



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Merafong Demarcation Forum and Others v President of the Republic of South Africa  
and Others**

**Case CCT 41/07  
[2008] ZACC 10**

**Date of Judgment: 13 June 2008**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court handed down judgment in an application brought by members of the Merafong community, challenging the validity of parts of the Constitution Twelfth Amendment Act of 2005 (Twelfth Amendment), as well as of the Cross-boundary Municipalities Laws and Repeal Related Matters Act 23 of 2005.

The Twelfth Amendment did away with cross-boundary municipalities and - in doing so - changed provincial boundaries, including the boundary between the provinces of Gauteng and North West. The Merafong City Local Municipality (Merafong) was a cross-boundary municipality. One part of 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. Section 74 of the Constitution requires the approval of a province for the passing of a Bill by the National Council of Provinces (NCOP) if the Bill alters the boundaries of that province.

The applicants asked this Court to declare that the Gauteng Provincial Legislature had failed to comply with its obligation in terms of section 118 of the Constitution to facilitate public involvement in its processes leading up to the approval of the Twelfth Amendment Bill by the NCOP. In the alternative, they sought a declaration that the Legislature had failed to exercise its legislative powers rationally when it decided to vote in support of the relevant parts of the Twelfth Amendment Bill in the NCOP. The case raised complex constitutional and factual issues and since argument was heard, this Court twice called for further evidence and submissions.

Late in 2005, the Gauteng and North West Provincial Legislatures called for and received submissions on the location of Merafong. A public hearing was also held. The majority of views expressed favoured Merafong's being located in Gauteng. The Local Government Portfolio Committee of the Gauteng Legislature thereafter formulated a negotiating mandate,

associating itself with the objective of doing away with cross-boundary municipalities and recording support for the Twelfth Amendment, on condition that Merafong be included in Gauteng. After being advised that the amendment required to achieve this was not possible in the NCOP, and after considering several options, the Portfolio Committee formulated a final mandate and recommended that Gauteng support the Twelfth Amendment in the NCOP, which the Gauteng Legislature then did.

As to the facilitation of public involvement, Van der Westhuizen J (writing for a majority of nine justices) found that the Legislature had fulfilled its duty to facilitate public involvement as required by section 118(1)(a) of the Constitution. The Legislature took reasonable measures to solicit public comment. The submissions made by the public were taken into account. Though the Portfolio Committee failed to report to the community when it changed its position, this possibly disrespectful conduct did not equal unconstitutional conduct.

Sachs J disagreed. In his view the failure of the Legislature to communicate with the Merafong community over its plans to renege on its earlier commitment constituted a breach of their constitutional obligation to facilitate public involvement. The nature of the legislative decision under consideration, the extent of the impact on the community of Merafong, and the strong public expectation that the Legislature had created that it would support the incorporation of Merafong into Gauteng, cumulatively resulted in a requirement that the Merafong community be appropriately involved in the entire decision-making process. Arms-length democracy was 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 aimed to achieve.

As to the rationality of the Gauteng Legislature's conduct, the applicants argued that the decision to locate Merafong in North West rather than Gauteng and the change of mind by the Portfolio Committee, were irrational.

Van der Westhuizen J applied the standard for rationality previously set out by this Court. On the merits of the decision to locate Merafong in North West, instead of Gauteng, he found that there was a link between the means adopted by the Legislature and the legitimate government end sought to be achieved. This Court's rationality jurisprudence does not permit an evaluation of the merits of the Legislature's decision. This was a matter to be decided by the appropriate political processes.

On the change of position and the reasons advanced for it, Van der Westhuizen J found that it cannot be concluded that the Gauteng Legislature acted irrationally. It did not materially misunderstand its constitutional powers and obligations. Taking the submissions of the community into account, the Portfolio Committee formulated a negotiating mandate. When it became clear that the Twelfth Amendment Bill could not be amended and that the part affecting Gauteng's boundaries had to be either approved or vetoed, the Committee considered all relevant circumstances and recommended that the Legislature support the Bill in the NCOP.

Ngcobo J agreed that the Legislature had not acted irrationally. The negotiating mandate formulated by the Portfolio Committee on behalf of the Legislature was by its nature subject to change. Once the true legal position was understood, the Legislature changed its position. Its reasons for supporting the Twelfth Amendment, as they appear from the final mandate,

reflect legitimate governmental objectives. The Legislature's support for the Bill was rationally related to these objectives, and its conduct was thus constitutional.

Skweyiya J concurred with Van der Westhuizen J and Ngcobo J. He wrote separately to stress that it is not the function of this Court to decide whether it is appropriate for Merafong to be in Gauteng or in North West, but rather that this is a political decision. Furthermore, the Court is not a site for political struggle; instead in instances such as this one the Constitution provides voters with a powerful method to hold politicians accountable through regular, free and fair elections.

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

In a minority judgment, concurred in by Madala J, Nkabinde J and Sachs J, Moseneke DCJ held that the application to set aside the challenged portion of the Twelfth Amendment Act should succeed. He found that the Legislature failed to exercise its legislative power rationally and that its decision to support the passage of the Twelfth Amendment Act was a constitutional nullity. The minimum requirement for the exercise of public power is rationality, in the absence of which public power can be said to be exercised arbitrarily. He concluded that when the Legislature abandoned its decision not to approve the Bill as it stood and resolved to support the Bill amending its provincial boundaries, it acted without a proper appreciation of its powers and duties and therefore irrationally. Since the impugned legislative decision of the Legislature did not pursue a legitimate governmental purpose, its decision did not meet the rationality standard imposed by our Constitution and is therefore invalid. This would mean that the relevant portion of the Twelfth Amendment and legislation that gives effect to that portion of the amendment would be inconsistent with the Constitution to the extent that it permits the incorporation of the affected part of Merafong into North West.

Moseneke DCJ also found that despite the general rule that courts should not second-guess the wisdom of the lawmaker in passing a law and its understanding of the consequences of those laws, in the special circumstances of this case, there is nothing inappropriate for this Court to test the rationality of the decision of the Legislature in performing the legislative function related to the passage of a constitutional Amendment Bill which altered its boundaries.

Madala J held that the Legislature's change of position between the two mandates reduced their conduct to the level of irrationality.

The majority therefore held that the Gauteng Provincial Legislature had not exercised its legislative powers irrationally.

The application was consequently dismissed.