CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/05

MATATIELE MUNICIPALITY	First Applicant
POVERTY ALLEVIATION NETWORK	Second Applicant
CEDARVILLE AND DISTRICT FARMERS ASSOCIATION	Third Applicant
MATATIELE DRAKENSBERG TAXI ASSOCIATION	Fourth Applicant
MATATIELE CHAMBER OF COMMERCE	Fifth Applicant
GOVERNING BODY OF THE KING EDWARD HIGH SCHOOL	Sixth Applicant
GEORGE MOSHESH TRIBAL AUTHORITY	Seventh Applicant
MALUTI CHAMBER OF BUSINESS	Eighth Applicant
MATATIELE AND MALUTI COUNCIL OF CHURCHES	Ninth Applicant
MPHARANE COMMUNITY BASED ORGANISATION	Tenth Applicant
ZIZAMELE PRESCHOOL TRAINING PROJECT	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
THE PREMIER OF THE EASTERN CAPE	Fourth Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCE OF THE EASTERN CAPE FOR LOCAL GOVERNMENT	Fifth Respondent
THE PREMIER OF KWAZULU-NATAL	Sixth Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL OF THE PROVINCE OF KWAZULU-NATAL FOR LOCAL GOVERNMENT	Seventh Respondent
MUNICIPAL DEMARCATION BOARD	Eighth Respondent
SISONKE DISTRICT MUNICIPALITY	Ninth Respondent
ALFRED NZO DISTRICT MUNICIPALITY	Tenth Respondent
O.R. TAMBO DISTRICT MUNICIPALITY	Eleventh Respondent
UMZIMKULU MUNICIPALITY	Twelfth Respondent
UMZIMVUBU MUNICIPALITY	Thirteenth Respondent

together with

THE SPEAKER OF THE NATIONAL ASSEMBLY	Fourteenth Respondent
THE CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fifteenth Respondent

Heard on : 14 February 2006

Decided on : 27 February 2006

JUDGMENT

NGCOBO J:

Introduction

[1] This case concerns the constitutional validity of the Constitution Twelfth Amendment Act 2005 ("the Twelfth Amendment") and the Cross-Boundary

Municipalities Laws Repeal and Related Matters Act 23 of 2005 ("the Repeal Act"). In terms of these legislative enactments, the boundary between the province of KwaZulu-Natal and the province of the Eastern Cape was altered so that the area which was Matatiele Local Municipality ("Matatiele Municipality") was transferred from KwaZulu-Natal to the Eastern Cape; new municipal boundaries were created as a consequence. In view of the importance of the constitutional issues involved in this case, we would have preferred to have had more time to consider these issues and formulate our view. Time does not permit this. The local government elections will be held on 1 March 2006. And our decision will have an impact on those elections. In view of the urgency of the matter there is a pressing need to announce our conclusions and basic reasoning within the shortest possible time.

[2] Although on the papers there is a substantial issue as to whether the Twelfth Amendment was passed in accordance with the procedure set out in the Constitution, this point was not taken in argument. For reasons that appear later on in this judgment, we have decided to call for further submissions on this issue. In this judgment we consider the main contention that was advanced in support of the constitutional challenge to the Twelfth Amendment, namely, that in passing the Twelfth Amendment, Parliament unconstitutionally usurped the powers of the Municipal Demarcation Board to re-determine municipal boundaries. This judgment does not decide the question whether the Twelfth Amendment was enacted in accordance with the procedure set out in the Constitution. This issue will be considered when this Court finally decides the application.

[3] The applicants also challenged provisions of the Repeal Act. It is not appropriate to determine that challenge till the constitutionality of the Amendment Act has been finally determined. In the circumstances, we do not consider that challenge now. If the applicants succeed on that challenge in due course, just and equitable relief will have to be formulated at that stage. It is accordingly not necessary at this stage to decide whether the applicants are entitled to direct access in relation to the Repeal Act. We also do not decide the question of costs. This will be decided when the remaining issues in this case are finally determined.

[4] The applicants, who include the Matatiele Municipality and a diverse group of business people, educators, associations and non-governmental entities residing in Matatiele, are challenging the constitutional validity of the Twelfth Amendment and the Repeal Act. The substantial relief sought by the applicants is an order that:

> "2. that the Constitution Twelfth Amendment Act is unconstitutional alternatively, ultra vires in that it in effect:
>
> 2.1 re-demarcates the Matatiele Municipality;
>
> 2.2 changes the boundary and composition of the Matatiele Municipality;
>
> 2.3 moved the provincial boundary with the effect that the Matatiele Municipality is moved from its present District Municipality and Province to another District Municipality and Province;
>
> without complying with the process set down therefor in the Constitution.
>
> 3.1 that Applicants be granted leave to bring the application for the relief in this paragraph by direct access.
>
> 3.2 that the Cross-Boundary Municipalities Laws Repeal and Related Matters Act is unconstitutional alternatively, ultra vires in that it re-demarcates the Matatiele Municipality in a manner which is inconsistent with the Constitution and ultra vires the Constitution or other national legislation.

4. that it is declared that in passing and signing the said Acts Parliament and the President respectively have failed to fulfill a constitutional obligation to Matatiele Municipality in that the constitutional process for re-demarcation thereof has been unconstitutionally circumvented, and that First, Second and Third Respondents have not complied with the principles of co-operative government in the management of this dispute over the re-demarcation of Matatiele Municipality.
5. that First, Second and Third Respondents be ordered to pay the costs of this application.
6. that Applicants be granted such further and/or alternative relief as to this Court seems meet."

[5] The President of the Republic of South Africa, the Minister of Provincial and Local Government ("the Minister") and the Minister of Justice and Constitutional Development who are first, second and third respondents respectively, are resisting this challenge. The remaining respondents have decided to abide the decision of the Court. They are the Premier of the Eastern Cape; the Member of the Executive Council of the Province of the Eastern Cape for Local Government; the Premier of KwaZulu-Natal; the Member of the Executive Council of the Province of KwaZulu-Natal for Local Government; the Municipal Demarcation Board; Sisonke District Municipality; Alfred Nzo District Municipality; O.R. Tambo District Municipality; Umzimkulu Municipality; Umzimvubu Municipality**;** the fourth to thirteenth respondents respectively. The Speaker of the National Assembly and the Chairperson of the National Council of Provinces ("NCOP") subsequently sought, and were granted, leave to intervene on the side of the respondents.

[6] The constitutional challenge was lodged two days before Christmas, with a request that it be dealt with as a matter of urgency. It was said that the matter was one of extreme urgency and national interest which called for an expedited hearing. It was also said that the Executive had moved with great haste to complete the objects of the impugned legislation before the municipal elections, which the Matatiele Municipality had been advised were due to be held on 1 March 2006. This date had not yet been formally proclaimed at the time. It has since been proclaimed.[1]

[7] In order to set the scene for this legal drama, it will be convenient to set out first, how Matatiele Municipality came to be established as a local municipality; second, to say a word on the cross-boundary municipalities which triggered the legislation now under challenge; and finally, to sketch the history of the re-determination of the boundaries of Matatiele Municipality which eventually led to the present constitutional challenge. This background provides the context in which the constitutional challenge must be considered.

Background

A. The establishment of Matatiele Municipality

[8] The boundary between KwaZulu-Natal and the Eastern Cape had been an issue of some concern to the government for many years. The present-day Matatiele Municipality and the Maluti area originally constituted a single area. Matatiele was an urban development while Maluti was a rural area. In 1978, the Steyn Commission

[1] Government Gazette 28380 GN 4, 6 January 2006.

recommended that Matatiele and Maluti be separated, and that Maluti become part of the Transkei while Matatiele remain in KwaZulu-Natal. This was in line with the apartheid policy of separate development and relocating Africans into rural areas which formed homelands such as the Transkei while ensuring that whites remained in the urban areas.

[9] When the interim Constitution commenced on 27 April 1994, it established the nine provinces in the Republic and determined their provincial boundaries by reference to magisterial districts established in terms of the Magistrates' Courts Act 32 of 1944, as amended.[2] The present-day local municipality of Matatiele was designated the magisterial district of Mount Currie, in KwaZulu-Natal. The present-day area of Maluti was included as part of the magisterial district of Matatiele, in the Eastern Cape. These provincial boundaries were adopted by the Constitution.[3] Thus the magisterial district of Matatiele as described in the Interim Constitution represents the area currently referred to as "Maluti", while the magisterial district of Mount Currie as described in the Interim Constitution represents the area currently referred to as Matatiele Municipality.[4]

[10] During 1995, the government appointed the Trengove Commission to inquire into and make recommendations concerning, in part, the feasibility of: first, excluding

[2] Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution"), s 124 (2), Schedule 1.

[3] Section 103 of the Constitution of the Republic of South Africa, 1996.

[4] Schedule 1 Part 1 of the interim Constitution. But as will appear from this schedule certain land and farms Drumleary 130 and Stanford 127, which were in KwaZulu-Natal, were proclaimed as part of the Eastern Cape.

portions of the magisterial district of Matatiele (present-day Maluti) and surrounding areas from the Eastern Cape and including them in KwaZulu-Natal; and second, excluding the magisterial district of Mount Currie from KwaZulu-Natal and including it in the Eastern Cape. A majority of the Trengove Commission recommended that the District of Mount Currie be excised from the province of KwaZulu-Natal and incorporated into the province of the Eastern Cape. A minority recommended that Mount Currie remain in KwaZulu-Natal. Neither option was adopted.

[11] During 2000, the Board established the Matatiele Municipality in the area that was described as Mount Currie in the interim Constitution. This municipality was incorporated into Sisonke District Municipality in KwaZulu-Natal.[5] A small portion of Sisonke District Municipality was surrounded by Umzimvubu Local Municipality which formed part of Alfred Nzo District Municipality in the Eastern Cape.[6] In this manner, the present day Matatiele Municipality came to be established in KwaZulu-Natal. The magisterial district of Matatiele (the Maluti area) was demarcated by the Board to form part of a local municipality known as Umzimvubu and placed within Alfred Nzo District Municipality, which fell within the Eastern Cape.

B. Cross-boundary municipalities

[12] The determination of provincial boundaries by reference to magisterial districts resulted in some municipal boundaries straddling provincial boundaries. To manage

[5] Provincial Gazette of KwaZulu-Natal 5535, MN 147, 18 July 2000. This determination was authorised by the Local Government: Municipal Demarcation Act 27 of 1998.

[6] Provincial Gazette Extraordinary 613 GN 169, 26 July 2000; Provincial Gazette 636 CN 200, 9 August 2000 (correcting GN169).

this situation, the Constitution was amended in order to introduce the concept of cross-boundary municipalities. Section 155(6A) of the Constitution authorised the establishment of cross-boundary municipalities.[7] This provision permitted a municipal boundary to be established across a provincial boundary where this could not be avoided. However, the establishment of cross-boundary municipalities was subject to the consent of the provinces affected and national legislation authorising the establishment of a cross-boundary municipality. To give effect to section 155(6A), the Local Government: Cross-Boundary Municipalities Act 29 of 2000 ("Cross-Boundary Municipalities Act") was enacted. This statute authorised the Executive Councils responsible for local government in the provinces which share municipalities to establish cross-boundary municipalities. The provinces concerned were listed in the schedule to the statute. A total of sixteen cross-boundary municipalities were established under the scheme.

