in terms of section 74(8) of the Constitution. In other words, they can only vote 'aye or nay' to the Bill. The final voting mandate further states that the legislative process applicable to the Bill does not allow for amendments to be effected in the NCOP. This belated discovery in itself is disturbing. The Legislature or its Portfolio Committee should have apprised itself of the legislative power section 74(8) confers on it before adopting the negotiating mandate and before participating in the NCOP legislative process.

[178] The final voting mandate continues to explain that the Portfolio Committee reviewed its initial position "notwithstanding the views of the public" after "deliberations and negotiations by the select committee" and after "hearing diverse positions advanced" and after the Portfolio Committee had considered "the substance

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say Gauteng can only veto (reject) the part of the proposed Schedule 1A that defines its territory; it will mean that the authorization to have cross-boundary municipalities is revoked, whilst the current boundary of Gauteng remains the same. The result of this would be that not only West Rand District but also Tshwane, Ekurhuleni and Metsweding would be affected. These municipalities (and their local municipalities where applicable) would have to be disestablished and those areas of the municipalities in question that fall in Gauteng. The cross-boundary areas falling in the other provinces would likewise have to be re-demarcated into the new municipalities.

- The overall complication would be that the current boundaries of Gauteng are still determined with reference to magisterial districts, which are not used or referred to in the Constitution Twelfth Amendment Bill. Consequently, amendments that would be required in the Constitution Bill to address Gauteng's position may be such that it would not be possible to finalise the bill for the Local Government Elections, thus, elections would be conducted within the current municipal configuration."

of the issues raised". None of these considerations are explained or motivated beyond what is stated.

[179] What seems to have swayed the Legislature's views is found in the section of the final voting mandate which deals with "[i]mplications of Gauteng not supporting the Constitution Twelfth Amendment Bill". This heading by itself suggests that the Province considered that it had only two options, either to support or reject the Bill. This attitude is consistent with the Province's views set out in paragraph 10 of the final voting mandate, namely, that "[p]rovinces can only adopt or reject the Constitution Bill in terms of section 74(8) of the Constitution, say (aye or nay)."

[180] But this is a misconception of the power and obligation of the Province under the Constitution. The Province could have supported the Bill but declined to support that part of the Bill relating to the incorporation of Merafong-Gauteng into the North West Province. This is so because the power and duty of a province in relation to the adoption of a constitutional amendment that re-draws its boundary must be distinguished from the power and duty it bears in relation to any other constitutional amendment. This distinction was explained to the delegate from Gauteng Province at the meeting of the Select Committee of the NCOP. Indeed, the position of the Province at that meeting was that it supported the phasing out of cross-boundary municipalities but that it was opposed to the incorporation of Merafong-Gauteng into the North West Province. These twin objectives it could have achieved simply by voting in favour of the Bill while declining to support that part of the Bill which

affected its boundary. Despite the early counsel, the Legislature thought that the only option it had was to vote 'aye' or 'nay' on the entire Bill. This demonstrates a failure on the part of the Province to appreciate its nuanced duty under the Constitution. The Province had at least two valid legislative options open to it. It could have, at once, achieved the termination of cross-boundary municipalities by supporting the Bill and defeated the re-drawing of its boundary in relation to Merafong.

[181] I now give attention to each of the so-called three implications of Gauteng not supporting the Bill. First, the final voting mandate states that if the veto of Gauteng Province applies to the whole Bill, because the Bill relates to cross-boundary municipalities, the Cross-boundary Municipalities Laws Repeal Bill[39] (Repeal Bill) will have to be withdrawn from Parliament and the local government elections will have to be conducted within the current municipal configuration, that is, with cross-boundary municipalities.

[182] This is a startling proposition which exposes a fundamental misunderstanding of the powers conferred on a provincial legislature by the provisions of section 74(8) of the Constitution. First, the veto conferred on a provincial legislature relates only to a constitutional amendment which alters a provincial boundary. In short, the veto relates only to a part of a constitution amendment bill which concerns only a specific province or provinces and in relation to matters specified in section 74(3)(b) of the Constitution. It is therefore plain that the Gauteng Legislature does not have a veto

[39] Cross-boundary Municipalities Laws Repeal and Related Matters Bill [B36B-2005].

that relates to the whole Bill or over the entire Repeal Bill. To suggest that the Provincial Legislature could veto the entire Bill or Repeal Bill is far-fetched and fanciful.

[183] Equally startling is the reasoning that if the Gauteng Province were to vote against the Bill the entire Repeal Bill would have to be withdrawn from Parliament with the consequence that the local government elections would have to be held with cross-boundary municipalities. Again, this is a substantial misconstruction of the authority vested in the provincial legislature in a legislative process that involves a constitutional amendment that implicates a provincial boundary. The veto power of a province under section 74(8) is not as pervasive and all-powerful as the Gauteng legislature seems to imagine. If the province were to exercise a veto, only the provision that is a legitimate target of the veto would remain unaltered by the Bill amending the Constitution and legislation that gives effect to the amending Bill. In other words, the effect of the veto would be that the boundary between Gauteng and North West would remain as it was before the adoption of the Bill. However, that does not mean that the cross-boundary municipality of Merafong would survive the adoption of the Bill because the constitutional amendment and consequential legislation revoke all authority for the continued existence of cross-boundary municipalities. Therefore, there is no rational basis for suggesting that the local government elections of any municipality, other than the West Rand District in Gauteng and the Southern District Municipality in North West, would be affected or that any local election would be conducted on a cross-boundary basis.

[184] It bears repeating that the Bill was meant to revoke the constitutional authority for the creation or continued existence of cross-boundary municipalities. In turn, the Repeal Act was to rescind all laws which regulated cross-boundary municipalities. It must follow that, first, the Province had no power to veto the Bill save in relation to the configuration of its boundary or the Repeal Bill. So there can be no question of any of these legislative instruments being withdrawn from Parliament solely because of the veto of Gauteng Province. Second, once the Bill is passed, there cannot be cross-boundary local authorities in any province. And, third, it seems plain that the notion of cross-boundary local authority elections would then become implausible and a legal fiction.

[185] The next reason to be found in the final voting mandate for change is that, even if a narrow interpretation is applied (namely, that a province may veto only provisions which affect it) "the implications are just as extensive as if the whole Constitution Bill is rejected". The final mandate elaborates by saying that:

> "Let's for argument sake say Gauteng can only veto (reject) the part of the proposed Schedule 1A that defines its territory; it will mean that the authorisation to have cross-boundary municipalities is revoked, whilst the current boundary of Gauteng remains the same. The result of this would be that not only West Rand District but also Tshwane, Ekurhuleni and Metsweding would be affected. These municipalities (and their local municipalities where applicable) would have to be disestablished and those areas of the municipalities in question that fall in Gauteng. The cross-boundary areas falling in the other provinces would likewise have to be re-demarcated into the new municipalities."

[186] Again, this goes well beyond me. I am unable to determine the basis for this grandiose notion of the legal consequences of a veto conferred on a province in relation to its territorial integrity. Another error of reasoning has crept in here. It appears in the reasoning that if a veto were to be exercised in relation to the boundary between Gauteng and North West, all of the "current boundary of Gauteng remains the same" in relation to other cross-boundary municipalities along the Gauteng border. On this argument, all such municipalities in provinces adjacent to Gauteng will have to be "disestablished" or "re-demarcated" into new municipalities. I have demonstrated earlier that this suggestion has no merit whatsoever. The provincial veto will leave unaltered the boundary between Gauteng and North West that runs across Merafong and cannot tamper with any other municipal or provincial boundary which is not its legitimate target. It seems to me self-evident that the proposed re-drawing of provincial boundaries in other cross-boundary municipalities along the border of Gauteng could be validly implemented without the need to "disestablish" or to "re-demarcate" the local authorities concerned. It is clearly erroneous to conclude that, absent a provincial veto, other cross-boundary municipalities like Tshwane, Ekurhuleni and Metsweding would be affected by a veto directed at the border related to Merafong. Again this obvious error about the reach of the provincial veto power suggests a serious misappreciation of the character of the decision the legislature had to make and of the power it was called upon to exercise.

[187] The final voting mandate advanced a third reason for the Legislature changing its earlier mandate. The final voting mandate explains that if the Province were to

exercise a veto, the current boundaries of Gauteng would be determined with reference to magisterial districts whilst the Bill draws provincial boundaries on the basis of municipal boundaries. As I noted earlier, section 1(2) of the Twelfth Amendment re-defines the geographical areas of the nine provinces by reference to municipal areas. This is a departure from the position prior to the constitutional amendment which delineated provincial boundaries by reference to magisterial districts.[40] However, there is no merit in the suggestion that the provincial veto in relation to the municipal area of Merafong will cause the boundary of Gauteng to be determined by magisterial districts. It must be remembered that section 1(2) of the Twelfth Amendment provides that boundaries of a province "comprise the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A". This simply means that in the event of a veto, the sum of the geographical area of Gauteng will include the extent of the municipal area of Merafong-Gauteng. Absent a veto, the geographical area of North West would increase accordingly. Given the constitutional amendment that sets the demarcation of municipal areas as the criterion for delineation of provincial boundaries, there is simply no logical room for all of Gauteng reverting to magisterial districts as the delineation standard. To do so would be to resort to a constitutional standard which would not exist because it would have been repealed.

[188] In any event, the veto would have no impact whatsoever on municipal areas other than Merafong. The provincial legislature seems to think that all municipalities

[40] Above n 13 at para 47.

of Gauteng would be affected. Again, this reasoning displays a significant disregard for detail relating to the establishment of municipal areas and their part in making up the boundary of a province. It will be seen from Schedule 1A to the Twelfth Amendment that the re-demarcation of the municipal area of West Rand District Municipality is done by means of a discrete provision that relates only to that municipal area and is described on its own and not in relation to the rest of the boundary of Gauteng.[41] As I have shown earlier, the explanatory note to Map 5 of Schedule 1 to Notice 1998 of 2005 is cast in precise and distinct terms—

> "the municipal area of Merafong City Local Municipality is to be excluded from the municipal area of West Rand District Municipality and included in the municipal area of Southern District Municipality."

[189] It must follow that a veto related to the municipal area of Merafong is localised and discrete and cannot possibly affect the municipal boundaries of the rest of Gauteng. The effect of the veto would be no more than that the part of the area of Merafong City Local Municipality that fell within the municipal area of the West Rand District Municipality would remain in Gauteng. That is what the Twelfth Amendment sought to achieve and that is what the veto would prevent. And nothing more.

