SACHS J ABRIDGED JUDGMENT (CONCURRING)

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

[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. 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 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. 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*, Ngcobo J pointed out that our constitutional democracy has two essential elements which constitute its foundation: it is partly representative and partly participative. 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."
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> 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*, 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."

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 legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say." (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 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, 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 proposal that Merafong be incorporated into North West Province. 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.

[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.