[7] Section 155(6A) was introduced by the Constitution Third Amendment Act of 1998. Section 155(6A) provides—

> "If the criteria envisaged in subsection (3)(b) cannot be fulfilled without a municipal boundary extending across a provincial boundary—
>
> (a) that municipal boundary may be determined across the provincial boundary, but only—
> (i) with the concurrence of the provinces concerned; and
> (ii) after the respective provincial executives have been authorised by national legislation to establish a municipality within that municipal area; and
> (b) national legislation may—
> (iii) subject to subsection (5), provide for the establishment in that municipal area of a municipality of a type agreed to between the provinces concerned;
> (iv) provide a framework for the exercise of provincial executive authority in that municipal area and with regard to that municipality; and
> (v) provide for the re-determination of municipal boundaries where one of the provinces concerned withdraws its support of a municipal boundary determined in terms of paragraph (a)."

[13] Although this list did not include any municipalities in KwaZulu-Natal, the government appears to have considered the question of the boundary between KwaZulu-Natal and the Eastern Cape as an issue that was related to cross-boundary municipalities. This was largely because certain farms, which by proclamation formed part of KwaZulu-Natal, fell within the Eastern Cape while Umzimkulu, which according to a proclamation forms part of the Eastern Cape, fell wholly within KwaZulu-Natal. The government describes Matatiele as a "cross-boundary jurisdictional enclave similar to cross-boundary municipalities."

C. Abolition of cross-boundary municipalities

[14] Since their inception, cross-boundary municipalities have proved to be difficult to administer. The model that was adopted to administer them was called a joint administration model, which was sanctioned by section 155(6A) of the Constitution and the provisions of the Cross-Boundary Municipalities Act. In terms of this model, the MECs for Local Government of the provinces in which the cross-boundary municipalities were established exercised joint executive authority in these municipalities. The exercise of joint executive authority in cross-boundary municipalities presented a number of political, economic and other practical problems.

[15] These administration problems were captured as follows in a 2002 government report on cross-boundary municipalities:

> "It should be stressed that the joint exercise of executive authority only applies to the MECs for local government and not to other provincial MECs and functionaries. If provinces affected by a cross-boundary municipality opt for this system, the other

> functionaries of these provinces would have to continue exercising their statutory powers in the areas under their jurisdiction. The result would be that legislation that is the responsibility of the local government MECs, would be jointly administered in the cross-border area whilst other provincial legislation will have to be administered in the area by the two provinces separately. The legislation of the different provinces would still apply to the separate provincial segments of the cross-boundary area. The joint administration model therefore requires consensus and uniformity between the MECs, as far as local government matters are concerned. But as far as other matters are concerned e.g. health; housing; traffic control and vehicle licensing; ambulance services; auditing etc., each province exercises its executive authority in respect of such matters independently and without consulting the other affected province."[8]

[16] 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 sixteen 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.

[8] Memorandum to the President's Coordinating Council to be held on 1 November 2002: Administration of Cross-Boundary Municipalities.

[17] There is no explanation on the papers why the government left the implementation of this decision until about eight months before the elections were due to be held. This delay has regrettably put undue pressure on everyone who has had to deal with the Twelfth Amendment and the Repeal Act, including this Court which now has to consider important constitutional issues raised by them within a short period of time.

D. Re-determination of the boundaries of Matatiele Municipality

[18] The convenient starting point in setting out the immediate events that led to the re-determination of Matatiele Municipality, is the August 2005 request for the re-determination of Matatiele by the Minister of Provincial and Local Government. The Minister requested the re-determination of boundaries of Matatiele Municipality in terms of section 22(1)(b) of the Local Government Municipal Demarcation Act.[9] In that request, the Minister requested the Board to redetermine the boundaries of Matatiele Municipality by: first, excluding Matatiele Municipality from Sisonke District Municipality in KwaZulu-Natal and incorporating it into Alfred Nzo District Municipality in the Eastern Cape; second, excluding from Matatiele the small area surrounded by Umzimvubu Local Municipality and incorporating it into Umzimvubu Local Municipality; third, excluding Maluti area from Umzimvubu Local Municipality and incorporating it into Matatiele Municipality; and finally, excluding Umzimkulu Local Municipality from Alfred Nzo District Municipality and incorporating it into Sisonke District Municipality in KwaZulu-Natal.

[9] Local Government: Municipal Demarcation Act 27 of 1998.

[19] On 1 September 2005, the Board invited comments on the Minister's proposal. The Board received some 3248 individual petitions and a petition of 10 000 signatures from the Matatiele/Maluti Mass Action Committee, a coalition of organisations in the Matatiele/Maluti area, in response to the proposed demarcation. After it had considered the comments, the Board, on 18 October 2005, issued its provisional re-determination of the boundaries of Sisonke District Municipality, Matatiele Municipality, Alfred Nzo District Municipality, O.R. Tambo District Municipality and Umzimvubu Local Municipality.[10]

[20] The provisional re-determination of the Board differed in a material respect from that which had been requested by the Minister. While the Minister had requested that Matatiele Municipality be included in Alfred Nzo District Municipality in the Eastern Cape, the Board proposed that the municipality remain in Sisonke District Municipality in KwaZulu-Natal. In addition, the Board proposed that Maluti be excluded from the municipal area of Umzimvubu Local Municipality and be incorporated into Matatiele Municipality in Sisonke District Municipality; that Umzimkulu Local Municipality be excluded from Alfred Nzo District Municipality and be included into the municipal area of Sisonke District Municipality; and that Umzimvubu Local Municipality be excluded from the municipal area of Alfred Nzo and incorporated into the O.R. Tambo District Municipality.

[10] Provincial Gazette Extraordinary 1442, GN 326, 18 October 2005; Provincial Gazette of KwaZulu-Natal 6438 GN 94, 20 October 2005.

[21] Subsequently the Minister submitted an alternative re-determination proposal to the Board. At the same time the Parliamentary Portfolio Committee on Justice and Constitutional Development requested that the Board re-publish certain municipal maps reflecting municipal areas. On 31 October 2005, the Board published a notice reflecting the Minister's alternative proposal and the municipal maps as requested by the Portfolio Committee. This was done in General Notice 1998 of 2005 which was contained in Government Gazette No. 28189 of 31 October 2005. The Minister's alternative proposal is set out in Schedule 1 of the Notice.

[22] The Minister now proposed that: first, the Maluti area together with a certain district management area described as ECDMA44 and the small Matatiele area within Umzimvubu municipal area be excluded from Umzimvubu Local Municipality and incorporated into Matatiele Municipality; and second, the remainder of Umzimvubu municipal area and the new enlarged Matatiele Municipality be incorporated into Alfred Nzo District Municipality. The material difference between the proposed re-determinations of the Board and the proposal of the Minister, for present purposes, related to the location of the new enlarged Matatiele Municipality. While the Board proposed that it should be incorporated into Sisonke District Municipality in KwaZulu-Natal, the Minister proposed that it should be incorporated into Alfred Nzo District Municipality in the Eastern Cape.

[23] It will be convenient here to interpose the legislative process that was underway in the meantime. During August 2005, the Minister of Justice and Constitutional

Development gave notice of her intention to introduce the Twelfth Amendment in Parliament. The speakers of the various provincial legislatures were requested to comment on the proposed amendment. The Twelfth Amendment in its bill form was subsequently introduced in Parliament with comments from interested parties. Matatiele Municipality and the Cedarville and District Farmers Association, which are among the applicants, submitted written comments on the proposed Twelfth Amendment.

[24] On 30 September 2005, the Twelfth Amendment Bill was introduced in the National Assembly. On 15 November 2005, the National Assembly voted in favour of the Bill with a narrow two-thirds majority, the Deputy Speaker casting the deciding vote in support of the Twelfth Amendment. On 14 December 2005, the NCOP considered the Bill in the light of the provincial mandates and passed the Bill. On 23 December 2005, the Bill was signed into law.

[25] The Twelfth Amendment Bill re-determined the geographical areas of the provinces, primarily by reference to municipal areas as reflected in municipal demarcation maps. It incorporated the Minister's proposal by reference to Schedule 1 and 2 of General Notice 1998 of 2005. It will be recalled that Schedule 1 of this Notice contained the Minister's alternative proposed re-determination of Matatiele Municipality. The effect of this was that the enlarged new Matatiele Municipality would be incorporated into Alfred Nzo District Municipality in the Eastern Cape.

Thus what the Minister could not achieve through the Board was to be achieved through a constitutional amendment.

[26] In the meantime, on 26 August 2005, the Minister published the Cross-Boundary Municipalities Laws Repeal and Related Matters Bill for comments. Once again Matatiele Municipality submitted written comments on this Bill. This Bill was introduced in the National Assembly on 20 October 2005. On 13 December 2005 the National Assembly adopted the Bill. The NCOP voted to adopt the Bill on 14 December 2005, and it was signed into law on 23 December 2005.

[27] And now to return to the re-demarcation process.

[28] Faced with what was in effect a re-determination of the boundaries of Matatiele Municipality through a constitutional amendment, on 21 November 2005 the Board proposed a new provisional re-determination of the boundary of Matatiele Municipality. As the notice of this proposal candidly admits, it was "[b]ased on the re-alignment of provincial boundaries as reflected in the Constitution Twelfth Amendment Bill of 2005, and the imminent repeal of legislative provisions related to cross-boundary municipalities".[11] The Chairperson of the Board frankly admits that the proposed re-determination of the boundaries by the Board was "in line with the maps referred to in the two Bills." The Board therefore proposed that the enlarged Matatiele Municipality be incorporated into Alfred Nzo District Municipality in the

[11] Government Gazette 28236 GN 1257, 21 November 2005.

Eastern Cape. This notice was subsequently corrected in order to replace previous maps.[12]

[29] On 27 December 2005 the Board purported to publish its decision on the boundaries of certain municipalities which included Matatiele Municipality in terms of section 21(5)(c) of the Demarcation Act. In terms of this decision: first, the enlarged Matatiele Municipality was incorporated into Alfred Nzo District Municipality in the Eastern Cape; second, Umzimvubu Local Municipality formed part of Alfred Nzo District Municipality; and (c) Umzimkulu Local Municipality was incorporated into Sisonke District Municipality in KwaZulu-Natal. The fate of Matatiele Municipality was now sealed. It was effectively removed from KwaZulu-Natal and relocated into the Eastern Cape. In the same way, the people who lived in Matatiele were removed to the Eastern Cape by a constitutional amendment. It is this relocation of Matatiele Municipality from KwaZulu-Natal into the Eastern Cape which is at the heart of this litigation.

[30] Having regard to this history of the demarcation of Matatiele Municipality, in particular, the fact that it was initiated by the Minister whose proposal was rejected by the Board but only to be given effect through a constitutional amendment, it is understandable why the applicants take the view that the Twelfth Amendment and the Repeal Act took over the function of the Board by redetermining the boundaries of Matatiele. It is also understandable why they are emotionally unable to identify

[12] Government Gazette 28273 GN 1496, 28 November 2005.

themselves with the consequences of the exercise by Parliament of its authority to redefine provincial boundaries. However, the question is whether the law is on their side.