[190] As part of the third reason, the final voting mandate warns that any amendment that would be required to address Gauteng's boundary position would not

[41] Reference could also be made to Schedule 5 of the Repeal Act, which treats the establishment of new municipalities in a province discretely and with reference to a unique designation and map of the municipal area as reflected in a specified government notice.

be finalised in time for the local government elections to be held in March 2006. I have held that the provincial veto would have been directed at a cauterised position of Merafong. It is irrational to suggest that, by retaining Merafong within the West Rand District Municipality, local government elections of March 2006 would be marred or stopped for the entire Province of Gauteng. In my view, once the veto had been exercised in relation to Merafong, the cross-boundary municipality would have ceased to exist. This would have meant that between December 2005 and March 2006 the Demarcation Board would have been obliged to determine and demarcate municipalities on each side of the Merafong border and in a manner consistent with the Twelfth Amendment and the Repeal Act. It follows that the excuse that local government elections would be stopped or disrupted is not supportable.

[191] I remain with no doubt that the Provincial Legislature misconstrued the power conferred on it under section 74(8) of the Constitution in a number of respects which I have pointed out in the preceding paragraphs. What seems to have swayed its position is the belated consideration of the implications of not supporting the Bill. The legislature acting through its Portfolio Committee would have considered the pros and cons of supporting or not supporting the Bill prior to adopting a negotiating mandate. It is difficult to understand what the Portfolio Committee then meant by saying "in light of the outcome, impact assessment and analysis of the public hearing submissions" it agrees with the inclusion of Merafong in the Province of Gauteng. In assessing the impact of the submissions one would have thought that one of the

considerations would be the implications of the incorporation of Merafong into Gauteng.

[192] The inescapable conclusion is that the Provincial Legislature not only misconceived its constitutional obligations but also misconstrued the consequences of the exercise of its powers under the Constitution. This error led to its view that unless the Provincial Legislature reneged from its original mandate and supported the Bill as it stood, dire consequences, at odds with national interest, would follow. This, we know, is simply not so. The new decision of the Provincial Legislature was not taken to pursue a legitimate governmental purpose but to prevent consequences which, at best, were imaginary. In these circumstances, I find that the legislative conduct of the Provincial Legislature in the exercise of its power and duty under section 74(8) of the Constitution is irrational and inconsistent with the Constitution.

Remedy

[193] Section 172(1)[42] of the Constitution directs that when this Court decides a constitutional matter and finds any law or conduct that is inconsistent with the Constitution, it must declare the conduct in issue invalid to the extent of its inconsistency. In that event, this Court may make an order that is just and equitable. The remedial jurisdiction of this Court permits it to limit the retrospective effect of the

[42] Section 172(1) provides as follows:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

declaration of invalidity. And if it is just and equitable to do so, this Court may suspend the declaration of invalidity for a period in order to allow the competent authority to correct the defect.

[194] We have found that the Provincial Legislature has not exercised its authority under section 74(8) in a manner consistent with the Constitution. We are thus obliged to declare its decision to approve the Constitution Twelfth Amendment Act invalid. It must follow that the adoption of the Constitution Twelfth Amendment Act and the Cross-Boundary Municipalities Laws Repeal and Related Matters Act in relation to the municipal area of Merafong Local City Municipality is itself inconsistent with the Constitution to that extent. It is plain from what I have said that the effect of this judgment is very limited. The Constitution Twelfth Amendment Act continues to be part of our law in all respects save for the transfer of Merafong-Gauteng to North West Province.

[195] It is so that the entire municipal area of Merafong has been located within the Province of North West for over two years now. The papers suggest that far reaching steps have been taken to facilitate effective administration and service delivery under the aegis of the Province of North West. And yet, a vocal resistance of the concerned communities to the incorporation appears to have lived on. For reasons that are not obscure, it is just and equitable that the declaration of invalidity be suspended for a period to allow the Provincial Legislature to exercise its powers under section 74(8) in a manner consistent with the Constitution in respect of the municipal boundaries and

the location of that part of Merafong located in Gauteng. This form of order is careful not to usurp the legislative power of the province. It properly acknowledges that the conduct that this Court has declared inconsistent with the Constitution is legislative in character and thus has to be replaced by another decision of the Provincial Legislature, should the legislature choose to do so.

[196] In relation to the time period of suspension of the order of constitutional invalidity, I have opted for a period of 18 months. This decision is motivated by the need to afford the provincial legislature and later Parliament the space to deliberate. I am not unmindful of impending national and provincial elections within nearly 12 months from now. This may place stress on the legislative timetable of Parliament. I am also moved by the need to achieve certainty and stability in the community life of the people of Khutsong in particular and of Merafong in general. The papers before us suggest that those communities and various organs of civil society have endured considerable dislocation of nearly all vital aspects of their community life. A prompt resolution of this matter can only accrue to the benefit of communities and people closely affected and to the credit of our fledgling constitutional democracy.

Costs

[197] To escape a challenge on the grounds of non-joinder, applicants have joined no less than sixteen respondents. Many assumed a passive role and abided the decision of this Court. The first, second, third, fourth, fifth, sixth, seventh, eighth and ninth respondents actively opposed the granting of the relief sought by the applicants.

First, second and third respondents represent the national executive. For that reason, it would suffice to order the Minister of Provincial and Local Government (second respondent) to bear the costs in relation to the national executive. Three organs of the Gauteng Province have been cited, the Premier, the MEC for Local Government and the Gauteng Provincial Legislature. A costs order against the Gauteng Provincial Legislature should suffice. And lastly, three organs of state in the North West have been cited. They are the Premier, the MEC for Local Government and the Provincial Legislature. A costs order against the North West Provincial Legislature only would be just and equitable. I propose to make no costs order in relation to all other organs of state cited.

Order

[198] If this were a majority judgment, I would make the following order:

(a) It is declared that, in approving that part of the Constitution Twelfth Amendment Act of 2005 which concerns that part of Merafong City Local Municipality formerly situated in the Province of Gauteng, the Provincial Legislature of Gauteng exercised its legislative power under section 74(8) of the Constitution in a manner that is irrational and inconsistent with the Constitution.

(b) That part of the Constitution Twelfth Amendment Act of 2005 which transfers the part of Merafong City Local Municipality (designated DC48 by Map 12 of the Schedule to Notice 1257 of 2005, published in Government Gazette 28236 of 21 November 2005), formerly situated in the Province of Gauteng, to the

Province of North West Province 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 regulates the transfer of the part of Merafong City Local Municipality, situated in the Province of Gauteng (designated NW405 by Map 14 of Schedule to Notice 1257 of 2005, published in Government Gazette 28236 of 21 November 2005) to North West Province is declared inconsistent with the Constitution and therefore invalid.

(d) The orders in paragraph (b) and (c) above are suspended for a period of 18 months in order to allow the Provincial Legislature of Gauteng to exercise its legislative power under section 74(8) of the Constitution in a lawful manner.

(e) Should it be apparent that Parliament will not be able to adopt a new constitutional amendment altering the boundary of the Province of Gauteng 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.

(f) If Parliament decides not to proceed with the alteration of the boundary of Gauteng, or if the Provincial Legislature of Gauteng 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 Gauteng.

(g) The second respondent, sixth respondent and ninth respondent are ordered, jointly and severally, the one paying the others to be absolved, to pay the costs of the applicants, including the costs consequent upon the use of two counsel.

Madala J, Nkabinde J and Sachs J concur in the judgment of Moseneke DCJ.

MADALA J:

[199] I have read the several judgments prepared by some of my colleagues in this matter and take this opportunity to express my own views about the Merafong debacle. A debacle indeed I call the state of affairs which now exists in Merafong. The flames of discontent raging in the community require a serious effort in dousing those flames, and should not be dismissed lightly on technicalities.

[200] While it is important that there should be finality to legislation and while applicants need to bring their claims to the courts timeously, circumstances alter cases. The Court should not rely only on technicalities to dismiss matters but should weigh all the circumstances, legal and otherwise, on the scales of justice.

[201] The facts of this case appear fully from the judgments of both Van der Westhuizen J and Moseneke DCJ. It is accordingly not necessary to set out any further facts in this regard.

[202] The question of cross-boundary municipalities has indeed been a vexed question since the advent of the new constitutional dispensation. It touched on and affected the lives of communities in respect of administration and service delivery in particular, and caused confusion among the communities. It was therefore imperative that this state of affairs be remedied. The impugned legislation was an attempt to recognise this anomalous situation of cross-boundary municipalities and to do away with such municipalities. Regrettably this has not been achieved in the case of Merafong, where a part of the Merafong City Local Municipality which formed part of the West Rand District Municipality was excised from the Gauteng Province and transferred to the North West Province.

[203] The Merafong community had made representations against the incorporation of Merafong into the North West Province. The Minister, bent on having Merafong incorporated into North West, instructed the Demarcation Board to withdraw its earlier determination and to act in terms of his proposals, which sought the incorporation of Merafong into North West, despite the expressed views of the community to the contrary.

[204] The excision of Merafong from Gauteng was met with heavy opposition, resentment and protest among the members of the Merafong community whose livelihood has always been in and dependant upon the Gauteng Province, both economically and socially. In my view it is important that a lasting solution of the problem should now be found. We do not hear of any other cross-boundary municipalities where there is an upheaval of the level of Merafong. To arrive at a solution to the problem, it is imperative to understand its genesis. It is to this that I now turn.

[205] I lay the cause of the debacle at Merafong squarely at the foot of the Gauteng Provincial Legislature, and for that reason cannot go along with the decision of my colleagues, Van der Westhuizen J and Ngcobo J, who reasons that the present application should be dismissed without further ado, as it were.

[206] I am satisfied that the Gauteng Provincial Legislature complied with the prescripts of section 118(1)[1] of the Constitution in facilitating public involvement to sound the views of the Merafong community regarding the issue of the cross-

[1] Section 118(1) states that:

> "(1) 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."

boundary municipality which is the subject of this case. As Ngcobo J held in *Matatiele Municipality and Others v President of the RSA and Others* (*No. 2*):[2]

> "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, s 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* (CCT 12/05), 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."[3] (Footnote omitted.)

[207] It is indeed satisfactory that section 118 ordains public involvement in the legislative process. It will be recalled that during the apartheid era the views of the black population were never canvassed when legislation affecting them was being mooted—however much they disagreed with the proposed legislation. The new democratic order demands that everyone should play an active role in the legislative process.

[208] The involvement of the public in the legislative process was also intended to salvage the dignity of black people which had been ravaged by apartheid. In the light of this, public involvement in the legislative process is a cardinal virtue in our

[2] [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC).

[3] Id at para 40.

Constitution which should not lightly be departed from.

[209] Having sounded the views of the community which were overwhelmingly against the proposed transfer of Merafong in its incorporation into the North West Province, the next development was the formulation of the negotiating mandate and the final voting mandate.