Contentions of the parties and issues presented

[31] The constitutional challenge is directed at the Twelfth Amendment and the Repeal Act. The applicants contend that the Twelfth Amendment is unconstitutional in that it effectively re-demarcates Matatiele Municipality and removes it from KwaZulu-Natal into the Eastern Cape without compliance with the Constitution and contrary to its provisions. They contend further that the Repeal Act is unconstitutional in that it re-demarcates Matatiele Municipality in a manner that is inconsistent with the Constitution or other applicable legislation.

[32] In resisting this challenge, the respondents contend that once the applicants concede that the Twelfth Amendment was passed in accordance with the requirements set out in section 74 of the Constitution, they cannot be heard to complain. They submit that the Twelfth Amendment has become part of the Constitution and cannot therefore be challenged on the ground that it is inconsistent with the other parts of the Constitution. In relation to the Repeal Act, they contend that neither its terms nor its effect demarcate the boundaries of Matatiele Municipality.

[33] The applicants contend that this Court has exclusive jurisdiction to consider the constitutional challenge to the Twelfth Amendment under section 167(4)(d).[13] In relation to the Repeal Act, they contend that because it is inextricably interlinked with the Twelfth Amendment, they are entitled to come to this Court directly under section 167(6)(a).[14] While they accept that this Court has exclusive jurisdiction under the Constitution in relation to the Twelfth Amendment, the respondents nevertheless contend that the applicants have not made out a case for direct access under section 167(6)(a) in relation to the Repeal Act.

Jurisdiction

[34] In terms of section 167(4)(d) of the Constitution, only this Court may "decide on the constitutionality of any amendment to the Constitution". This Court therefore has exclusive jurisdiction over the applicants' constitutional challenge to the Twelfth Amendment. The respondents did not contend otherwise.

[35] The application for direct access relates to the constitutional challenge to the Repeal Act. And the question is whether it is in the interests of justice to allow the

[13] Section 167(4)(d) of the Constitution provides as follows:

> "(4) Only the Constitutional Court may–
> . . . .
> (d) decide on the constitutionality of any amendment to the Constitution".

[14] Section 167(6)(a) of the Constitution provides as follows:

> "(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–
> (a) to bring a matter directly to the Constitutional Court".

applicants to bring their Repeal Act challenge directly to this Court. As pointed out earlier, this will be decided when we consider the validity of the Repeal Act.

Constitutionality of the Twelfth Amendment

[36] This case raises two issues in relation to the constitutionality of the Twelfth Amendment. The first relates to the applicants' argument that the Twelfth Amendment unconstitutionally limits the authority of the Board under section 155(3)(b) of the Constitution. The second issue relates to the concession that was made in the written argument that the Twelfth Amendment was passed in accordance with the relevant constitutional procedures.

[37] The applicants contend that the Twelfth Amendment effectively re-demarcates Matatiele and removes it from Sisonke District Municipality in KwaZulu-Natal into Alfred Nzo District Municipality in the Eastern Cape contrary to the Constitution and its provisions. This broad constitutional attack is foreshadowed in prayer 2 of the applicants' notice of motion, which seeks an order to the effect that in enacting the Twelfth Amendment Parliament did not comply with the procedural requirements set out in section 74 of the Constitution. However, in written and oral argument, it was accepted on behalf of the applicants that the procedures required for the enactment of a constitutional amendment were complied with. Yet the papers suggest otherwise. And this calls into question the concession made. The concession in turn raises the question whether the procedures set out in section 74(8) were complied with. But first, does the Twelfth Amendment unconstitutionally usurp the powers of the Board?

A. Does the Twelfth Amendment unconstitutionally usurp the powers reserved for the Board?

[38] The main thrust of the applicants' argument concerning the Twelfth Amendment is that the Amendment re-determined municipal boundaries in a manner that usurped the authority reserved for the Board under section 155(3)(b) of the Constitution.

[39] Section 155(3)(b) provides:

> "155(3) National legislation must—
>
> . . . .
>
> (b) establish criteria and procedures for the determination of municipal boundaries by an independent authority".

[40] It is by now established that the independent authority referred to in section 155(3)(b) is the Board established under the Demarcation Act. In *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others*,[15] this Court held that the constitutional "authority to determine municipal boundaries vests solely in the Demarcation Board."[16] That authority extends to all categories of municipality.[17]

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[15] 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC).

[16] Id at para 47.

[17] Id.

[41] The independence of the Board is crucial to our constitutional democracy. One of the founding values of our constitutional democracy is "a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[18] This founding value must be given expression at the level of national, provincial and local government. Thus one of the objects of local government is "to provide democratic and accountable government for local communities".[19] The purpose of section 155(3)(b) is "to guard against political interference in the process of creating new municipalities."[20] For, if municipalities were to be established along party lines or if there was to be political interference in their establishment, this would undermine our multi-party system of democratic government. A deliberate decision was therefore made to confer the power to establish municipal areas upon an independent authority.

[42] Thus in *Executive Council, Western Cape Legislature*, we emphasised that in the performance of its constitutional duty to determine municipal boundaries, the Board "should be able to do so without being constrained in any way by the national or provincial governments."[21] For precisely this reason, we struck down a provision in the Local Government: Municipal Structures Act 117 of 1998, which purported to

[18] Section 1(d) of the Constitution.

[19] Section 152(1)(a) of the Constitution.

[20] *Executive Council, Western Cape Legislature* above n 15 at para 50.

[21] Id at para 55.

give the Minister the discretion to reject a municipal boundary determined by the Board. On that occasion we said:

> "Upon a proper construction, [section 6(2)] gives the Minister a discretion to decide whether to accept the recommendation of the Demarcation Board in relation to where the boundaries should be. In the exercise of this discretion the Minister may, therefore, reject a boundary determined by the Demarcation Board. Yet the scheme for the allocation of powers relating to the structure, functioning and establishment of municipalities contemplates that the Demarcation Board should determine boundaries in accordance with the criteria and procedures prescribed by the legislation contemplated in ss 155(2) and (3), and that it should be able to do this without being constrained in any way by the national or provincial governments. If s 6(2) is to have any meaning, it subjects the decision of the Demarcation Board in relation to the municipal boundaries to the discretion of the Minister. This, in my view, is impermissible. To the extent that s 6(2) of the Structures Act gives the Minister a discretion whether to accept the boundaries determined by the Demarcation Board in respect of categories of municipality, it is inconsistent with ss 155(2) and (3) of the Constitution."[22]

[43] In the performance of its constitutional duty, the Board is bound to apply the criteria determined by the Demarcation Act. Those criteria are set out in section 25, which sets out factors that the Board must take into account in determining municipal boundaries. And these are:

> "(a) the interdependence of people, communities and economics as indicated by—
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> (i) existing and expected patterns of human settlement and migration;
>
> (ii) employment;
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> (iii) commuting and dominant transport movements;
>
> (iv) spending;
>
> (v) the use of amenities, recreational facilities and infrastructure; and

[22] Id at para 68.

(vi) commercial and individual linkages;

(b) the need for cohesive, integrated and unfragmented areas, including metropolitan areas;

(c) the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively;

(d) the need to share and redistribute financial and administrative resources;

(e) provincial and municipal boundaries;

(f) areas of traditional rural communities;

(g) existing and proposed functional boundaries, including magisterial districts, voting districts, health, transport, police and census enumerator boundaries;

(h) existing and expected land use, social, economic and transport planning;

(i) the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care;

(j) topographical, environmental and physical characteristics of the area;

(k) the administrative consequences of its boundary determination on—

(i) municipal creditworthiness;

(ii) existing municipalities, their council members and staff; and

(iii) any other relevant matter;

(l) the need to rationalise the total number of municipalities within different categories and of different types to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability."

[44] Members of the Board have particular skills and expertise that are appropriate to the factors that the Board has to take into account in determining municipal boundaries. This is apparent from the qualifications, expertise and knowledge that members of the Board must have. They are required to have qualifications or experience or knowledge in:

"(a) local government generally; or

(b) any of the following:

(i) development economics;

(ii) integrated development planning;

(iii) community development;
(iv) traditional leadership and traditional communities;
(v) local government and municipal administration;
(vi) municipal finance;
(vii) municipal services;
(viii) social or economic geography;
(ix) town and regional planning;
(x) legal and constitutional matters affecting local government;
(xi) land survey, cartography and geographical formation systems;
(xii) public health care; or
(xiii) transport planning.

(2) The following persons are disqualified from becoming or remaining a member of the Board:
(a) an unrehabilitated insolvent;
(b) a person who is placed under curatorship;
(c) a person who is declared to be of unsound mind by a court of the Republic; or
(d) a person who after 4 February 1997 has been convicted of an offence and sentenced to imprisonment without the option of a fine for a period of not less than 12 months.

(3) A disqualification in terms of subsection (2)(d) ends five years after the imprisonment has been completed."[23]

[45] The expertise, knowledge and experience required of its members ensure that the Board is eminently qualified to perform the function of determining municipal boundaries. The question is whether the Twelfth Amendment unconstitutionally usurps this function. The answer to this question depends in the first place upon the purpose and effect of the Twelfth Amendment and, in the second place, on the nature and the scope of the powers of Parliament to alter provincial boundaries.

[23] Demarcation Act above n 9, at s 7.

[46] There can be no question that the purpose of the Twelfth Amendment is "to re-determine the geographical areas of the nine provinces of the Republic of South Africa". The Preamble to the Twelfth Amendment makes this abundantly clear. There also can be no question that in terms of section 44(1)(a)(i),[24] read with section 74(3)(b)(ii),[25] Parliament has the constitutional authority to alter provincial boundaries. Nor can there be any question that the effect of the Twelfth Amendment is to re-determine the boundaries of Sisonke and Alfred Nzo District Municipalities.

[47] Section 1 of the Twelfth Amendment redefines the geographical areas of the nine provinces by reference to municipal areas, a departure from the previous scheme which defined provincial boundaries by reference to magisterial districts. These geographical areas are reflected in Schedule 1A and are described as "compris[ing] the sum of the indicated geographical areas reflected in the various maps referred to in the Notice listed in Schedule 1A." The effect of this re-determination of provincial boundaries is that the area previously known as Matatiele Municipality is relocated from Sisonke District Municipality in KwaZulu-Natal and incorporated into the

[24]Section 44(1)(a)(i) of the Constitution provides as follows:

> "(1) The national legislative authority as vested in Parliament—
> (a) confers on the National Assembly the power—
> (i) to amend the Constitution".

[25] Section 74(3) of the Constitution provides—

> "(3) 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—
> . . . .
> (ii) alters provincial boundaries, powers, functions or institutions".

Eastern Cape while Umzimkulu Local Municipality is relocated from Alfred Nzo District Municipality in the Eastern Cape to KwaZulu-Natal.

[48] The Twelfth Amendment therefore has the effect of re-determining the boundaries of Sisonke and Alfred Nzo District Municipalities. The crux of the applicants' complaint is that Parliament cannot do this because it amounts to performing the functions that vest in the Board under section 155(3)(b). The issue that arises from the applicants' contention is the following: Does Parliament, in the exercise of its constitutional authority to redefine provincial boundaries, have the authority to alter municipal boundaries?

[49] The Board's authority to determine municipal boundaries is not unlimited. It is limited, for example, by Parliament's authority to establish provincial boundaries. This is implicit in section 155(6A) of the Constitution and explicit in section 25(e) of the Demarcation Act. In terms of section 155(6A), when the Board in exercising its powers considers it necessary to establish a municipal area across a provincial boundary, it requires both national and provincial legislations to do so.[26] In terms of section 25(e) of the Demarcation Act, the Board is required to have regard to provincial and municipal boundaries when it determines municipal boundaries.[27] It is

[26] Above n 7.

[27] Section 25(e) of the Demarcation Act provides as follows:

> "25. Factors to be taken into account.—In order to attain the objectives set out in section 24, the Board must, when determining a municipal boundary, take into account—
>
> . . . .
>
> (e) provincial and municipal boundaries".

plain from these two provisions that the authority of the Board to determine municipal boundaries is limited by the authority to redefine provincial boundaries. And the authority to redefine provincial boundaries vests in Parliament.

[50] Once a decision was taken to redefine provincial boundaries by reference to municipal areas and to abolish the concept of cross-boundary municipalities, the provincial boundaries had to be redefined in such a manner that no municipality would fall into two provinces. This process necessarily involved a decision as to the province in which the municipalities should be located. It was therefore inevitable that the alteration of provincial boundaries would impact on municipal boundaries. This is implicit in the power to alter provincial boundaries. It is trite that the power to do that which is expressly authorised includes the power to do that which is necessary to give effect to the power expressly given.[28] The power of Parliament to redraw provincial boundaries therefore includes the power that is reasonably necessary for the exercise of its power to alter provincial boundaries.

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[28] See, for example, *GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape, and Another*, 1998 (3) SA 45 (SCA) at 51G-H; *Moleah v University of Transkei and Others*, 1998 (2) SA 522 (Tk) 536H-37D. In *Moleah*, Van Zyl J described at 536H-I the doctrine of implied powers as follows:

> "Applying the principles applicable to the interpretation of statutes, it is clear that, if certain conduct is required or authorised, the authorising act should be interpreted as impliedly including authorisation to do that which is 'reasonably necessary' to achieve the main purpose or to perform the action effectively or that which is 'reasonably incidental' or reasonably ancillary' to those powers expressly conferred."

Compare Section 44(3) of the Constitution, which provides as follows:

> "(3) Legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is, for all purposes, legislation with regard to a matter listed in Schedule 4."

[51] By contrast, the power of the Board to determine municipal boundaries does not include the power to determine provincial boundaries. This is so because the power to alter provincial boundaries is expressly reserved for Parliament, which is required to comply with stringent procedures in order to effect an alteration of boundaries. In addition, section 25(e) of the Demarcation Act expressly makes the power of the Board subject to provincial boundaries. It is quite clear that if the demarcation powers of the Board are unlimited, as contended by the applicants, they are inconsistent with those conferred on Parliament to alter provincial boundaries. The proper approach in such a case is to place a construction on the Board's authority that would remove the inconsistency. In my view section 103(3) of the Constitution as introduced by the Twelfth Amendment and section 155(3)(b) of the Constitution can be harmonised by understanding that once provincial boundaries have been redefined, it is the task of the Board to demarcate municipal boundaries in terms of the Demarcation Act.

[52] There is some suggestion in the applicants' founding affidavit and written argument that the Twelfth Amendment and the Repeal Act apply only to cross-boundary municipalities. As Matatiele was never declared a cross-boundary municipality under section 155(6A) of the Constitution and other relevant legislation, the suggestion goes, the impugned legislation does not apply to it. This point was pursued somewhat faintly in argument, it being accepted that the laws under attack do not deal "solely" with cross-boundary municipalities.

[53] Once it is accepted that the Twelfth Amendment and the Repeal Act do not deal solely with cross-boundary municipalities that is the end of the point. The Twelfth Amendment declares that its purpose is "to re-determine the geographical areas of the nine provinces of the Republic of South Africa; and to provide for matters connected therewith", while the Repeal Act declares its purpose as, amongst other things, to "provide for consequential matters as a result of the re-alignment of former cross-boundary municipalities and the re-determination of the geographical areas of provinces; and provide for matters connected therewith." The purpose of the Twelfth Amendment and the Repeal Act was to develop a new criterion for determining provincial boundaries, namely, municipal areas as opposed to magisterial districts. This new criterion applies not only to provinces that had cross-boundary municipalities but to all provinces, including those that did not have such municipalities. It follows therefore that the argument that the impugned laws apply only to cross-boundary municipalities falls to be rejected.

Section 41

[54] The applicants also challenged the Twelfth Amendment on grounds that in enacting it, Parliament and the President failed to fulfil their constitutional obligation. This obligation was said to be comprehended by the provisions of section 41 of the Constitution, which deal with co-operative government. No submissions were addressed to us in this regard during the hearing. When counsel for the applicants was pressed to make submissions, he indicated that he did not have any submissions on the point but was not abandoning it.

[55] It is difficult to make out what the precise complaint is in this regard. What is clear, however, is that section 41(2) contemplates that an Act of Parliament will be enacted that will establish structures and institutions to promote and facilitate intergovernmental relations. In addition, this statute will provide appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The respondents submitted that this legislation is the Intergovernmental Relations Framework Act 13 of 2005 ("the Framework Act").[29] The applicants did not contend otherwise. Nor could they.

[56] In its long title and preamble, the Framework Act provides:

> "To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith.
>
> . . . .
>
> And whereas section 41(2) of the Constitution requires an Act of Parliament—
>
> (a) to establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
>
> (b) to provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes".

[57] Section 2(2) provides that the Framework Act does not apply to Parliament and the provincial legislatures. On its face, therefore, this statute excludes Parliament and provincial legislatures from its ambit. It follows that the submission relating to co-

[29] Act 13 of 2005.

operative government must fail. We are not called upon, and we express no view on whether the Framework Act can constitutionally exclude from its ambit, Parliament and provincial legislatures. That is not the question before us.

[58] To sum up, therefore, the powers of the Board under section 155(3)(b) are subject to the power of Parliament to redefine provincial boundaries. Thus construed, there is no conflict between section 103(3) of the Twelfth Amendment and section 155(3)(b) of the Constitution. However, that is not the end of the matter. There is a substantial question as to whether the correct procedure was followed in the enactment of the Twelfth Amendment.

B. Procedural requirements

[59] Sections 73 to 82 of the Constitution set out the constitutional framework for the "national legislative process". Section 74 deals with bills that amend the Constitution. Subsections (3) and (8) deal with a constitutional amendment that alters provincial boundaries, powers, functions or institutions. And these subsections provide:

Subsection 74(3)—

"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."

Subsection 74(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."

[60] A bill that alters provincial boundaries must therefore be passed: first, by the National Assembly by a two-thirds majority; and second, by the NCOP with a supporting vote of at least six provinces. But the NCOP may not pass the bill or the relevant part "unless it has been approved by the legislature or the legislatures of the province or provinces concerned." It appears from the provisions of subsection 74(8) that provinces have a veto power in relation to a bill that alters their boundaries. It is not difficult to imagine the purpose of this provision. Its purpose is to ensure that the boundaries of a province are not reduced without its consent. This protects the territorial integrity of a province.

[61] In addition, the alteration of a provincial boundary may have the effect of relocating an entire community from one province to another province. And this may implicate the fundamental rights of the individual men and women who reside in the province. In terms of section 21(3) of the Constitution "[e]very citizen has the right to enter, remain in and reside anywhere in, the Republic." This provision protects the

rights of people of Matatiele to remain in the province of KwaZulu-Natal if they should choose to do so. But, like any of the fundamental rights guaranteed in the Bill of Rights, this right is subject to limitation under section 36(1). Once an individual has chosen to reside in KwaZulu-Natal, that individual is entitled to remain in that province subject to the provisions of the Constitution. Such an individual may not be legislated out of that province into another province contrary to the provisions of the Constitution. It is this right that is at the heart of the protection offered by section 74(8). The provincial legislature is given the power to protect the right of its residents under section 21(3) to remain in their province by exercising its right to veto a constitutional amendment that seeks to alter its provincial boundaries, if it considers it to be in the interests of the province to do so.

[62] Compliance with section 74(8) in turn raises the question whether the provisions of section 118(1)(a) of the Constitution must be complied with in the process of considering and approving a constitutional amendment under section 74(8). Section 118(1) of the Constitution provides:

> "(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."

[63] This Court has not yet construed section 118(1)(a) or the scope of its application. This provision raises, in particular, the question whether the process of considering and approving a proposed constitutional amendment under section 74(8) amounts to a "legislative process" or "other process" of a provincial legislature within the meaning of section 118(1)(a). In addition, it is not entirely clear what the phrase to "facilitate public involvement" means in the context of section 118(1)(a).

[64] Recently, in the case of *Mary Patricia King and Others v Attorneys Fidelity Fund Board of Control and Another*,[30] the SCA commented on the phrase to "facilitate public involvement" in the context of Section 59 of the Constitution.[31] It said:

> "'Public involvement' is necessarily an inexact concept, with many possible facets, and the duty to 'facilitate' it can be fulfilled not in one, but in many different ways. Public involvement might include public participation through the submission of commentary and representations: but that is neither definitive nor exhaustive of its content. The public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes. It is plain that by imposing on Parliament the obligation to facilitate public involvement in its processes the Constitution sets a base standard, but then leaves Parliament significant leeway in fulfilling it. Whether or not the National Assembly has fulfilled its obligation cannot be assessed by examining only one aspect of 'public involvement' in isolation of others, as the appellants have sought to do here. Nor are the various obligations s 59(1) imposes to be viewed as if they are independent of one another, with the result that the failure of one necessarily divests the National Assembly of its legislative authority."[32]

[30] 2006 (1) SA 474 (SCA).

[31] Section 59(1)(a) which applies to the National Assembly is the equivalent of Section 118(1)(a) which applies to provincial legislatures.

[32] *King* above n 30 at para 22.

[65] The correctness of this case was not argued in this Court. It is therefore not desirable to comment on the correctness of the passage cited above, in particular, the SCA's statement that "[t]he public may become 'involved' in the business of the National Assembly as much by understanding and being informed of what it is doing as by participating directly in those processes." It seems to me that it is arguable that in the process of considering and approving a proposed constitutional amendment under section 74(8), a provincial legislature must at a bare minimum provide the people who might be affected by the alteration of its boundary an opportunity to submit oral or written commentary and representations on the proposed amendment.

[66] But it was conceded on behalf of the applicants that the procedures set out for the enactment of a constitutional amendment were complied with. The question is whether it is appropriate for this Court to investigate whether the provisions of the Constitution were complied with in the light of this concession. As a general matter, a court should decide issues raised by the parties in their pleadings and in argument. They should not embark upon a judicial frolic and decide matters that are not before them. The adjudication of disputes between the parties is not an occasion to engage in an academic exercise of deciding a whole range of issues that are not before a court. But, like all general rules, this too is subject to exceptions. It must yield to the interests of justice.