[210] At this stage we enter into a hazy area where the Gauteng Legislature, armed with a mandate from the people, did an about-turn. Having formulated a negotiating mandate, the Legislature deviated from that mandate and took a different position in the final voting mandate, which reduces their conduct to irrational. It appears as though the Legislature misunderstood its role in the legislative process. It did not bother to go back to the community.

[211] In my view the turn around by the Legislature was the precipitate cause of the debacle which has influenced the feelings of the community.

[212] I agree with the approach proposed by my colleague Moseneke DCJ and the order he proposes.

NGCOBO J:

Introduction

[213] This case raises important questions concerning the powers of a provincial legislature when considering a constitutional amendment which proposes to alter its boundary and the role of this Court to supervise the exercise of that power. In particular, it raises the question of the competence of this Court to review the reasons which moved a provincial legislature to support a constitutional amendment which alters its boundary and the relationship between a provincial legislature and its portfolio committee.

[214] These questions arise out of the conduct of the Gauteng Local Government Portfolio Committee (the Committee) which took a position in its Negotiating Mandate to support the Constitution Twelfth Amendment Bill (the Bill) on condition that the area of the Merafong City Local Municipality (Merafong) be included in the Gauteng Province. However, in its recommendation to the Gauteng Provincial Legislature (the Legislature) on the final mandate to be conferred on the delegation to the National Council of Provinces (the NCOP), the Committee supported the Bill unconditionally. In respect of each position it took, the Committee provided reasons for its position. Based on the report and recommendation of the Committee, the Legislature took a decision to support the Bill unconditionally. The Bill altered the boundary of the Gauteng Province by including Merafong in the North West Province.

[215] The Merafong Demarcation Forum (the Merafong community) contended that the change in the position taken on the Bill demonstrates that the conduct of the

Legislature in supporting the Bill which alters its boundary was irrational. In addition, the Merafong community also contended that in taking the decision to support the Bill, the Legislature did not comply with the provisions of the Constitution which required it to facilitate public participation in the process leading to the decision to support the Bill.

[216] I have read the various judgments prepared by my colleagues in this matter. All these judgments are well-reasoned and are persuasive. On the balance, however, I find the conclusion reached in the judgment of Van der Westhuizen J, upholding the decision of the Legislature, more persuasive. I therefore concur in the judgment and order of Van der Westhuizen J. Because my reasons for concurring differ both in their approach and emphasis, I had better set them out.

Background

[217] The background to this case has been set out fully in the various judgments by my colleagues, in particular, in the judgments of Moseneke DCJ and Van der Westhuizen J. I do not propose to repeat it here. The history and the purpose of the Constitution Twelfth Amendment is also set out in *Matatiele 1*[1] where we had occasion to consider this Amendment in the context of a constitutional challenge to the powers of Parliament to redefine municipal boundaries.[2] It is sufficient for purposes of this judgment to record that the purpose of the Bill was two-fold, namely,

[1] *Matatiele Municipality and Others v President of the RSA and Others* [2006] ZACC 2; 2006 (5) SA 47 (CC); 2006 (5) BCLR 622 (CC) (*Matatiele 1*).

[2] Id at para 2.

first to redefine the geographical areas of the nine provinces using municipal boundaries as the basis for determining provincial boundaries; and second, to abolish cross-boundary municipalities. The Cross-Boundary Municipalities Laws Repeal and Related Matters Act[3] was also introduced simultaneously with the Bill in order to give effect to the proposed constitutional amendment.

[218] The implementation of these two pieces of legislation necessarily involved a decision as to the province in which areas of former cross-boundary municipalities and certain municipalities should be located. The area of Merafong City Local Municipality, a former cross-boundary municipality, was one such area whose fate had to be decided. The legislation in issue here placed this area in the North West Province within the Southern District Municipality. It is this incorporation of Merafong into the North West Province that is resisted through the present challenge by the Merafong community.

[219] It must be emphasised right at the outset that what the Merafong community challenged is the decision of the Legislature to support a bill which alters its boundary. In effect therefore the Merafong community challenged that part of the Constitution Twelfth Amendment which alters the boundary of the Gauteng Province by incorporating the area of Merafong into the North West Province. They mounted two challenges in this regard. In the first place, they contended that the Legislature had failed to facilitate public participation in its decision to support the Bill as

[3] Act 23 of 2005.

required by section 118(1) of the Constitution.[4] For reasons advanced in the judgment of Van der Westhuizen J, this challenge cannot succeed. In the second place, they contended that the Legislature acted irrationally when it approved that part of the Bill which included the area of Merafong in the North West Province. It is on this challenge that this Court is deeply divided and which I consider in this judgment.

[220] Regrettably this Court is divided not only on the legal principles applicable to this particular challenge but also on how the background facts are to be understood. Although there is agreement on the legal principles that govern rationality, the Court is divided on how those principles should be applied on the facts of this case. The Court is further divided on the competency of this Court to investigate the reasons which moved the Legislature to support the Bill.

[221] It will be convenient at this stage to set out, in broad outline, the legal framework within which the issues raised in this case must be understood.

The applicable legal framework

[4] Section 118(1) states:

> "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."

[222] The constitutional scheme within which the issues involved in this case must be considered is provided by sections 74(3)(b) and 74(8) of the Constitution. These sections provide:

> "(3) Any other provision of the Constitution may be amended by a Bill passed—
> (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."

[223] What is apparent from these provisions is that whenever a constitutional amendment contemplates the alteration of any provincial boundary, at least six provinces must vote in favour of the proposed amendment, and, in addition, the legislature of the province whose boundary is to be altered must approve that part of the amendment that affects it. In terms of section 74(8) the NCOP may not pass a bill that alters a provincial boundary unless the provincial legislature concerned has approved it. It necessarily follows that if the province concerned declines to approve the alteration of its boundary, regardless of the support that the Bill might have from other provinces, the part of a bill that affects it cannot be passed. In effect, therefore, the province concerned has a power to veto that part of a bill that alters its boundary.

[224] In *Matatiele 2*[5], we dealt with the effect of these provisions and explained their interaction as follows:

> "The provisions of s74(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'. 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 s74(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."[6]

The court continued:

> "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 s74(3)(b)(ii). Provinces cast their votes by conferring voting mandates on their delegations in terms of s 65 of the Constitution. 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 s74(8) does not render the provisions of s74(3)(b)(ii) redundant."[7] (Footnote omitted.)

And further held:

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[5] *Matatiele Municipality and Others v President of the RSA and Others (No. 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC) (*Matatiele 2*).

[6] Id at para 21.

[7] Id at para 25.

> 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 s74 makes provision for a special majority for a constitutional amendment as required by the Constitutional Principles, the Court explained that s74 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 s74(8) in the Constitution] *also requires the approval of the relevant legislature or legislatures of the province or provinces concerned*'."[8] (Footnote omitted.)

[225] And we concluded that:

> "This construction of s74(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'. 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 s74(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 South African map. As this Court observed in the *First Certification* judgment, this provision constitutes a 'bulwark of provincial integrity'."[9] (Footnotes omitted.)

Voting mandates

[226] Section 74(8) does not however prescribe the manner in which a province should signify its approval or disapproval of the part of a bill that alters its boundary. It has been left to the various provinces to develop their own internal rules for dealing

[8] Id at para 28.

[9] Id at para 29.

with this matter. It appears that in this case, the provinces followed the same practice that they follow when considering a vote that they should cast at the NCOP in terms of section 65 of the Constitution.[10] They confer authority on their delegations to cast votes on their behalf. This is the procedure envisaged in section 65(1)(a) of the Constitution which provides that "each province has one vote [at the NCOP], which is cast on behalf of the province by the head of its delegation".[11] The vote is cast by the head of the delegation in accordance with a mandate given by the provincial legislature. The Constitution requires national legislation to determine a uniform procedure by which legislatures can confer authority to vote on their delegations. This legislation has not yet been passed. In the mean time provincial legislatures have adopted a number of different methods for determining mandates. These methods have to dovetail with the processes of the NCOP.

[227] Broadly speaking, the process of the NCOP allows the provincial delegations to first deliberate and negotiate on the basis of their negotiating mandates. This occurs in the Select Committee of the NCOP. And this is where negotiating mandates are considered. After this process, the delegations report back to their respective portfolio committees. Portfolio committees will consider the deliberations and negotiations of

[10] Section 65 of the Constitution states:

> "(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 provincial legislatures confer authority on their delegations to cast votes on their behalf."

[11] Section 65(1)(a) of the Constitution.

the Select Committee meetings and other relevant materials and consider the final mandate that should be conferred on their respective delegations.

[228] The relevant portfolio committee must thereafter submit a report to the legislature recommending a final mandate and provide a motivation for its recommendation. This report will then be tabled in the provincial legislature for its consideration. The legislature will then decide on the final voting mandate to be conferred on the delegation in the light of the report of the committee. Armed with this, the provincial delegation will attend the plenary session of the NCOP where it will cast the vote on behalf of the province in accordance with the final voting mandate. The Speaker of the Provincial Legislature must, in writing, confirm the authority of the delegation and set out the final mandate.

[229] As appears above, there are two types of mandate that are given, namely, the negotiating mandate which is intended to guide the delegations at the first stages of the NCOP discussion; and the final mandate which determines the vote in the NCOP plenary. In the Gauteng Province, the conferral of a mandate is governed by the rules of the Legislature. These rules make provision for a negotiating and a final mandate. The negotiating mandate is a mandate which, as its name indicates, forms the basis of the negotiations at the NCOP Select Committee discussions. By its very nature therefore, the negotiating mandate does not necessarily reflect the final position of the province. It reflects the preferred position of the province and is therefore subject to reconsideration. By contrast, the final mandate is a mandate which is given to a

delegation instructing it on how to vote on a measure at the plenary session of the NCOP.

[230] The relevant portfolio committee considers and formulates a negotiating mandate. The negotiating mandate sets out the position of the province on the matter under consideration and must give guidance to the delegation on the position that it should take at the initial discussions at the NCOP. This is provided for in Standing Rule 235(6) of the Gauteng Province Legislature which provides:

> "When a committee considers a matter about which the province's delegation to the NCOP must negotiate in the NCOP before voting, the committee must confer a negotiating mandate on the delegation. The negotiating mandate should set out the province's position on the matter and provide guidance to the delegation on the position that it should take."

[231] Unlike the final mandate, a negotiating mandate does not require the approval of the Legislature. The final mandate must first be considered by the portfolio committee in the light of deliberations and the negotiations by the Select Committee of the NCOP, including the negotiating positions advanced during consideration of the negotiating mandate in the NCOP Select Committee. The portfolio committee must thereafter submit a report to the legislature setting out its recommendation on the final mandate to be conferred on the delegation. The position is governed by Rules 235(7) and 236(3). Rule 236(3) states:

> "In the case of a section 76 bill or another matter on which the province's NCOP delegation must be given authority to vote on behalf of the province, the House must by resolution confer authority to vote on the province's delegation to the NCOP."

And Rule 235(7) provides:

> "Before the matter is to be decided in the NCOP, the committee must report to the House and make a recommendation concerning the way that the province's NCOP delegation should be mandated to vote in the NCOP."

[232] It is implicit, if not explicit from Rule 235(7), that the report of the committee must not only set out its recommendation, it must also set out the motivation for its recommendation. This rule must of course be read together with the provisions of Rule 152 which requires, among other things, a committee considering a bill to submit a written report reflecting its position on the bill and provide an explanation for its position on the bill.[12] It is therefore apparent from these rules that a portfolio committee plays a crucial role in the consideration, formulation and conferral of mandates.

The role of a portfolio committee

[233] A large body such as the legislature, to be effective, must function through its committees. Indeed the Constitution permits a provincial legislature to establish its committees.[13] And the Standing Rules of the Gauteng Province make provision for the establishment of various committees. These committees include the Local Government Portfolio Committee. The Standing Rules define the powers of these

[12] Rule 152(2)(c) and 190(1) of the Standing Rules of the Gauteng Provincial Legislature, Version 4, Revision 2, April 2006 http://www.gautengleg.gov.za/Legislature_documents//legislature%20documents/rules/third%20legislature/2006/standing%20rules,%20revision%204%20-%20version%202.pdf, accessed on 7 May 2008.

[13] Section 116(2)(a) of the Constitution.

committees. These include dealing with national bills and other national matters submitted to the committee by the Speaker and to "perform any other function assigned to it by the Legislature."[14] The powers and functions of a portfolio committee are further defined to include the authority to investigate and report on issues that are referred to it or on its initiative. Where a portfolio committee has considered a bill, it is required to submit a written report indicating its position on the bill and provide an explanation for the position of the committee on the bill.[15] These powers include the authority to conduct public hearings on the bills before a provincial legislature, and, as we have seen, the authority to consider and formulate negotiating mandates and recommend final mandates to the legislature. A portfolio committee is therefore an engine through which a legislature functions.

[234] It is within this legal framework that the issues raised in this case must be understood and considered.

The process that preceded the decision of the Legislature

[235] On 16 November 2005, the Speaker of the Provincial Legislature formally referred the Bill to the Committee. On the following day, the Legislature resolved that the Committee should hold a joint public hearing session with the North West Legislature in order to receive representations from the affected communities on the Bill. The Merafong community had already approached the Legislature with memoranda and petitions setting out their views in opposition to the incorporation of

[14] Rule 178(2) and (7).

[15] Rule 152(1) and 152(2)(c).

Merafong into the North West Province. A public hearing was held in the course of which written and oral submissions were made. On 29 November 2005, the Committee deliberated and considered the position to be taken on the Bill and the negotiating mandate to be conferred on the delegation.

[236] The Committee took the position to: (a) in principle, support the phasing-out of the cross-boundary municipalities; (b) agree with the inclusion of Merafong into the Gauteng Province in the light of the submissions at the public hearing; and (c) recommend to the Legislature the amendment to Schedule 1A of the Bill so as to provide for the inclusion of Merafong into the West Rand District Municipality in the Gauteng Province. And based on this position, it adopted the following Negotiating Mandate:

> "Subject to section 74(8) of the Constitution, the Portfolio Committee on Local Government, will support the bill on condition that the municipal area of Merafong is included in the municipal area of the West Rand District municipality of the Gauteng Province."

[237] As the record shows, the Committee adopted this position on the premise that the Legislature had the authority under section 74(8) to propose an amendment to the Bill. It is not immediately clear what the Committee sought to convey by prefacing its Negotiating Mandate with the phrase "[s]ubject to section 74(8) of the Constitution". The phrase seems to convey that, if section 74(8) permits, this is the position it would take on the Bill. This would suggest that it was unclear to the Committee whether its position was permitted by section 74(8). Indeed subsequent events suggest as much.

This is not surprising given the fact that section 74(8) is a novel provision which requires approval of a legislature. Gauteng was not alone in this regard, as the North West Province held a similar view.

[238] That said, it was pointed out to the Gauteng delegation at the NCOP Select Committee deliberations that in terms of section 74(8) provinces do not have the power to amend the Bill. Once it became clear to the Committee that its initial position to recommend to the Legislature that it should propose an amendment to the Bill was unworkable, it reconsidered this position. After deliberations, the Committee unanimously adopted the position that the Bill should be supported by the Legislature. It accordingly made a recommendation to that effect. And consistently with the Standing Rules, the Committee prepared a report for the Legislature.[16]

[239] This report dealt with a number of issues including an overview and analysis of the public hearing. In particular, it sets out the views in favour of and against the inclusion of Merafong into Gauteng, as well as the reasons advanced in support of each view; the explanation why it had to review its initial position; the factors it took into consideration in reviewing its initial position; and a proposal to address the problem of service delivery in North West. The report therefore provides a useful insight into the reasons which motivated the Committee to make the recommendation

[16] Rule 152.

that it made. The contents of the report were not disputed. It is necessary to refer to those relevant parts of the report in some detail.[17]

[17] For convenience, the relevant portions of the report are set out here.

> "8.4 Recommendations on Public Hearing
>
> In principle the Merafong community agreed with the phasing out of cross-boundary municipalities but argued for the inclusion of the municipal area of Merafong into the municipal area of the West Rand Municipality, Gauteng Province.
>
> The public hearings gave every indication that the current service delivery challenges require a focused intervention approach. The purpose of the focused intervention approach will be to promote economic development and growth, human resource development and institutional development capacity, by mobilising and directing funds to sustainable development projects and related matters contained herein.
>
> The intervention approach must provide a supportive framework to the affected Municipality (Merafong City Local Municipality area).
>
> After due analysis of the Portfolio Committee's public hearing report the Department of Local Government together with sector departments of the Gauteng Province and the North West Province must conduct a service delivery audit to establish service delivery backlogs and recommend corrective measures for the North West Province Government. E.g. there is a need to strengthen the human resource capacity in the provision of social services including the provision of proper infrastructure in close proximity to the affected communities.
>
> Home Affairs related services must be accessible and sufficient to the needs of the affected communities.
>
> Heath and Emergency Services are said to be inadequate in the North West Province and clinics are normally without medicines. These are critical issues which need urgent and immediate attention, especially the roll-out of anti-retroviral (ARV).
>
> In conclusion the committee will await a hand-over from the Department of Local Government of the Gauteng Province which report, must outline recommended corrective measures for the North West Province.
>
> Of emphasis it is important to note that National Government has pledged to build and create transitional arrangements that will ensure the service delivery is sustained and improved in affected municipalities.
>
> 9. COMMITTEE POSITION AT THE NEGOTIATING STAGE
>
> The Portfolio Committee on Local Government –
>
> - in principle, supported the phasing-out of cross-boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005];
> - in light of the outcome, impact assessment and analysis of the public hearing submissions, agreed with the inclusion of the geographical area of Merafong municipality into the West Rand District municipality in the Gauteng Province;
> - recommended to the House, amendment to Schedule 1A of the Constitution Twelfth Amendment Bill [B33B-2005], to provide for the inclusion of the municipal area of Merafong into the municipal area of the West Rand District municipality of the Gauteng province.
>
> 10. COMMITTEE POSITION AFTER CONSIDERATION OF NEGOTIATING MANDATES BY THE NCOP SELECT COMMITTEE

"The Portfolio Committee's Negotiating Mandate indicated that Gauteng will support the Constitution Twelfth Amendment Bill on condition that the municipal area of Merafong is included in the municipal area of the West Rand District Municipality of the Gauteng Province. In the absence of any indication whether the Gauteng Legislature has adopted or rejected the Constitution Bill in terms of section 74(8), this signals a qualified support for the Constitution Bill.

Provinces can only adopt or reject the Constitution Bill in terms of Section 74(8) of the Constitution say (aye or nay). The legislative processes applicable to the Constitution Bill does not allow for amendments to be effected in the NCOP.

Subsequent to deliberations and negotiations by the select committee and the diverse positions advanced, the portfolio committee in considering the substance of the issues raised, notwithstanding the views of the public, reviewed their initial position based on the following—

1. The committee supports the phasing out of cross boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005], cross boundary municipalities have proved difficult to administer with negative consequences on the delivery of services.

2. Gauteng supports the creation of viable and sustainable municipalities with a proper revenue base.

3. Implications of Gauteng not supporting the Constitution Twelfth Amendment Bill [B33B-2005].

    - If the veto of the Gauteng Province applies to the whole Constitution Bill as it relates to cross-boundary municipalities, the Cross-Boundary Municipalities Laws Repeal Bill will have to be withdrawn from Parliament, and the local government elections would be conducted within the current municipal configuration, i.e. with cross-boundary municipalities.

    - If the notion of a narrow interpretation is applied to the provisions of the Constitution Bill which may be vetoed by a province, the implications are just as extensive as if the whole Constitution Bill is rejected. Lets for argument sake say Gauteng can only veto (reject) the part of the proposed Schedule 1A that defines its territory; it will mean that the authorisation to have cross-boundary municipalities is revoked, whilst the current boundary of Gauteng remains the same. The result of this would be that not only West Rand District but also Tshwane, Ekhuruleni and Metsweding would be affected. These municipalities (and their local municipalities where applicable) would have to be disestablished and those areas of the municipalities in question that fall in Gauteng. The cross-boundary areas falling in the other provinces would likewise have to be re-demarcated into the new municipalities.

    - The overall complication would be that the current boundaries of Gauteng are still determined with reference to magisterial districts, which are not used or referred to in the Constitution Twelfth Amendment Bill. Consequently, amendments that would be required in the Constitution Bill to address Gauteng's position may be such that it would not be possible to finalise the bill for the Local Government Elections, thus, elections would be conducted within the current municipal configuration.

11. FINAL VOTING POSITION ADOPTED BY THE COMMITTEE

The report of the Committee to the Legislature

[240] The report pointed out that in principle the Merafong community supported the phasing-out of cross-boundary municipalities but wanted to be included in the Gauteng Province. It further pointed out that service delivery between the North West Province and the Gauteng Province was one of the contentious issues raised by the community organisations and in the submissions made during the hearing. In order to address "the current service delivery challenges", the report proposed a "focused intervention approach" which "must provide a supportive framework to the affected [Merafong City Local Municipality]". The report explained that this approach is aimed at—

> "promot[ing] economic development and growth, human resources development and institutional development capacity by [mobilising] and directing funds to sustainable development projects and related matters".