[67] Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law. Indeed, in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*,[33] this Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that "if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it."[34] Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct in fact is inconsistent with the Constitution. This would be contrary to the provisions of section 2 of the Constitution which provides that the "Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid".

[68] Thus where on the papers before it, there is doubt as to whether a particular law or conduct is consistent with the Constitution, this Court may be obliged to investigate the matter. This would be particularly so where, as here, an important constitutional issue is involved. In the *Executive Council, Western Cape Legislature v President of Republic of South Africa*[35] this Court, subsequent to the hearing, realised that there were questions regarding section 235(8) of the interim Constitution that had not been addressed by counsel in their written or oral argument. Because of the importance of

[33] 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC).

[34] Id at para 16.

[35] *Executive Council, Western Cape Legislature* above n 15 at paras 22-23.

these questions, the Court considered it necessary to afford the parties an opportunity to make submissions on those questions and the Court the benefit of debating them. The parties' legal representatives were therefore invited urgently to canvass the particular issues at a further hearing which was set down at fairly short notice. This is the course that must be followed in this case. It is in the interests of justice that these important issues, which may well have a bearing on the validity of the Twelfth Amendment, be investigated.

[69] On the papers, there are doubts as to whether the Twelfth Amendment was passed in accordance with the appropriate constitutional procedures. In their notice of motion, the applicants sought an order declaring, amongst other things, that the Twelfth Amendment was unconstitutional because it altered provincial boundaries without complying with the process set forth in the Constitution. It appears from the affidavit deposed to by the Speaker of the KwaZulu-Natal Provincial Legislature filed in an attempt to establish compliance with the procedures set out in the Constitution that the KwaZulu-Natal Legislature did not invite written or oral submissions from the people of Matatiele, nor did it hold any public hearings on the proposed amendment. In their replying affidavit, the applicants confirm that public hearings were not held by the KwaZulu-Natal Legislature for the people of Matatiele. In the context of public participation, the applicants allege that:

> "14.10 As far as the public participation of the people of the Matatiele Municipality is concerned it is to be noted that according to Noxolo Kiviet public hearings were held at various places in the Eastern Cape Province. . . . However, no meetings called by any government were held in any place in the Matatiele Municipality.

> 14.11 The Speaker of the KwaZulu-Natal Legislature does not dispute [the] allegations relating to public meetings."

[70] The procedure followed by the KwaZulu-Natal Legislature must be contrasted with the steps taken by the majority of the provincial legislatures in the process of considering and approving the Twelfth Amendment Bill. According to the record before this Court, the legislative committees of the Eastern Cape, Gauteng, Limpopo, Mpumalanga, Northern Cape and North West Provinces all held public hearings in the affected communities. It is somewhat difficult to compare the nature of these hearings because the affidavits vary in their level of detail and in their inclusion of relevant annexures. However, we know that Eastern Cape, Gauteng, Northern Cape and North West considered both written and oral submissions. North West and Gauteng held at least one joint public hearing in a cross-boundary area. Mpumalanga's Portfolio Committee on Local Government and Housing used local radio stations to invite people to the hearings as well as to committee meetings. The committees of the North West, Mpumalanga and Eastern Cape Legislatures drafted detailed reports of the public hearings.[36]

[71] Based on the record before this Court, it appears that Matatiele Municipality and the people of Matatiele were not afforded an opportunity to be heard by the provincial legislature of KwaZulu-Natal on the impending constitutional amendment to alter its boundary. The KwaZulu-Natal Legislature, alone amongst those required

[36] The Western Cape legislature was not required to approve the Bill in terms of section 74(8). Nonetheless, its Standing Committee on Governance placed advertisements in local newspapers informing the public about the Twelfth Amendment and Repeal Act Bills and inviting them to make submissions and attend the Standing Committee meeting that would consider the negotiating mandates for those Bills.

to approve or reject the Twelfth Amendment in terms of section 74(8)[37] did not hold public hearings, publicise committee meetings in newspapers or radio, or invite written submissions from the public and relevant stakeholders. The KwaZulu-Natal Speaker's affidavit does not refer to the public at all, except to note that the relevant Standing or Portfolio Committee has the discretion to call for a public hearing on matters referred to it by the NCOP Committee.

[72] Now if the provisions of section 74(8) require compliance with section 118(1)(a) and if the provisions of section 118(1)(a) require the provinces to afford the communities affected by the alteration of the provincial boundaries a fair opportunity to make representations as to why their province should not consent to the alteration of its boundary, the record before us establishes that the KwaZulu-Natal Legislature did not hold any hearings or afford the applicants any opportunity to submit written representations on the question of whether it should consent to the alteration of the boundaries. And if this amounts to a failure to comply with the provisions of section 118(1)(a) and thus section 74(8), the question which arises is whether this renders the approval by the KwaZulu-Natal Legislature invalid and thus the Twelfth Amendment invalid insofar as it relates to KwaZulu-Natal. Now these are issues of grave importance. They lie at the very heartland of our participatory democracy and the power of the provinces to protect their territorial integrity.

[37] The Free State followed similar, non-participatory procedures.

[73] In my view, the provisions of sections 74(8) and 118(1)(a) are crucial to the determination of the question whether the Twelfth Amendment was enacted in accordance with the procedure set out in the Constitution. In terms of section 44(4) of the Constitution, "[w]hen exercising its legislative authority, Parliament . . . must act in accordance with, and within the limits of, the Constitution." And in terms of section 2, "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid".

[74] However, these issues cannot be decided without the benefit of argument and debate on them. The present application cannot be finally decided without hearing the provincial legislature of KwaZulu-Natal and the parties on the meaning and the scope of the provisions of sections 74(8) and 118(1)(a) and their implications for the validity of the Twelfth Amendment.

[75] Ordinarily, these issues should be heard before we deliver judgment on the other issues involved in the case. But we are faced with the reality that the local government elections are to be held in less than two days. And the decision of this Court on the validity of the Twelfth Amendment may have an impact on those elections. The question of the validity of the Twelfth Amendment, however, depends ultimately on the scope and effect of the provisions of sections 74(8) and 118(1)(a) of the Constitution. Yet we cannot decide these issues without the benefit of argument and debate on them. It is impractical to do so before the elections.

[76] But the elections are in the minds of the people of Matatiele. They must be anxious to know whether when they go to the polls they will do so in KwaZulu-Natal or the Eastern Cape. We are also mindful of the fact, and the record indicates, that a majority of the people of Matatiele do not want to relocate to the Eastern Cape. But answers to these questions depend on the validity of the Twelfth Amendment, and in particular, whether the Twelfth Amendment was enacted in accordance with the procedures set out in the Constitution. This point was conceded on their behalf. Because we doubt the correctness of this concession we have decided to call for written submissions on whether the constitutional procedures set out for the enactment of the Twelfth Amendment were complied with.

[77] The question is whether we should postpone the elections in the affected areas pending our decision on the validity of the Twelfth Amendment. This raises very complex practical problems. We do not know whether the areas of Matatiele Municipality and Maluti still exist in their old form. Under the Twelfth Amendment read with the Repeal Act and the determination of 27 December 2005 by the Municipal Demarcation Board, both of these areas now fall under the Eastern Cape and in the Alfred Nzo District Municipality. If no elections are held in these areas, it is not clear which province will be responsible for their administration. Nor do we know what will be the effect of restoring old Matatiele to Sisonke District Municipality in KwaZulu-Natal and leaving Maluti to the Eastern Cape. We have not had the benefit of any argument on these issues. And we cannot resolve them without the benefit of submissions by the parties and the Electoral Commission.

[78] It may be that we will need to determine the electoral consequences if the Twelfth Amendment or the Repeal Act is declared invalid. The advice of the Electoral Commission will be helpful in determining the appropriate course in that event. The Electoral Commission must therefore be joined.

[79] There is another matter. It is not desirable to disrupt elections. As a general matter, this must be resorted to only when it is in the interests of justice to do so. It will generally be the case where the postponement of elections is unavoidable. This will be the case, for example, where the adverse consequences of holding elections far exceed those that will ensue if the elections are not held. This determination can only be made after hearing submissions on such consequences. There is nothing on the record to indicate that the adverse consequences of holding elections far exceed those that would ensue from postponing them.

[80] In the context of this case, if it had been apparent on the papers that there may have been a violation of the Constitution, we would have had no hesitation in stopping the elections in their tracks. For there would be no point in holding elections that will be set aside in due course. But in this case, it is not that apparent as we have yet to decide the scope and effect of sections 74(8) and 118(1)(a) of the Constitution. And more importantly, we need to hear the Legislature of KwaZulu-Natal on these issues.

[81] We are not unmindful of the concerns of the people of Matatiele. These concerns are legitimate. If the Twelfth Amendment is not valid in relation to KwaZulu-Natal, then the people of Matatiele are entitled to remain in Sisonke District Municipality in KwaZulu-Natal and cast their vote in that province until a properly enacted constitutional amendment is in place. In this judgment we do not decide the validity of the Twelfth Amendment. Nor do we decide whether the people of Matatiele should relocate into the Eastern Cape. Therefore the present position is no more than a holding position until a final decision is made on the constitutional validity of the Twelfth Amendment. It is only then that the fate of the people of Matatiele will finally be decided.

[82] In all the circumstances, the elections must go ahead as planned. If the question of whether fresh elections have to be held arises, it will have to be determined in the light of the final decision on the constitutional validity of the Twelfth Amendment.

[83] But in the meantime, the people of Matatiele are entitled to know the answer to the primary contention that they advanced in support of their constitutional challenge to the Twelfth Amendment. They contended that the Twelfth Amendment re-determined municipal boundaries in a manner that usurped the authority reserved for the Municipal Demarcation Board under section 155(3)(b) of the Constitution. The answer to this question is that Parliament has the constitutional authority to redraw the provincial boundaries and to affect municipal boundaries insofar as this is necessary for the purpose of altering the provincial boundaries.

[84] The Court is unanimous in holding that its work has not been facilitated by the lack of candour on the part of government as to why it was regarded as appropriate to place Matatiele Municipality in the Eastern Cape. In keeping with the constitutional values of accountability, responsiveness and openness, the Directions will give the second and third respondents the opportunity to provide further information concerning the objectives sought to be pursued by the relocation of Matatiele to the Eastern Cape. Such information could be of considerable assistance to the Court in finalising this matter.

[85] In the event, we hold that in altering provincial boundaries, the Twelfth Amendment did not usurp the powers conferred upon the Municipal Demarcation Board by section 155(3)(b) of the Constitution and is therefore not inconsistent with the Constitution on that ground.

[86] In all the circumstances, the following further directions are made:

(a) The application is set down for further hearing on 30th March 2006 to consider the following issues:

1. Do the provisions of section 74(8) of the Constitution require a provincial legislature whose boundary is being redrawn by a proposed constitutional amendment to comply with the provisions of section 118(1)(a) of the Constitution.

2. If the answer to paragraph (a)(1) above is in the affirmative, what does section 118(1)(a) require and did the provincial legislatures of KwaZulu-Natal and the Eastern Cape comply with the provisions of section 118(1)(a) of the Constitution.
3. If the answer to paragraph (a)(2) is in the negative, does non-compliance with the provisions of section 74(8) and section 118(1)(a) render the approval contemplated in section 74(8) invalid.
4. If the answer to paragraph (a)(3) above is in the affirmative, what is the effect, if any, on the Twelfth Amendment.
5. If non-compliance with the provisions of sections 74(8) and 118(1)(a) render the Twelfth Amendment invalid, either wholly or in part, what is the effect of this on the municipal areas affected and the elections held in the affected areas.
6. Must a constitutional amendment comply with the constitutional principle of rationality; and if so, did the Twelfth Amendment comply with that principle.

(b) The Speakers of the Provincial Legislatures of KwaZulu-Natal and the Eastern Cape and the Electoral Commission are joined as parties to these proceedings.

(c) The Speakers of the Provincial Legislatures of KwaZulu-Natal and the Eastern Cape and the Electoral Commission are to lodge their affidavits, if any, by 9 March 2006, dealing with the issues set out in paragraph (a)(1)-(6) above.

(d) A copy of this order must be served on the Speakers of the remaining provincial legislatures. Any provincial legislature that wishes to intervene in

these proceedings must lodge its notice of its intention to do so together with an affidavit, if any, by 9 March 2006.

(e) The Second and Third Respondents are given an opportunity to lodge further affidavits until 9 March 2006 in the light of paragraph 84 of the judgment and paragraph (a)(6) above.

(f) The applicants must lodge their replying affidavits, if any, by 15 March 2006.

(g) Written submissions must be lodged by all parties by 23 March 2006.

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

O'REGAN J:

[87] I have had the opportunity of reading the judgments prepared in this matter by my colleagues, Ngcobo J, Sachs J and Yacoob and Skweyiya JJ jointly. I support the order made by Ngcobo J and wish briefly to indicate why.

[88] In principle, I agree with Yacoob and Skweyiya JJ that it is undesirable for a court in an urgent matter to raise a fresh legal issue not relied upon by the applicants, and upon which the applicants do not wish to rely. The role of a court is essentially to

be responsive to litigation brought before it. It should be noted that the applicants did in their founding affidavits raise some complaint of the absence of consultation in the process leading up to the redrawing of the provincial boundaries, although in written and oral argument they conceded that the Constitution Twelfth Amendment Act, 2005, had been properly enacted. As Ngcobo J states, a court is not bound by a legal concession of that sort. Nevertheless, I might for the reasons given by Yacoob and Skweyiya JJ have taken the view that because the matter is urgent, and because it would be impossible to determine the legal issue raised by Ngcobo J before the elections are to be held, this would not be a matter in which it would be appropriate to pursue such an issue.

[89] However, there is another concern which suggests to me that the route proposed by Ngcobo J should be followed. 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.

[90] Were we to leave undetermined the legal issues raised by Ngcobo J (and indeed also by Sachs J) which raise the question of whether, in the case of Matatiele, the KwaZulu-Natal/Eastern Cape boundary may not have been rationally or procedurally effected, it would create uncertainty and doubt which might continue to be a source of disquiet and anger for decades to come. It is this Court's constitutional task to ensure that the Constitution is upheld. Leaving undecided an issue of great public interest and controversy that only this Court may determine[1] because the proceedings are urgent, and because counsel for the applicant made what may prove to be an incorrect legal concession, would in my view not further the interests of justice in this case. In that respect, it may well be an exceptional case.

[91] I conclude therefore that it would not be in the interests of justice for this Court to leave the legal issues raised by Ngcobo J undetermined. It would of course have been ideal for the matter to have been determined before the local government elections were held. That has not been possible for many reasons. The Amendment Act was only passed just over two months before the local government elections had to be held in terms of the Constitution.[2] The applicants launched urgent proceedings

[1] The matter raises the constitutionality of a constitutional amendment which section 167(4) of the Constitution reserves as a matter to be determined only by this Court.

[2] Section 159 of the Constitution reads as follows:

> "Terms of Municipal Councils
> (1) The term of a Municipal Council may be no more than five years, as determined by national legislation.
> (2) If a Municipal Council is dissolved in terms of national legislation, or when its term expires, an election must be held within 90 days of the date that Council was dissolved or its term expired.
> (3) A Municipal Council, other than a Council that has been dissolved following an intervention in terms of section 139, remains competent to function from the time it is dissolved or its term expires, until the newly elected Council has been declared elected."

in this Court which were enrolled for 14 February 2006. At that hearing, the issues raised in the judgments of Ngcobo J were aired.

[92] It is quite clear that it would be inappropriate to determine the issues raised in their judgments without affording the affected provincial governments and national government a proper opportunity to respond. Doing that will inevitably take us past the date planned for local government elections. I agree with Ngcobo J for the reasons he gives that it would be inappropriate to suspend those elections at this stage. The question of what relief would be just and equitable, should there prove to be merit in the constitutional issues raised, will have to be determined at the next hearing.

[93] I wish to add that I agree with Ngcobo J that the argument raised by the applicant that the Twelfth Amendment Act is inconsistent with section 155(3)(b) of the Constitution is ill-founded. I would however prefer to express no view whatsoever on the powers of the national legislature in relation to the re-demarcation of municipal boundaries as a result of their redrawing provincial boundaries. I would also prefer not to agree at this stage with the statement (at para 25) that "what the Minister could not achieve through the Board was to be achieved through a constitutional amendment". This is a matter which will require further consideration. I am not necessarily in agreement with Yacoob and Skweyiya JJ's analysis of the possibilities

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Section 24 of the Local Government Municipal Structures Act, 117 of 1998 reads as follows:

> "Term of municipal councils. –(1) The term of municipal councils is five years calculated from the day following the date set for the previous election of all municipal councils in terms of subsection (2)."

(at para 27 of their judgment) that arise for resolving the demarcation of municipalities after a provincial boundary has been changed, but consider that this is a matter which can be determined after the next hearing. They are logically related to the question whether the provisions of the Cross-Boundary Municipalities Laws Repeal and Related Matters Act, 23 of 2005, as challenged by the applicants, are constitutional or not, and I would prefer to leave that matter entirely alone for the purposes of the present judgment.

[94] For these reasons, I concur in the judgment of Ngcobo J and in the order proposed by Ngcobo J.

Langa CJ and Van der Westhuizen J concur in the judgment of O'Regan J.

SACHS J:

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

[96] Our country has moved a long way since Stratford CJ said that "Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of courts of law to enforce its will.'' [97] [1] For a decade we have now lived in a constitutional democracy in which all power, whether legislative, executive or judicial, has had to be exercised in keeping with the Constitution. In the eloquent words of Mahomed AJ:

> "The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."[2]

[98] The spirit of the Constitution to which he referred is not a ghostly presence that attaches itself to the text. Rather, it is immanent in the text itself,[3] which clearly establishes the structures, overall design, above all the fundamental values of the Constitution. These founding values are set out in section 1 which provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

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[1] *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 11 at 37.

[2] *S v Acheson* 1991 (2) SA 805 (Nm HC) at 813 (At that time Justice Mahomed was Acting Judge of Appeal in Namibia, before later becoming Deputy President of this Court and then Chief Justice of South Africa.)

[3] See Mahomed DP in *Premier, KwaZulu-Natal, and Others v President of the Republic of South Africa and Others* 1996 (1) SA 769 (CC); 1995 (12) BCLR 1561 (CC) at para 47.

(b) Non-racialism and non-sexism.

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

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

As this Court emphasized in *UDM*,[4] these founding values have an important place in our Constitution, informing the interpretation of the Constitution and the law, and setting positive standards with which all law must comply in order to be valid.

[99] A founding value of particular relevance in the present matter is that of a multi-party system of democratic government to ensure accountability, responsiveness and openness. In *President of the Republic of South Africa v UDM*[5] this Court pointed out that a legislature has a very special role to play in such a democracy. It is the law-maker consisting of the duly elected representatives of all the people. With due regard to that role and mandate, it is drastic and far-reaching for any court, directly or indirectly, to suspend the commencement or operation of an Act of Parliament and especially one amending the Constitution, which is the supreme law. The Court continued:

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

[4] *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*) (2)* 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at paras 18-19.

[5] *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*)* 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC) at para 25.

> three branches of government are indeed partners in upholding the supremacy of the Constitution and the rule of law."[6]

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

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

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

[6] Id.

[7] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at paras 25-26.

Our Constitution accordingly requires that all legislation be rationally related to a legitimate government purpose. If not, it is inconsistent with the rule of law and invalid.[8]

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

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

[103] Before dealing with whether this posture adopted by counsel was constitutionally correct, an observation needs to be made about the manner in which Matatiele was fitted into the scheme of the Twelfth Amendment. It would seem from

[8] *UDM*, above n 4 at para 55.

the record that Matatiele was dealt with as a legislative add-on to the Amendment, which was intended essentially to grasp another nettle, namely, the problems created by divided provincial government responsibility for service delivery to cross-boundary municipalities. Yet the particular governmental purpose that could legitimately underlie re-making borders so as to eliminate cross boundary municipalities, would on the face of it appear to bear no immediately apparent relationship to a measure which relocates a municipality whose services have in fact been administered solely by the KZN provincial government.

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

[105] Of greater significance, however, was the fact that as recently as October 2005 an independent statutory body, namely the Municipal Demarcation Board, had considered and rejected the proposal that was later incorporated into the Twelfth

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

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

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

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

[109] The notion that 'government knows best, end of enquiry', might have satisfied Justice Stratford CJ in the pre-democratic era. It is no longer compatible with democratic government based on the rule of law as envisaged by our Constitution. This Court has frequently acknowledged the wide legislative mandate given by the Constitution to Parliament. Democratically elected by the nation, Parliament is the

engine-house of our democracy. One cannot but be mindful of the intense time-tabling pressures to which it is subjected in a period of institution-building and transformation. Yet the more significant the work that Parliament undertakes and the greater the pressures under which it operates, the stronger the need for government to provide an explanation for the introduction of legislation; robustness need not be equated with opaqueness.

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

SKWEYIYA AND YACOOB JJ:

Introduction

[111] We have had the privilege of reading the meticulous, detailed and carefully reasoned judgment of Ngcobo J (the main judgment). We agree that both the applicants' attacks on the constitutionality of the Amendment Act

[112] [1] to the effect that the Act unconstitutionally usurps the authority of the Demarcation Board[2] and that it offends section 41 of the Constitution must be rejected.

[113] Although the applicants limited their challenge of the Amendment Act to those bases rightly rejected in the main judgment, the judgment goes further. It considers that it is arguable whether the amendment was passed consistently with the procedure mandated by section 74(8) of the Constitution and postponed the case, on certain conditions, until the end of March this year for that argument to be presented and considered. We disagree with this approach, however, and conclude that it is inappropriate, in the circumstances of this case, for this Court to delay judgment of the application and postpone it to consider whether there has been compliance with section 74(8) of the Constitution.