[241] In order to give effect to its recommendation on how to address the problem of service delivery, the Committee recommended that the Department of Local Government should, in consultation with the relevant departments in the Gauteng Province and in North West, "conduct a service delivery audit to establish service delivery backlogs and recommend corrective measures for the North West Province" and thereafter prepare a report for submission to the North West Province. And finally, on this aspect, the report noted that the National Government had pledged to

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In terms of Section 65 of the Constitution, the Local Government Portfolio Committee recommends that the House confer authority of the Head of its Delegation to the NCOP, to **Vote in Support** of the Constitution Twelfth Amendment Bill [B33B-2005]." (The emphasis is original).

build and create transitional arrangements to ensure improved and sustainable service delivery in the affected areas.

[242] The report next sets out the position that the Committee took at the negotiating stage and explained why it had adopted that position. What is apparent from the report is that initially the Committee took the position that the Legislature should propose an amendment to the Bill so as to provide for the inclusion of Merafong into the municipal area of the West Rand District Municipality in the Gauteng Province. And consistently with this position, the Committee formulated a Negotiating Mandate instructing its delegation to support the Bill on condition that Merafong was included in the Gauteng Province. This is the position which the Committee had hoped to recommend to the Legislature. It is for this reason that the Negotiating Mandate contained a recommendation to the House. This recommendation however was not submitted to the Legislature as the Standing Rules do not require a negotiating mandate to be submitted to the Legislature for approval. What the Committee was hoping to do eventually was to recommend to the Legislature that it should propose an amendment to the Bill. However, as it turned out, this could not be done under section 74(8).

[243] Finally the report sets out the position adopted by the Committee after the consideration of negotiating mandates by the NCOP Select Committee. The report explains why the Committee had to review its initial position to support the Bill on condition that Merafong was included in the Gauteng Province. It is apparent from

the report that the initial position adopted by the Committee was taken on the premise that it was competent for the Legislature to propose an amendment to the Bill. And it is plain from the report that this position proved to be unworkable because, in terms of section 74(8), a province may only approve or reject that part of a constitutional amendment that affects its boundary. The report goes on to point out that "[s]ubsequent to deliberations and negotiations by the Select Committee and diverse positions advanced" the Committee decided to review its initial position "notwithstanding the views of the public." The report further explains that the Committee reviewed its initial position on the basis of three factors, namely, (a) the fact that it supports the phasing-out of cross-boundary municipalities; (b) the fact that the Province supports the creation of viable and sustainable municipalities with proper revenue; and (c) the implications if the Legislature did not support the Bill.

The decision of the Legislature to adopt the report

[244] On 6 December 2005 the report was tabled in the Legislature for its consideration. In the Legislature, the Chairperson of the Committee highlighted certain aspects of the report focussing on, among other things, the review and analysis of the public hearing, the Committee's recommendation on how to address the concerns about service delivery, the position taken by the Committee during the negotiation stage and the explanation for reviewing its initial position. In the Legislature the Chairperson pointed out that the Committee reviewed its initial position based on (a) the Committee's support for the phasing-out of cross-boundary municipalities; and (b) the Gauteng Province's support for the creation of viable and

sustainable municipalities. She went on to point out that "it is important to understand what the implications of Gauteng would be for not supporting the Bill." She concluded by saying—

> "[t]hese compelling reasons . . . informed the Committee's final voting position which is . . . that the House confer authority on the Head of the Delegation to the NCOP to vote in support of the [Bill]."

[245] Once the recommendation of the Committee was seconded, the Speaker called for a vote on whether the report should be adopted. The Democratic Alliance and a member of the African National Congress opposed the recommended Final Mandate. The letter by the Speaker to the Chairperson of the NCOP confirming the Final Mandate of the Gauteng NCOP Delegation reveals that "the Gauteng Provincial Legislature adopted the attached report". The entire report was sent to the NCOP. In this manner, the Legislature took a decision to accept the recommendation of the Committee that it should confer a final mandate supporting the Bill. In the event the Legislature approved that part of the Bill that altered its boundary.

[246] It is the change of the position from supporting the Bill on condition that the area of Merafong City Local Municipality be included in Gauteng Province, to the unconditional support of the Bill which included the area of Merafong in the North West Province which is the subject of the constitutional challenge in this Court. The Merafong community contended that the reasons advanced for the change in the position demonstrates irrationality on the part of the Legislature.

Questions presented

[247] The contention by the Merafong community raises the following questions:

(i) The inter-relation between the Committee and the Legislature; in particular, the extent to which the position adopted by the Committee in the negotiating mandate can be attributed to the Legislature;

(ii) The competence of this Court to investigate the reasons that moved the Legislature to adopt the recommendation of the Committee to support the Bill; and

(iii) Whether on all the facts and circumstances of this case the decision of the Legislature to support the Bill was irrational.

Whether the position of the Committee on the Negotiating Mandate can be attributed to the Legislature

[248] There is disagreement amongst my colleagues on whether the position taken by the Committee on the Negotiating Mandate should be attributed to the Province. To my mind the position is governed by Rule 235(6) of the Standing Rules of the Gauteng Province which states:

> "When a committee considers a matter about which the province's delegation to the NCOP must negotiate in the NCOP before voting, the committee must confer a negotiating mandate on the delegation. The negotiating mandate should set out the province's position on the matter and provide guidance to the delegation on the position that it should take."

[249] It is clear from this Rule that the Negotiating Mandate reflects not just the position of the Committee but it "sets out the province's position on the matter" and

should guide "the delegation on the position that it should take." The effect of this Rule is to authorise the Committee to develop a negotiating mandate on behalf of the Province and not on its behalf only. What is significant here is that the Portfolio Committee is composed of members of the Legislature and acts on behalf of the Legislature. And, what is more, it performs "functions assigned to it by the Legislature".[18] A portfolio committee is an engine through which a legislature performs its work. In respect of those matters entrusted to it by a legislature, a portfolio committee acts on behalf of the legislature.

[250] In the light of the provisions of section 235(6), it is therefore not inaccurate to hold that the position of the Province as set out in the Negotiating Mandate was to support the amendment on condition that Merafong remain in Gauteng.

[251] What must be stressed here, however, is that this Negotiating Mandate, as its name indicates, was no more than a negotiating position. It was intended to facilitate the discussions at the NCOP Select Committee which considers negotiating mandates. It was not cast in stone. Indeed it is crucial that negotiating mandates should be flexible so that they can allow effective and constructive deliberation to take place in the NCOP and its committees. This enables delegates to debate and discuss with delegates from other provinces and to suggest new ideas. To hold a legislature to a position adopted during the negotiating session of the NCOP may well inhibit effective and constructive deliberations at the NCOP Select Committee. Indeed this

[18] Rule 178(7).

may inhibit delegates from effectively advancing the interests of their respective provinces.

[252] I am not aware of anything, in principle, that prevents a committee from changing a position adopted during the negotiating stage, in particular, where, as here, the position was premised on a misunderstanding of the powers conferred on the Legislature.

[253] The next question to consider is whether it is competent for this Court to investigate the reasons that moved the Legislature to support the Bill.

The competency of this Court to investigate the reasons for supporting the Bill

[254] In the context of administrative action it is permissible to look at the reasons which motivated the decision under review. This is so because these reasons are normally furnished, and if they are not furnished, they may be demanded.[19] However, in the context of legislation, the legislature does not give reasons for enacting laws. In the nature of things the legislature cannot record a complete catalogue of considerations which moved its members to enact laws. And in the absence of such a record a court can only speculate as to the reasons which may possibly have moved the Legislature to enact a particular law. This is undesirable. However, here we are not concerned with legislation. Nor are we concerned with a decision which falls within the purview of administrative action.

[19] Section 5 of the Promotion of Administrative Justice Act 3 of 2000.

[255] We are concerned here with a decision which a provincial legislature is required by the Constitution to make whenever there is a proposed constitutional amendment which alters its boundary. The Constitution requires such a province to make a decision whether or not to approve the alteration of its boundary. The process by which the decision is taken is in the nature of law-making process. Yet the process does not itself result in the enactment of a law by the Province. Although there is an investigation of the matter followed by a report and a recommendation to the legislature, the process itself is legislative. The decision was taken after the report had been presented to the Legislature. The information in the report was therefore present to the minds of the members of the Legislature. It does not mean, however, that this was the only information upon which the decision to support the Bill was based. They had the purpose of the Bill to consider as well.

[256] In terms of Rule 235(7) of the Standing Rules of the Gauteng Legislature, before a matter is decided in the NCOP, "the committee must report to the House and make a recommendation concerning the way that the province's NCOP delegation should be mandated to vote in the NCOP." Therefore, the report which sets out the recommendation and the motivation for it by the committee in terms of Rule 235(7) should, and in this case does, provide a reasonable account of the factors which moved the committee to make a particular recommendation to the legislature on a matter under consideration. Therefore, before a legislature takes a decision, it has the benefit of the report and the recommendation of the committee. What is required of the

legislature is to consider the report and the recommendation including the motivation for the recommendation, and thereafter decide whether to accept or reject the recommendation.

[257] A report submitted to the legislature may throw light on the material that the legislature considered in arriving at a decision whether or not to accept the recommendation of the committee. Once the record is available it cannot, in my view, be said that it is beyond judicial scrutiny. It forms part of the material that the court may legitimately consider when a decision flowing from it is under challenge. Indeed in *UDM 2*[20] this Court, in the context of considering the rationality of floor-crossing legislation, had regard to the report of a committee appointed by Parliament to consider draft legislation dealing with floor-crossing.[21]

[258] Here the position is even more compelling. The Legislature sent the entire report to the NCOP confirming that it had adopted the report. It seems fair, I think, to say that the Legislature, by sending the report to the NCOP, was communicating to the world that it had taken into account the information and the reasons advanced in the report. That being the case, I am unable to conceive of any reason, both in principle and logic, that would prevent this Court from having regard to the contents of the report in determining whether the decision to support the Bill is rationally related to a legitimate purpose. After all, the report motivates the support for the Bill. The matter

[20] *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*) (No. 2*) [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) (*UDM 2*).

[21] Id at paras 61-7.

must therefore be approached on the footing that the Legislature had regard to, among other things, the report of the Committee.

[259] The question which falls to be considered next is whether having regard to the report of the Committee which was adopted by the Legislature, the decision of the Legislature to support the Bill and approve the alteration of its boundary was rational. But first, the legal principles that govern the rationality of the exercise of public power.

Was the decision of the Legislature to support the Bill irrational?

The applicable legal principles

[260] It is by now axiomatic that our Constitution requires legislation to be rationally related to a legitimate government purpose. If legislation fails to meet this requirement, it is inconsistent with the rule of law and is therefore invalid.[22] This standard applies not only to statutes but also constitutional amendments.[23] The requirement of rationality in legislation is a safeguard against arbitrariness or caprice in the exercise of legislative power. It is a requirement of the rule of law, one of the foundational values of our constitutional democracy.