[114] We accordingly hold that the Amendment Act is not invalid on the grounds relied upon by the applicants and that their application for an order declaring the Amendment Act to be inconsistent with the Constitution must be dismissed. This judgment deals predominantly with this issue and touches on other aspects in the main judgment in relation to which there is either lack of clarity or potential disagreement.

Must this Court consider compliance with section 74(8) of the Constitution?

[1] Constitution Twelfth Amendment Act of 2005.

[2] The Municipal Demarcation Board created in terms of section 2 of Local Government Municipal Demarcation Act 27 of 1998.

(a) The relevant facts

[115] The factual matrix relevant to a determination of whether we should consider the section 74(8) issue is summarised briefly. This application was launched as a matter of urgency on 23 December 2005. This Court agreed that the application should be considered as a matter of urgency because its outcome would have implications for the local government municipal elections which are scheduled to take place on 1 March 2006. The main judgment encapsulates the issue of urgency as follows:

> "In view of the importance of the constitutional issues involved in this case, we would have preferred to have had more time to consider these issues and formulate our view. Time does not permit this. The local government elections will be held on 1 March 2006. And our decision will have an impact on those elections. In view of the urgency of the matter there is a pressing need to announce our conclusions and basic reasoning within the shortest possible time."[3]

[116] The only material object of the Amendment Act is to amend certain provincial boundaries including the boundary between the provinces of KwaZulu-Natal and the Eastern Cape. To do this effectively, section 74(8) of the Constitution had to be complied with. The main judgment essentially holds that it is arguable that the Amendment Act is invalid in relation to the alteration of the boundary between the provinces of KwaZulu-Natal and the Eastern Cape on the following basis: the public involvement mandated by section 118(1) of the Constitution is embraced by the section 74(8) procedure and that the public involvement by section 118(1) of the Constitution has not occurred. In other words, the main judgment is concerned with

[3] Paragraph 1 of Ngcobo J's judgment.

the possibility that the Amendment Act is fatally defective for want of compliance with a single procedural requirement.

[117] It is now convenient to repeat section 74(8) and section 118(1) of the Constitution.

(a) Section 74(8) is in chapter 4 of the Constitution which is concerned with Parliament, and in that section of the chapter on Parliament regarding the way in which the Constitution may be amended. It reads as follows:

> "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."

(b) Section 118(1) is to be found in chapter 6 of the Constitution which is about the provincial legislature[4] and reads:

> "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."

[118] The applicants did not raise any issue concerning compliance with section 74(8) of our Constitution. Indeed, immediately before the hearing of the case, it was

[4] This provision appears in identical terms in section 72(1) in relation to the National Council of Provinces and in section 59(1) which is binding on the National Assembly.

common cause between the parties that the procedure in section 74(8) had been complied with. However, the affidavit filed by the Speaker of the KwaZulu-Natal provincial legislature is silent on whether there had been any "public involvement" in the process of the decision by the KwaZulu-Natal provincial legislature to approve of the amendment in so far as it related to the provincial boundary between KwaZulu-Natal and the Eastern Cape.

[119] It was in this context that some members of this Court questioned counsel during argument. This questioning pointed pertinently to certain issues namely whether:

(a) proper compliance with section 74(8) required the provincial legislatures to comply with section 118(1) in the process leading to the decision by the KwaZulu-Natal provincial legislature in a plenary session to mandate its representatives on the National Council of Provinces to approve the proposed constitutional amendments;

(b) the affidavit of the Speaker of the KwaZulu-Natal legislature demonstrated that there had been no public involvement and that section 118(1) had not been complied with;

(c) the Amendment Act was unconstitutional on this basis;

(d) this Court is bound by concessions in argument that section 74(8) has been complied with;

(e) this Court could raise the issue; and

(f) the Speaker of the KwaZulu-Natal provincial legislature should have an opportunity to address the issue.

[120] The response of counsel for the applicants was unambiguous. They frankly confessed that the applicants had not raised this basis of non-compliance with section 74(8) on the papers and disavowed any intention to pursue the point. Counsel conceded, however, that this Court did have the power to consider the issue if it chose to do so even though the matter had not been raised by the applicants. Counsel made no submission about whether we should do so in this case. Finally it must be emphasised that counsel for the applicants left us in no doubt as to the applicants' object in bringing this application: they wanted to have the area of Matatiele located in the province of KwaZulu-Natal. We consider this to be an important factor in determining whether the case should be postponed to determine the section 74(8) issue. We revert to this later.

(b) The evaluation

[121] The main judgment appears to accept that the case should be postponed for argument on the section 74(8) issue only if it is in the interests of justice to do so. This is indeed the appropriate test. The issues that must be considered in determining whether it is in the interests of justice to postpone the case include the importance and complexity of the matter and issue; whether the applicants wish the issue to be argued; and whether it is in the interests of the applicants, who after all, have brought the application to have this issue adjudicated. The last two factors referred to in the previous sentence are not considered in the main judgment.

[122] It is our respectful view that the issues raised in the course of the questioning described in the preceding paragraph are by no means capable of a ready answer. They are as important as they are complex and involve an investigation of, amongst other things, the inter-play of sections 74(8), 72(1) and 118(1) of the Constitution; the implications of section 65(2) of the Constitution;[5] the procedure described in the legislation contemplated by, and passed pursuant to section 65(2) of the Constitution; the correct interpretation of section 118(1) as a whole in its context; and the meaning to be attributed to the words "facilitate" and "public involvement" in particular; whether the conduct of the KwaZulu-Natal provincial legislature met the relevant standard; and whether, if it did not, the appropriate remedy consequent upon non-compliance was a declaration of invalidity of the Amendment Act to the extent that it was concerned with the province of KwaZulu-Natal[6] despite the approval of the legislation by the elected representatives of the people of that province.

[123] The issues are so complex that it is impossible to say that the argument for constitutional invalidity is compelling. However, the problem does not end here. Even if the Court were to hold that compliance with section 118(1) of the Constitution was necessary and that there was no compliance, we have doubt about whether we will set aside the Amendment Act in so far as it concerns the border between the provinces of the Eastern Cape and KwaZulu-Natal. We do not intend to suggest that the section 118(1) public involvement is unimportant: it is an important building block

[5] Section 65(2) provides: "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."

[6] *King and Others v Attorneys' Fidelity Fund Board of Control and Another* 2006 (1) SA 474 SCA.

in the process of forging a participatory democracy, a process which is both long and arduous. Our reason for doubting whether this Court will set aside that part of the Amendment Act is that we will need to balance against it the following factors:

(a) the provincial legislature is not bound by what the people who are consulted want to do;

(b) the process has been approved by two-thirds of the members of the National Assembly who are the elected representatives of the South African people, by all of the provinces and by a majority of the members of the KwaZulu-Natal legislature who are the democratically elected representatives of the people of KwaZulu-Natal.

(c) there has been consultation at the national level and the people of Matatiele have made strenuous representations there already;

(d) it is unlikely that the provincial representatives were not aware of the content and nature of these representations; and

(e) the people of Matatiele have made their views known to a Member of the Executive Council in KwaZulu-Natal and have aired their views at public hearings held by the Demarcation Board.[7]

We would suggest that there is a compelling argument that it is to put form above substance to set aside part of the Amendment Act, in all the circumstances of this case, because consultation by the provincial legislature is absent.

[7] Municipal Demarcation Board established by the Local Government: Municipal Demarcation Act 27 of 1998.

[124] Even if the relevant part of the Amendment Act were to be set aside, there would be a compelling argument that it is in the interests of justice for the declaration of invalidity to be suspended for a reasonable period in order to enable the provincial legislature to cure the defect. It is important to point out here that the main judgment proposes that elections be held in the newly established Matatiele Local Municipality, in the Sisonke District Municipality, and in the Alfred Nzo District Municipality. By the time we come to consider whether to suspend the declaration of invalidity of part of the Amendment Act (if that declaration is in fact made), these elections would have been held and the argument would be that setting aside part of the Amendment Act without more would give rise to considerable and perhaps unnecessary disruption. How everything is to be undone if the declaration of invalidity of parts of the Amendment Act is not suspended boggles the mind.

[125] If the order for suspension is granted, the possibility that the consultation will result in the KwaZulu-Natal legislature changing its position on the Amendment Act is remote. It is unlikely that the consultation will produce a new factor not previously considered and so potent as to justify a change in what must be seen as the previously considered view of the KwaZulu-Natal legislature.

[126] It is perhaps so that the applicants did not embrace the point when it was suggested to them because it was realised that the new road did not necessarily lead to the desired destination. It is in our view not in the interests of justice to postpone this case to hear an argument on an issue and subject the applicants to extra effort and

expenditure of taking the argument forward because the Court regards the issue as important and arguable in circumstances where there cannot be said to be any compelling reason to suggest that the applicants (and it is the applicants who have launched this application) will benefit in the sense of achieving their only objective: the transfer of Matatiele from the province of the Eastern Cape to KwaZulu-Natal.

[127] It will be remembered that the applicants approached this Court urgently, precisely because they required a decision of the case before 1 March. We must also not forget that this Court heard the case urgently for that reason and that reason alone. In addition, the issue as to whether final judgment on the application should be given after 1 March and after consideration of the section 74(8) issue has not been canvassed with the parties. Indeed, the applicants disavowed any reliance on the section 74(8) compliance issue and did not urge the Court to consider it even after the matter had been pertinently drawn to their attention.

[128] We conclude that it is not in the interests of justice to determine an important and complex constitutional issue if the appropriate determination of the issue requires us to postpone full argument and the delivery of judgment to a date beyond that of the municipal elections to be held on 1 March, in circumstances where the applicant does not require this Court to determine the issue and wishes to have judgment before the date of the elections.

[129] We would therefore simply hold that the Amendment Act is not invalid on the grounds urged by the applicant. We would not postpone the case to consider the section 74(8) issue at this stage because it is not in the interests of justice to do so. We would therefore dismiss the applicants' claim that the Amendment Act is inconsistent with the Constitution.

The reasons for the amendment?

[130] One more matter concerning the Amendment Act must be mentioned. When it was pointed out to counsel for the respondents that the papers filed on their behalf did not set out the motivation for the decision taken to alter the provincial boundary between the province of KwaZulu-Natal and the province of the Eastern Cape, counsel took the view that this information was irrelevant to a determination of the matters at hand. He added that the respondents could not be faulted for not furnishing the reasons. This response represents an unfortunate over-simplification.

[131] It is impossible for a court to determine whether or not the motivation for a particular legislative choice is relevant until and unless the reason is made known. Our Constitution requires transparency and accountability and it is ordinarily incumbent upon government to make public the basis on which a particular choice was made. It is quite possible that in this case, the motivation was not fully canvassed because papers had to be prepared as a matter of urgency. It is also apparent that the provincial boundary re-determination effected by the Amendment Act is consistent with the majority recommendation of a commission appointed by the government to

make recommendations concerning this provincial boundary. In the circumstances, there may be sufficient to detract from any contention that the amendment might be irrational. It is not necessary to decide the issue at this stage but irrationality may in a particular case constitute a sufficient basis for a declaration of constitutional invalidity. It is essential, in all future cases, for government to provide courts with the reasons which motivated particular legislation in order to promote transparency and accountability and to ensure that courts decide cases on a holistic consideration of all the circumstances.

[132] Although we are of the view that this case should not be postponed so that the section 74(8) issue can be investigated, there will be a postponement because the majority supports this course. Since the case is to be postponed, in any event, we agree entirely with the main judgment and associate ourselves with that part of the Order that requires the Minister to furnish particulars of the motivation.

Repeal Act

[133] The invalidity of the Amendment Act will result in the Repeal Act[8] becoming redundant. Accordingly, the constitutionality of the Repeal Act falls to be considered only if the Amendment Act is valid. In the circumstances, and because the main judgment supported by the majority does not pronounce on the validity of the Amendment Act, any consideration of the Repeal Act would be pointless. We accordingly refrain from going there.

[8] Cross-Boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005.

The interaction between the Executive and the Demarcation Board in the process of boundary re-determination

[134] We have considerable difficulty with the way in which the main judgment depicts the interaction between the Executive and the Demarcation Board in the process of the preparation and adoption of the Amendment Act and the Repeal Act. Indeed, the main judgment expressly says of the Minister in relation to the Amendment Act:

> "Thus what the Minister could not achieve through the Board was to be achieved through a constitutional amendment."[9]

We cannot agree with this statement, nor the way in which this process is described.[10]

[135] Before setting out the process in detail, we think it will be helpful to set out my views broadly. The interrelationship between the amendment of provincial boundaries and the amendment of municipal boundaries must have been obvious to all, including the Minister and the Board. So must the constitutional provision that requires municipal boundaries to be determined by an independent authority.[11] Under the circumstances, once the decision had been made to amend provincial boundaries, and to eliminate cross-boundary municipalities with the passage of the Amendment

[9] Paragraph 25 of the main judgment.

[10] Paragraphs 18-30 of the main judgment.

[11] Section 155(3)(b) of the Constitution.

Act and the Repeal Act imminent, it would have been evident that some co-operation between the Executive and the Demarcation Board would have to occur for there to be a smooth process. Otherwise, the consequences of changing provincial boundaries without addressing the consequences of that change would be unthinkable. The consequences will be investigated briefly with particular reference to Matatiele Local Municipality.

[136] It is necessary to traverse the process for the establishment of municipalities in order to understand the consequences of the provincial boundary change. The Constitution demands that "each provincial government must establish municipalities" consistently with certain national legislation.[12] A provincial government cannot therefore establish a municipality in another province. The national legislation concerned with the establishment of municipalities is the Structures Act[13] and the Demarcation Act.[14] Consistent with the constitutional requirement that only provincial governments may establish municipalities and only in their provinces, section 12 of the Structures Act provides:

> "12 **MECs to establish municipalities**
>
> (1) The MEC for local government in a province, by notice in the *Provincial Gazette*, must establish a municipality in each municipal area which the Demarcation Board demarcates in the province in terms of the Demarcation Act.
>
> (2) The establishment of a municipality—
>
> (a) must be consistent with the provisions of this Act; and

[12] Section 155(6) read with sections 155(2) and (3) of the Constitution .

[13] Local Government : Municipal Structures Act 117 of 1998.

[14] Above note 7.

(b) takes effect at the commencement of the first election of the council of that municipality.

(3) The notice establishing the municipality must set out—

(a) the category of municipality that is established;

(b) the type of municipality that is established;

(c) the boundaries of the municipal area;

(d) the name of the municipality;

(dA) in the case of a metropolitan or local municipality, the number of wards in the municipality;

[Para. (dA) inserted by s. 1 (b) of Act 33 of 2000.]

(e) the number of councillors as determined in terms of section 20;

(eA) in the case of a district municipality, the number of councillors, determined in terms of section 23, to—

(i) proportionally represent parties;

(ii) be appointed by each of the local councils within the district municipality to directly represent each local municipality; and

(iii) proportionally represent parties from each district management area within that district municipality;

[Para. (eA) inserted by s. 93 of Act 27 of 2000.]

(f) which councillors of the municipality (if any) may be designated as full-time in terms of section 18 (4);

(g) .....

[Para. (g) deleted by s. 1 (c) of Act 33 of 2000.]

(h) any provisions of this Act from which the municipality has been exempted in terms of section 91; and

(i) any other relevant detail.

[Sub-s. (3) amended by s. 1 (a) of Act 33 of 2000.]

(4) The MEC for local government must—

(a) at the commencement of the process to establish a municipality, give written notice of the proposed establishment to organised local government in the province and any existing municipalities that may be affected by the establishment of the municipality;

(b) before publishing a notice in terms of this section, consult—

(i) organised local government in the province; and

> (ii) the existing municipalities affected by the proposed establishment; and
>
> (c) after such consultation publish particulars of the proposed notice for public comment."

[137] The old Matatiele was undoubtedly established by the MEC of local government for the province of KwaZulu-Natal in the province of KwaZulu-Natal. The old Matatiele was not established and could not be established for the province of the Eastern Cape. The re-determination of the provincial boundary cannot therefore mean that the old Matatiele Local Municipality established by the relevant KwaZulu-Natal MEC for that province became a municipality by the same name, covering the same area within the province of the Eastern Cape. The change in provincial boundaries resulted in the fact that the old Matatiele ceased to exist when the Amendment Act came into operation. In addition, the territory which previously formed the old Matatiele was now in the province of the Eastern Cape; an area in respect of which no municipality had yet been established by the Eastern Cape provincial government.[15]

[138] There would have been three ways of managing this problem. The first, a way which in fact would amount to mismanaging it would be to pass the Amendment Act and then ask the Demarcation Board to reconfigure municipalities in the light of the change in provincial boundaries. This approach would be inconsistent with the Constitution because it would result in the territory of the old Matatiele Local

[15] Section 151(1) of the Constitution requires municipalities to be established for the whole of the territory of the Republic.

Municipality to have no governance. The second way would have been to temporarily tack the territory of the old Matatiele onto an existing municipality in the Eastern Cape and thereafter to ask the Demarcation Board to determine the municipal boundaries. The third would be to engage the Demarcation Board in the process, sharing with the Board the intention to change provincial boundaries and asking it to advise on the municipal re-configuration in advance and to implement that advice simultaneously with the amendment of provincial boundaries. This course would mean that the municipal boundaries would have been determined by the Demarcation Board and avoid a temporary municipal re-configuration consequent upon the alteration of provincial boundaries. The evidence demonstrates that the Executive followed this course.

[139] As will be seen from what follows, the pattern of the interaction demonstrates that there was discussion with the Demarcation Board, a request to the Demarcation Board to publish a determination, the use of that publication in the process of drafting legislation which is subsequently published, a determination by the Demarcation Board of municipal boundaries and the subsequent implementation of those boundaries in the Repeal Act. The first letter in the process that we have been able to find on the record is dated 17 August 2005 and addressed by a ministerial representative to the Chairperson of the Demarcation Board requesting that certain boundaries be published at the request of the Minister. Pertinent for present purposes is the first sentence of this letter which reads:

> "My letter dated 17 August 2005 and our various discussions on the aforementioned matter has reference."

This demonstrates that there had been discussions and even previous correspondence between the Deparment of Provincial and Local Government and the Demarcation Board. And it would be naïve to suggest that the discussion was anything but about the contemplated provincial boundary change upon municipal boundaries.

[140] The Demarcation Board acceded to the Minister's request and on 19 August 2005, in Government Notice No. 1594 of 2005,[16] the Demarcation Board published the Minister's proposals. The shape and size of the new Matatiele Local Municipality proposed by the Minister is contained in Map 3 to Notice No. 1594 of 2005. The only significant aspect of the configuration of the new Matatiele municipality as proposed by the Minister is that the old Matatiele and Maluti would be combined to form the new Matatiele. It must be noticed that the Minister's proposal also indicated that the new Matatiele Local Municipality is to form part of the Eastern Cape province.

[141] The purpose of the request to publish is also clear. What happened was that on 26 August 2005 the Minister published the Repeal Bill. It will be noted that the Repeal Bill refers to all the municipal boundaries concerned by naming Notice 1594 of 2005, published by the Demarcation Board at the Minister's request on 19 August 2005.

[16] Government Gazette No. 27937.

[142] The Demarcation Board published its proposal for Matatiele Local Municipality (and many other municipalities) in a Provincial Gazette on 18 October 2005.[17] Map 2 of this Notice deals with Matatiele Local Municipality. The Demarcation Board did not accede to the Minister's request that the newly configured Matatiele Local Municipality be placed in the province of the Eastern Cape. It must be remembered however, that this was not the Demarcation Board's decision to make. What is of importance though is that there is very little or no difference between the shape and size of the new Matatiele as proposed by the Minister and the re-determination proposed by the Demarcation Board after full and proper consultation.[18]

[143] The next development was that the Minister requested the Board to publish certain boundary determinations while the Parliamentary Portfolio Committee for Justice and Constitutional Development requested that the Board re-publish certain municipal maps. This was done by the Demarcation Board on 31 October 2005 in Notice No. 1998 of 2005.[19] The purpose of this request was again clear. What the Minister and the Portfolio Committee wanted was to be able to indicate provincial boundaries in the Amendment Act by reference to a set of maps covering the whole country contained in a single publication. This was done for it will be seen that schedule 1A of the Amendment Act delineates provincial boundaries by reference to the maps published in Notice 1998 of 2005. And this cannot be referred to as the

[17] Notice no 326 of 2005 published in Provincial Gazette No. 1442.

[18] In terms of section 26 of the Demarcation Act.

[19] Contained in Government Gazette No. 28189.

submission by the Minister as an "alternative" re-determination proposal.[20] Matatiele is represented in map 1of Notice 1998 of 2005. It will be seen that map 1 of Notice 1998 is identical to map 2 of Notice No 326 of 2005 published on 18 October 2005 in Provincial Gazette, which it will be remembered was the Matatiele configuration recommended by the Demarcation Board.

[144] We therefore disagree with the main judgment in relation to the publication in Notice 1998.[21]

[145] To complete this aspect two more Notices must be referred to. The first is Notice No.1257 of 2005 published on 21 November 2005.[22] Suffice it to say that in map 9 attached to this Notice Matatiele Local Municipality is the same as the map in which the Demarcation Board determined it after full and proper consultation in the Provincial Gazette of 19 October 2005, just referred to.

[146] The second Notice of relevance is the Correction Notice No. 1496 of 2005[23] on 28 November 2005. Matatiele Local Municipality is again in map 9. The municipality is now differently configured. It is the Demarcation Board that is responsible for this re-configuration. And it is this map that reflects the size and shape of the Matatiele Local Municipality in the Repeal Act.

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[20] Paragraph 21 of the main judgment.

[21] Paragraphs 21 and 22 of the main judgment.

[22] Government Gazette No. 28236.

[23] Government Gazette No. 28273.

[147] There is accordingly nothing untoward in the interaction between the Minister and the Demarcation Board. The Minister has done nothing to usurp the Board in so far as the shape and size of Matatiele is concerned. All the Amendment Act and the Repeal Act do is to place the whole of this area as determined by the Demarcation Board in the Alfred Nzo municipality in the Eastern Cape province. It may be that the Board wanted it in KwaZulu-Natal but that is neither here nor there.

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