[261] The Constitution does not prescribe the objective norms for the exercise of the power conferred in section 74(8). And this Court will not substitute its judgement for

[22] *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 84-5. (*Pharmaceutical Manufacturers*) See also *UDM 2*, above n 20 at para 35.

[23] Above n 20 at para 68.

that of the Province. However, this does not mean that the decision of a province to approve or not to approve the alteration of its boundary can never be subject to review by this Court. Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the Constitution. And the Constitution places specific and general constraints upon the manner in which the power is to be exercised. If these limits are transgressed, this Court is entitled to intervene and set the decision aside. Section 74(8) decisions are therefore reviewable for rationality in the same way as any decision to pass a law.

[262] No doubt, the decision whether to approve the alteration of its boundary called for a political judgement by the Legislature. But that judgement had to be made consistently with the requirements of the Constitution. The Constitution places significant constraints upon the exercise of public power through the founding principle enshrining the rule of law.[24] These constraints have, as their basis, the foundational principle of the supremacy of the Constitution, which requires that all branches of government, the judiciary, the legislature and the executive comply with the law and the Constitution. When we had occasion to consider the validity of a constitutional amendment we alluded to this fact, pointing out that "the Constitution as the supreme law is binding on all branches of government and no less on the Legislature and the Executive." And we added, the "Constitution requires the courts to ensure that all branches of government act within the law."[25]

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[24] *Pharmaceutical Manufacturers* above n 22 at para 83.

[25] *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 25.

[263] The question which falls to be decided therefore is whether, having regard to the report of the Committee that was placed before the Legislature together with the Bill, the decision by the Legislature to support the Bill, viewed objectively, advances a legitimate purpose.

The rationality of the decision to support the Bill

[264] It is apparent from the report to the Legislature that, in recommending that the Bill be supported, the Committee was motivated by two primary considerations. The first was its support for the phasing-out of cross-boundary municipalities. As the report makes plain, these municipalities had proved to be difficult to administer and this had negative consequences for service delivery. The other consideration was that the Legislature supported the creation of viable and sustainable municipalities. Now these are legitimate objectives to pursue.

[265] The first advances one of the objects of the Bill. The Bill had a dual purpose: (a) to introduce new criteria for determining provincial boundaries; and (b) to abolish cross-boundary municipalities. The provincial boundaries were previously determined by reference to magisterial districts. This was an apartheid-based criterion. The determination of provincial boundaries by reference to this criterion resulted in some municipalities straddling provincial boundaries. This was managed by introducing the concept of cross-boundary municipalities.[26] Since inception, cross-

[26] Above n 1 at para 12.

boundary municipalities proved difficult to administer. In *Matatiele 1* we alluded to some of these difficulties and said:

> "The problems associated with the administration of the cross-boundary municipalities led to huge financial burdens and costs and often undermined service delivery. According to the government, eight of the 16 cross-boundary municipalities 'experience service delivery challenges necessitating national support intervention.' Various reports that were commissioned on the cross-boundary municipalities recommended that the concept of cross-boundary municipalities should be abolished. As a consequence of these recommendations, the government took a decision as early as November 2002 to do away with cross-boundary municipalities and to review provincial boundaries so as to ensure that all municipalities fall in one province or the other. It was this political decision that led to the enactment of the Twelfth Amendment and the Repeal Act."[27]

[266] The purpose of the Bill was therefore to achieve the twin objectives of redefining provincial boundaries on the basis of municipal areas and abolishing cross-boundary municipalities. The pursuit of these twin purposes is therefore legitimate.

[267] The same goes for the objective of creating viable and sustainable municipalities. Municipalities form an important component of our constitutional scheme of government. They are closer to the community and they constitute the first line for the delivery of services. Indeed one of the objects of local government is "to ensure the provision of services to communities in a sustainable manner".[28] When establishing municipalities, national legislation is enjoined to "take into account the

[27] Id at para 16.

[28] Section 152(1)(b).

need to provide municipal services in an equitable and sustainable manner."[29] Viable and sustainable municipalities with revenue are crucial to the fulfilment of these constitutional objectives.

[268] Once it is accepted, as it must be, that it was legitimate for the Legislature to pursue these two objectives, the next question is whether the decision to support the Bill is rationally related to these two objectives. To my mind, it is. Therefore, when the Legislature exercised its powers under section 74(8) to pursue these objectives, it did not act irrationally. This in my view provides sufficient basis for a conclusion that the decision of the Legislature was rational.

[269] There is a further consideration which appears in the report. Ms Letwaba, the Chairperson of the Committee, alluded to this consideration when presenting the report to the Legislature and put it in perspective. She emphasised that it was important to understand the implications that would have arisen if Gauteng had not supported the Bill. These implications related to what would happen to the boundary of Gauteng as a whole and those of municipalities falling within Gauteng if the Legislature did not support the Bill. The Committee was equally concerned about the effect on the pending elections if Gauteng's boundaries and its municipalities were to be re-configured as a result of its refusal to support that part of the Bill affecting its boundary.

[29] Section 155(4).

[270] Expressing a concern about the implications of not supporting the Bill is not inappropriate. It is a proper matter which a legislature must, among other considerations, have in mind. I did not understand any of the judgments of my colleagues to suggest otherwise. The debate among my colleagues centres around the validity of the implications expressed by the Committee and whether they were decisive in the decision of the Legislature to support the Bill. In my view this debate is not germane to the outcome of this case. I say this because, first, the considerations advanced by the Committee, namely, its support for the phasing-out of cross-boundary municipalities and the Province's support for the creation of viable and sustainable municipalities are sufficient to sustain the rationality of the decision of the Legislature; second, I cannot say that these implications were utterly remote; and third, nor can I say that they were decisive in the decision to support the Bill.

[271] In alluding to these implications, the Committee was speculating on the actions that might be taken by the National Assembly in consequence to its refusal to support the inclusion of Merafong into North West. It may well be that the boundary of Gauteng and possibly other provinces may have been reconsidered. And this may well have resulted in a delay in the holding of the pending elections. I am unable to say, with adequate certainty, that they were so remote that they should not have entered the reckoning. It is not necessary, however, to speculate on these matters. It is sufficient to say that in considering the possible implications of a refusal to support the Bill, the Committee acted appropriately; its conduct cannot therefore be criticised.

[272] There is a further consideration which presents difficulty in exploring the correctness or otherwise of these implications. This is not an issue which was raised in the papers by the applicants. It was therefore neither explored in the papers nor in the written and oral arguments. It is true that this Court did put further questions to the parties. What is significant however is that the role that these implications played in the ultimate decision to support the Bill was not explored in the papers nor in the argument in this Court. In addition, what compounds the problem is that the Chairperson of the Committee when presenting the report in the Legislature advanced two reasons for the recommendation made by the Committee. These were the support for the phasing-out of the cross-boundary municipalities and the support for the creation of viable and sustainable municipalities. After referring to these two primary considerations she then emphasised that it was important to understand the implications of a decision by Gauteng not to support the Bill.

[273] We are therefore left to speculate on the impact that these implications played in the minds of the Committee. Indeed we are also left to speculate on the role that these implications played in the minds of the members of the Legislature who voted to adopt the report. It is not desirable to do so. In *S v Lawrence; S v Negal; S v Solberg*,[30] and in the context of rational basis review of legislation, Chaskalson P cited with approval the following passage from the United States Supreme Court:

> "This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has

[30] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 43.

> the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."[31]

[274] It is true, there might have been other options that could have been adopted to avoid the consequences feared by the Committee. But that is not the issue. It is not for this Court to tell the Legislature how it should have accommodated the views of the majority of the residents of Merafong while at the same time achieving the objectives of the Bill. That is for the Legislature to decide. In *Pharmaceutical Manufacturers* and in *UDM 2* we pointed out that rationality is a minimum requirement for the exercise of legislative power. This standard does not permit us to substitute our opinions as to what is appropriate for the opinions of the Legislature. Once it is established that the purpose sought to be achieved is within the authority of the Legislature, and as long as the Legislature's decision, viewed objectively, is rational, we cannot interfere with that decision simply because we disagree with it or because we consider that the power was exercised inappropriately.

[275] What is significant is that the fact that one of the considerations that the Committee had regard to may have been unsound, does not detract from the fact that the two primary considerations referred to above were legitimate purposes for the

[31] *Carmichael, Attorney-General of Alabama v Southern Coal & Coke Co.* 301 US 495 (1937) at 510.

Legislature to pursue and that the decision to support the Bill is rationally related to these purposes. These two primary considerations provide sufficient support for the decision to support the Bill.

[276] Furthermore there were other considerations which support the rationality of the decision of the Legislature. The report noted that the contentious issue that emerged in the submissions and at the public hearing was the issue of poor service delivery in North West. This was the major concern of the Merafong community. In its report the Committee recommended a focused intervention approach to address "the current service delivery challenges". In addition, it recommended the compilation of a detailed report setting out the problems of service delivery and recommending corrective steps to address the problems. This report was to be submitted to North West for it to implement the measures recommended. In addition, the National Government had pledged to build and create transitional arrangements that would ensure that service delivery was offered on a sustained and improved basis.

[277] In addition, we are told that in order to deal with the concerns relating to service delivery that were raised by the Merafong community, the provincial governments of North West and Gauteng concluded a protocol and various service-level agreements relating to the delivery of services in the affected areas. These agreements, we are told, imposed certain reciprocal duties on the provincial government of Gauteng to continue exercising the function of service delivery on an agency-basis in the affected areas and the provincial government of North West to act

in accordance with the terms contemplated in the agreements. The purpose of concluding these service-level agreements was to ensure the continuous delivery of services in the affected areas notwithstanding the consequent exclusion of Merafong from Gauteng and its inclusion into North West.

[278] What is also apparent from the report is that there were conflicting views within the community of Merafong as to whether Merafong should be included in the North West Province or the Gauteng Province. There were strong views from each side. The Legislature had to take a decision whether the area of Merafong had to be included in the North West Province or the Gauteng Province. The views of the Demarcation Board, as evidenced by the two demarcations it made, demonstrates that each view was viable and rational. Ultimately the Legislature took a political decision that the area of Merafong should be included in the North West Province. The question is whether this decision is rationally related to the legitimate purpose pursued by the Legislature.

[279] As we pointed out in *Pharmaceutical Manufacturers* and repeated in *UDM 2*, rationality as a minimum requirement for the exercise of public power—

> "does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately."[32]

[32] *Pharmaceutical Manufacturers*, above n 22 at para 90. See also *UDM 2*, above n 20 at para 68.

[280] It is true that the report of the Committee does not indicate whether in adopting its initial position the Committee considered the implications of not supporting the Bill. It is apparent from the record, and, in particular, the report, that at that stage the Committee was of the view that it could support the Bill and at the same time propose an amendment to the Bill. It did not at that stage consider not supporting the Bill. But once it became clear that it could not propose an amendment to the Bill, the question of exercising its power to veto the part of the Bill that affects Gauteng and the implications of the exercise of the veto power arose. It does not necessarily follow therefore that the implications of a veto were decisive in the initial decision of the Province whether or not to support the Bill.

[281] What must be stressed here is that it is the Legislature which ultimately took the decision to support the Bill. It did so in the light of the report that was submitted to it by the Committee and the Bill itself. The report told the Legislature of the position that was adopted on behalf of the Province in the Negotiating Mandate. It was explained to the Legislature why that position was reviewed. The Legislature was informed of the factors that were taken into consideration in reviewing the initial position. It was told that steps had been taken to address the problem of service delivery that had emerged as a major source of concern at the public hearing. And the Legislature was aware that the community of Merafong supported the primary objectives of the Bill, namely, the phasing-out of cross-boundary municipalities and the introduction of municipal boundaries as the new criterion for determining

provincial boundaries. Based on at least all this information, the Legislature accepted the recommendation of the Committee to support the Bill.

[282] Another point which must be stressed is this: the fact that the majority of the people of Merafong supported the inclusion of Merafong into the Gauteng Province is not decisive. The purpose of facilitating public involvement under section 118(1) of the Constitution is not to have the views of the public dictate to the elected representatives what position they should take on a bill. The purpose of facilitating public involvement is to enable the legislature to inform itself of the fears and the concerns of the people affected. The decision as to how to address those concerns and fears is, by our Constitution, that of the elected representatives. In this case what emerged at the public hearings as the major concern of the Merafong community was poor service delivery. The Committee took steps to ensure that this problem was addressed. It did not ignore those concerns.

[283] As we have said in the past, one of the defining features of our constitutional democracy is that it is both representative and participative. These two elements should not be seen as being in tension with each other. On the contrary, they are mutually supportive as we noted in *Doctors for Life*:

> "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 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]

[284] On all the facts and circumstances of this case, I am unable to conclude that the decision of the Legislature in supporting the Bill which altered its boundary was irrational. As *Pharmaceutical Manufacturers* teaches us, rationality "is a minimum threshold requirement". And as long as the purpose sought to be achieved by the legislature is within the authority of the legislature, and as long as the legislature's decision, viewed objectively, is rational, this Court is not entitled to interfere with the decision of the legislature simply because it disagrees with it or considers that the power was exercised inappropriately.[34]

[285] What must be stressed here is that the support of the Constitution Twelfth Amendment Bill was directed to the concerns relating to cross-boundary municipalities, the implementation of the new criteria for determining provincial

[33] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 115; 2006 (12) BCLR 1399 (CC) at 144A-D.

[34] *Pharmaceutical Manufacturers* above n 22 at para 90. *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 36.

boundaries and the creation of viable and sustainable municipalities. Viewed objectively, in the light of the problems identified in relation to cross-boundary municipalities, the need to introduce the new criteria for determining provincial boundaries and the object of local government "to ensure the provision of services to communities in a sustainable manner",[1] the decision to support the Bill, cannot be said to be irrational.

[286] For all these reasons, I am unable to conclude that the decision of the Legislature of the Gauteng Province to approve that part of the Constitution Twelfth Amendment Bill which altered its boundary, was irrational. It follows that the challenge based on rationality cannot be upheld. The application must therefore be dismissed.

Langa CJ, Mpati AJ, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of Ngcobo J.

[1] Section 152(1)(b).

SACHS J:

[287] I agree with Moseneke DCJ that approval by the Gauteng Provincial Legislature (the Legislature) of the incorporation of Merafong into the province of North West was given in a manner that was inconsistent with the way it was obliged by the Constitution to exercise its powers. I concur with the order he makes. I wish to add, however, that I believe the process was flawed in another respect. I refer to the failure of the Legislature to communicate with the Merafong community over its plans to renege on its earlier commitment, in the form of its Negotiating Mandate for the National Council of Provinces (NCOP), to oppose the incorporation of Merafong into North West Province. Van der Westhuizen J states that it might have been good for the Legislature to have reported back to the community on its change of stance, but holds that its failure to do so did not reach the level of unconstitutional conduct contended for by the community. I disagree. What follow are my reasons for believing that the default went beyond merely showing a lack of appropriate political respect, and constituted a breach of a constitutional obligation.

[288] I accept fully that the initial engagement of the Legislature with the Merafong community was not a sham. On the contrary, members of the community were given proper notice of the gathering, their diverse representations were carefully and appropriately recorded, and there can be no doubt that their contentions were taken to heart and acted upon. Indeed, the Legislature did more than comply with a minimal

duty to give the community a hearing: it listened. And it went on to incorporate what it had heard into its mandate for the NCOP deliberations. Its report reads as follows:

> "Key determining principles
> Joint public hearing between North West and Gauteng Legislature was held successfully. Among the key principles underpinning the approach of the public hearing are as follows:
>
> - Service delivery and infrastructure development
> - Social and economic development of the affected areas
> - The current and future human settlements and migration patterns as it relates to the interdependence of people and communities
> - Employment, commuting and dominant transport movements and related costs
>
> An overwhelming majority of people attending the public hearing were opposed to the proposal to incorporate Merafong City Local Municipality into the North West Province, due to the fact that they were not provided with substantive and compelling reasons.
>
> People of Merafong regard themselves as being an inseparable part of the West Rand District which forms part of the Gauteng Province. In pursuance of their argument it is argued that there are no social and economic fibre linkages between Merafong and areas in the North West Province such as Ventersdorp, Lichtenburg, Mafikeng, Klerksdorp or Rustenburg.
>
> Committee Position
> The Portfolio Committee on Local Government—
>
> - in principle, supports the phasing-out of cross-boundary municipalities as envisaged by the Constitution Twelfth Amendment Bill [B33B-2005];
> - in light of the outcome, impact assessment and analysis of the public hearing submissions, agrees with the inclusion of the geographical area of Merafong municipality into the West Rand District municipality in the Gauteng Province;
> - recommends to the House, amendment to Schedule 1A of the Constitution Twelfth Amendment Bill [B33B-2005], to provide for the inclusion of the

> municipal area of Merafong into the municipal area of the West Rand District municipality of the Gauteng Province."

The report of the Local Government Provincial Portfolio Committee (the Portfolio Committee) to the Legislature concluded as follows:

> "Negotiating Mandate
> Subject to section 74(8) of the Constitution, the Portfolio Committee on Local Government, will support the bill on condition that the municipal area of Merafong is included in the municipal area of the West Rand District municipality of the Gauteng Province."

[289] The subsequent turn-around could hardly have been more complete. Yet, nothing was communicated to the people of Merafong. I have read the motivation for the change of position and find it far from clear. Whatever the reasons might have been, they were not brought to the attention of the people of Merafong. The calendar of events concerning the NCOP indicates that two weeks were available for further consultations and nine days for explaining the reversal of position to the Merafong community.[1] The consciousness of the need to report back was there. The chairperson of the Portfolio Committee stated:

> "As responsible public representatives, our responsibility is also to go back to those people and advise them as to how we arrived at this conclusion. . . . Our

[1] The first discussions in the NCOP took place on 30 November 2005. For reasons that are not entirely clear on the papers, but are fully discussed in the other judgments, the negotiators then formed the view that the Legislature should no longer comply with the mandate. As a result, on 5 December 2005 the Portfolio Committee of the Legislature resolved to recommend to the Legislature that its delegation to the NCOP vote in support of the Constitution Twelfth Amendment Bill, thereby agreeing to incorporate Merafong into North West Province. On 12 December 2005 the Select Committee of the NCOP considered the final voting mandate from the provinces, and on 14 December 2005 the NCOP in plenary session adopted the Constitution Twelfth Amendment Bill.

> responsibility is to go out there and communicate with those people and inform them of how we arrived at this position, if there is a need for that."

[290] The question then is whether in the special circumstances of this case the failure to continue the engagement with the Merafong community was in breach of the obligation to facilitate public involvement.[2] In answering that question I will deal first with the significance of the default, and secondly with its impact on the reasonableness of the consultation process.

[291] Writing for the majority in *Matatiele 2*,[3] Ngcobo J pointed out that our constitutional democracy has two essential elements which constitute its foundation: it is partly representative and partly participative.[4] 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. As he observed:

> "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."[5]

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[2] As required by section 118(1)(a) of the Constitution, interpreted and applied in *Doctors for Life* below n 6 and *Matatiele 2* below n 3. It reads:

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

[3] *Matatiele Municipality and Others v President of the Republic of South Africa and Others (No 2)* [2006] ZACC 12; 2007 (6) SA 477 (CC); 2007 (1) BCLR 47 (CC).

[4] Id at paras 57-60.

[5] Id at para 58.

Even though words from a judgment should not be read with the exacting interpretative lens one uses when parsing a legislative text, one cannot escape the significance of the use of the word "dialogue". In some ways an interrupted dialogue, when expectations of candour and open-dealing have been established and certain unambiguous commitments have been made, can be more disruptive of a relationship than silence from the start might have been.

[292] As was pointed out by the majority in *Doctors for Life*,[6] 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, to identify themselves with the institutions of government and to become familiar with the laws as they are made.

> "[Such participation] 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."[7]

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[6] *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).

[7] Id at para 115. In *Doctors for Life* the nature of the laws before the NCOP in respect of which reasonable consultation was required was different. The laws involved did not affect the specific configuration of the province itself. A one-off opportunity for anyone in the province to make representations would have been sufficient. What the majority of the Court found to be unreasonable was for the NCOP to offer public hearings and then renege on the offer. In *Matatiele 2* something more was required. The Legislature had voted to affirm the boundary changes without having had any direct consultation at all with the affected community. As Van der Westhuizen J points out, in the present matter there was direct consultation with the Merafong community. The question, however, is whether, given the nature of the power being exercised and the intense interest of the

In the present matter, the failure of the Legislature to go back to the community and explain its abrupt about-turn violated each and every one of these constitutional goals. It diminished the civic dignity of the majority. It denied any spirit of accommodation and produced a total lack of legitimacy for the process and its outcome in the eyes of the people. And finally, it gave rise to a strong perception – reflected in the papers – that the legislative process had been a sham because an irreversible deal had already been struck at a political level outside the confines of the legislative process in terms of which, come what may, Merafong was going to go to North West.

[293] This brings me to the question whether in these dolorous circumstances the failure to resume consultation breached the constitutional standard of reasonableness. In this regard there can be no doubt that participatory democracy does not require constant consultation by the Legislature with the public, nor does it presuppose that the views of the community will be binding on the Legislature, nor that the Legislature is precluded from changing its mind. Far from it. What is involved is not a set of prescriptions but an appropriate civic relationship. As with so much in law, everything will depend on context. In the words of Ngcobo J in *Matatiele 2*:

> "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 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

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Merafong community in the legislative process, it was constitutionally reasonable for the Legislature to do an abrupt about-turn without engaging in any further consultations.

> legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."[8] (Footnote omitted.)

[294] Given the discrete nature of the community affected and the intense impact on their interests, I believe that three factors combined to make it unreasonable in the present matter for the Legislature not to have resumed at least some degree of consultation with the Merafong community. Taken together they created a duty to speak and not to remain silent.

[295] The first relates to the nature of the legislation under consideration. What was at stake was not just an ordinary piece of legislation of broad nation-wide importance about to be considered in the NCOP. Nor was it a constitutional amendment in respect of which the concurrence of six out of the nine provinces in the NCOP had to be achieved. It concerned the possible exercise of a unique veto power which the Constitution gives to each provincial legislature in respect of alterations to its provincial boundaries.[9] At stake were the direct interests of a discrete community specifically identified by the Constitution Twelfth Amendment itself. There can be

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[8] Above n 3 at para 68.

[9] Section 74(8) of the Constitution provides:

> "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*." (Emphasis added.)

Section 74(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." (Emphasis added.)

few matters that could have required more intense consultation than re-delimitation of the area in respect of which the very writ of the Legislature itself would run. Where communities are effectively to be relocated, it is the existence of reasonable consultation that marks the difference between a gracious and constitutionally acceptable goodbye, however sad, and a harsh and constitutionally invidious expulsion.

[296] This is where the second specific factor kicks in, namely the extent of the potential impact of the proposed change on the Merafong community. The boundary alteration was not merely topographical, it was sociological, involving more than the loss of a hill or a river. As the overwhelming majority of the Merafong community had in carefully motivated submissions pointed out, the proposed transfer stood to affect them both functionally and emotionally. The theme of the right to choose one's identity looms large in our Constitution,[10] and lawmakers gloss over identity concerns at their peril.

[297] The crucial third factor governing reasonableness was a strong public expectation created by two objective considerations. The first was that an independent body, the Municipal Demarcation Board, had expressly rejected an earlier

[10] See for example *MEC for Education, KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at paras 53 and 62-65; *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 59; *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 36; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 26.

proposal that Merafong be incorporated into North West Province.[11] The second was the adoption of the Negotiating Mandate as referred to above. The adoption of that mandate had not only corresponded to what the majority in Merafong wanted. It had followed a thorough process of consultation and represented the conclusion of a carefully reasoned and fully-motivated report. None of these objective considerations had changed. The new circumstances referred to by the Portfolio Committee related to technical procedures in the NCOP and possible implications for demarcation of voting districts in the next municipal elections. On the assumption that legitimate state objectives were involved, these were matters that could and should have been discussed with those whose fate was being decided.

[298] It is the specific conjunction of these three factors which, in my view, must guide the evaluation of the facts in this matter. Civic dignity was directly implicated. Indeed, it is important to remember that the value of 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.[12]

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[11] The Municipal Demarcation Board Press Statement explains:

> "Submissions and motivation in terms of section 24 and 25 of the Demarcation Act, indicate overwhelming resistance to the inclusion of Westonaria and the City of Merafong into the Southern District Municipality. The Board agreed with some motivations provided, and decided, in terms of section 21(5) of the Demarcation Act, to withdraw its re-determination in Notice No. 3359 gazetted in the Gauteng Provincial Gazette No. 375 of 2 September 2005, and Notice No. 458 gazetted in North West Provincial Gazette No. 6208 of 2 September 2005. The Westonaria Local Municipality and the City of Merafong Local municipality thus remain within the West Rand District municipality, and the boundaries of the Southern District municipality also remain unchanged."

[12] See Bryden "Public Interest Intervention in the Courts" (1987) 66 *Canadian Bar Review* 490 at 509, endorsed by the Court of Appeals of Quebec, Canada, in *Caron v R* 20 QAC 45 [1988] RJQ 2333 at para 14, and cited with approval by Ngcobo J in *Matatiele 2* above n 5 at para 66.

[299] Given that the purpose of participatory democracy is not purely instrumental, I do not believe that the critical question is whether further consultation would have produced a different result. It might well have done. On the facts, I am far from convinced that the outcome would have been a foregone conclusion. Indeed, the Merafong community might have come up with temporising proposals that would have allowed for future compromise and taken some of the sting out of the situation. For its part, the Legislature might have been convinced that the continuation of an unsatisfactory status quo would have been better – even if just to buy time for future negotiations – than to invite a disastrous break-down of relations between the community and the government. Yet even if the result had been determinable in advance, respect for the relationship between the Legislature and the community required that there be more rather than less communication.

[300] There is nothing on the record to indicate that the Legislature took any steps whatsoever even to inform the community of the about-turn, let alone to explain it. This is not the sort of information that should be discovered for the first time from the newspapers, or from informal chit-chat. Once structured processes of consultation were put in place, with tangible consequences for the legislative process and of central importance to the community, the principle of participatory democracy required the establishment of appropriately formal lines of communication, at least to clarify, if not to justify, the negation of those consequences. In my view, then, it was constitutionally incumbent on the Legislature to communicate and explain to the

community the fact of and the reasons for the complete deviation from what the community had been led to believe was to be the fruit of the earlier consultation, and to pay serious attention to the community's response. Arms-length democracy is not participatory democracy, and the consequent and predictable rupture in the relationship between the community and the Legislature tore at the heart of what participatory democracy aims to achieve.

[301] I would hold that, after making a good start to fulfil its obligation to facilitate public involvement, the Legislature stumbled badly at the last hurdle. It ended up failing to exercise its responsibilities in a reasonable manner, with the result that it seriously violated the integrity of the process of participatory democracy. In choosing not to face the music (which, incidentally, it had itself composed) it breached the constitutional compact requiring mutuality of open and good-faith dealing between citizenry and government, and thereby rendered the legislative process invalid.

SKWEYIYA J:

[302] I have had the advantage of reading and studying all the different judgments written by my colleagues, namely Moseneke DCJ, Madala J, Ngcobo J, Sachs J and Van der Westhuizen J and I concur in the judgments of Van der Westhuizen J and Ngcobo J read together for the reasons advanced by them. I merely wish to add the following.

[303] This application has been brought to this Court on behalf of many thousands of people who live in the Merafong City Local Municipality. The municipality of Merafong was situated in two provinces, Gauteng and North West, and was accordingly a cross-boundary municipality. The constitutional amendment under debate resulted in the whole of the municipality being situated within the North West Province. The applicants are convinced that the decision to locate the whole of this municipality in the North West Province is wrong. They are opposed to the decision and have protested in support of their rejection of the decision. There has been violence and destruction of property as a result of the protest action taken.

[304] Most of the people in the communities are convinced that the whole of the Merafong City Local Municipality should be moved to Gauteng. They have no doubt that service delivery in virtually all sectors will be much better if the municipality was situated in Gauteng than if it was in North West. I may say at this stage that no one has ever before suggested, nor could anyone reasonably suggest in the circumstances, that the municipality should be divided into two so that that part of it situated in Gauteng should remain in Gauteng, and the part which was in North West should remain in North West.

[305] The communities expect this Court to achieve the object of ensuring that the whole of the Merafong City Local Municipality is relocated from North West to Gauteng. That is the reason why the applicants seek to set aside the relevant

amendment to the Constitution as unconstitutional and a nullity. I stress that it is not the function of this Court to decide whether it is more appropriate for the Merafong City Local Municipality to be in Gauteng or in North West. That is not an exercise that any of the judges in this Court is qualified to undertake. The determination of provincial boundaries and the inter-related issue of the demarcation of municipal boundaries within each province are complex issues requiring expertise in the fields of town planning, provincial planning, sociology, political science and geography, at the very least. It is impossible for me to tell at this stage which course is better for the people of Merafong, the province of Gauteng, the province of North West and the country as a whole. I must say frankly to the community that it is not ours to decide where Merafong should be located. That is a political decision which must be made elsewhere.

[306] I do not agree with the approach or conclusion set out in those judgments that say that the Constitution has not been complied with and that the amendments are unlawful. All this Court can do is determine whether proper procedures have been complied with by the Province of Gauteng and whether the legislation is rational. If so, that is the end of the matter. The difficulties of those who believe that the Merafong City Local Municipality has been inappropriately located would not be resolved even if this Court had concluded that the procedures were not properly complied with or that the legislation is irrational. If this Court had come to that conclusion the National Legislature and the provinces would probably have been

given 18 months[1] to resolve the problem and to get the amendment procedurally correct. If the conclusion of the national and provincial governments, on advice they currently have in relation to where Merafong should be located, remains the same as it was at the time of the constitutional amendment, the amendment would probably be passed in exactly the same terms. This Court is not and cannot be a site for political struggle. It can do nothing to resolve differences within that process. We are a site for the vindication of rights and the enforcement of the Constitution. All that this Court can do in relation to a constitutional amendment is to determine whether the constitutional requirements for the amendment have been met. We have a limited role.

[307] Van der Westhuizen J makes an important point which is that while the conduct on the part of democratically elected legislatures may be discourteous, this does not necessarily render their actions unconstitutional and their enacted legislation invalid.[2] While the Constitutional Court is the highest court in the land, it cannot and should not be seen as a panacea. This does however not mean that discourteous officials should be let off the hook merely because this Court cannot invalidate the legislation.

[308] The Constitution makes clear that South Africa is a democratic state founded on the values of dignity, equality and freedom. As Van der Westhuizen J highlights, if voters perceive that their democratically elected politicians have disrespected them or believe that the politicians have failed to fulfil promises made by the same politicians

[1] See the order proposed by Moseneke DCJ above in [198].

[2] See above at [60].

without adequate explanation, then the politicians should be held accountable by the voters. Courts deal with bad law; voters must deal with bad politics. The doctrine of separation of powers, to which our constitutional democracy subscribes, does not allow this Court, or any other court, to interfere in the lawful exercise of powers by the legislature.

[309] A democracy such as ours provides a powerful method for voters to hold politicians accountable when they engage in bad or dishonest politics: regular, free and fair elections. Section 19 of the Constitution embodies this powerful avenue and provides that—

> "(1) Every citizen is free to make political choices . . .
>
> . . . .
>
> (2) Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.
>
> (3) Every adult citizen has the right—
>
> (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret".

[310] The people of Merafong rightly brought their dispute to this Court. However, Van der Westhuizen J and Ngcobo J are correct in finding that the Gauteng Provincial Legislature did not act irrationally and thus this Court cannot find that the Amendment passed was invalid. Our duty ends .here.

Yacoob J concurs in the judgment of Skweyiya J.

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