

The duty to involve the public

THE CONSTITUTIONAL COURT SPEAKS

The Constitutional Twelfth Amendment Act (12th Amendment Act) altered the basis for determining provincial boundaries and resulted, among other things, in the changing of provincial boundaries between KwaZulu-Natal and the Eastern Cape. It effectively relocated the local municipality of Matatiele from Sisonke District Municipality in KwaZulu-Natal to the Alfred Nzo District Municipality in the Eastern Cape and relocated Umzimkhulu Local Municipality from Alfred Nzo District Municipality into the Sisonke District Municipality in KwaZulu-Natal. Amid much controversy, protest and resistance, it was the former transfer which was the crux of the constitutional challenge to the validity of the 12th Amendment Act.

Issue

This case report is limited to the responsibility of a provincial legislature when its provincial boundaries are being altered and, in particular, the obligation of a province to consult the people who are to be affected by the re-drawing of its provincial boundaries. The judgment is of critical importance to local government inasmuch as the duty to facilitate public involvement extends to all organs of state, including municipal councils. As in this case, the effect of non-compliance with this requirement can lead to the invalidation of laws enacted in the legislative process of a particular organ of state.

Provincial approval of boundary change

First, the Court ruled on the applicability of section 74(8) of the Constitution, which provides that when a Bill or any part

thereof concerns only specific province(s), the affected province(s) must approve the amendment. The Court held in this regard that “to protect the territorial integrity of the provinces, the framers of our Constitution gave each province the final say on whether its boundary should be altered”. The effect of section 74(8) is that the boundary of a province may not be altered without its approval. Thus, the amendment had to be approved by the legislatures of KwaZulu-Natal and the Eastern Cape.

Duty to facilitate public involvement

The question that then arose was whether, in considering a proposed constitutional amendment which alters its boundary, a provincial legislature is obliged to facilitate public involvement as required by section 118(1)(a) of the Constitution.

Section 118(1) provides: “A provincial legislature must – (a) facilitate public involvement in the legislative and other processes of its committees”.

The KwaZulu-Natal legislature argued that, as the representative of the people of that province and therefore speaking for them, it was not required to facilitate public involvement in its consideration of the 12th Amendment Act.

In answering this question, the Court emphasised that:

Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. Consistent with the constitutional order, section 118(1)(a) calls upon the provincial legislatures to ‘facilitate public involvement in [their] legislative *and other processes*’ [emphasis added].

The Court said that the Constitution calls for open and transparent democracy, which requires all organs of state, including all legislative organs, to facilitate public participation in their law-making process. Construed in this context, section 118(1)(a) envisages that a provincial legislature will facilitate public participation whenever it is engaged in a legislative, or indeed any other, process of the legislature.

The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves.

The Court held that Parliament and provincial legislatures have a broad discretion to decide on the best ways of facilitating that involvement, but that ultimately it must be reasonable. The Court emphasised the case-by-case nature of the test, saying that “the nature and degree of public participation that is reasonable in a given case will depend on a number of factors”. These include, among others, the nature and importance of the legislation as well as the intensity of its impact on the public. For example, the more discrete and identifiable the potentially affected section of the population and the more intense the possible effect on their interests, the greater will be the expectation that the legislature will ensure that that section of the population has a say. It was not enough, the Court said, to simply point to standing rules of the legislature that provide generally for public involvement as evidence that public participation in fact took place; what matters is that the

legislature acted reasonably in the manner that it facilitated public involvement in the particular circumstances of any given case.

The Court held that there are at least two aspects of the duty to facilitate public participation. First, there is a duty to provide the opportunities for meaningful public participation in the law-making process. Second, there is a duty to ensure that people are able to take advantage of those opportunities. Construed in this light, public involvement may be seen as a “continuum that ranges from providing information and building awareness, to partnering in decision-making”.

Participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and to become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It strengthens the legitimacy of legislation in the eyes of the public. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.

The Court held further that the Constitution makes Parliament, provincial legislatures and municipal councils the primary democratic institutions in the country and, as such, the people have a voice in those institutions, not only through elected representatives but also through access to committee meetings and deliberations. “The people have the right to speak and make representations to committees and meetings.”

Were the measures taken reasonable?

Having laid down the principles, the Court turned to determining whether the Eastern Cape and KwaZulu-Natal provincial legislatures acted reasonably in their respective circumstances.

The Eastern Cape Portfolio Committee on Local Government and Traditional Affairs held public hearings in the seven areas that it viewed to be directly affected by the proposed constitutional amendment. The hearings took place in both urban and rural parts of those affected areas. The Committee also received written submissions from individuals, municipalities, political parties and traditional

leaders. Subsequently, the Committee recommended the approval of the Amendment Act, but noted that certain concerns expressed by the public, particularly relating to the quality of service delivery, should be addressed as a matter of urgency. Plainly, there could be no doubt that the Eastern Cape Legislature, for its part, fully complied with its duty to facilitate public involvement in relation to the constitutional amendment.

In stark contrast:

it is common cause that the KwaZulu-Natal legislature did not hold [any] public hearings or invite written submissions on the proposed amendment. All the provinces which had their boundaries altered held public hearings, except for KwaZulu-Natal.

This, despite the general sentiment in KwaZulu-Natal that public hearings or a referendum were necessary. The Court held in this regard that:

the Eastern Cape managed to hold carefully monitored public consultations in areas contiguous to Matatiele where facilities were probably less developed. [T]he need for appropriate consultation with the people of Matatiele was especially intense because another governmental agency, namely, the Municipal Demarcation Board...had in fact held public consultation and after listening to the people had arrived at a completely different conclusion. The conclusion that the KwaZulu-Natal legislature acted unreasonably in failing to hold public hearings or invite written representations, is unavoidable. This is a plain, clear and unmistakable violation of section 118(1)(a) of the Constitution.

If the measures taken to facilitate public participation are unreasonable in a given case, it will thus lead to the invalidity of the legislative act in question.

Court order

Considering the drastic implications of invalidity with immediate effect, the Court held that the order of invalidity only applied to that part of the 12th Amendment Act which concerned KwaZulu-Natal. It suspended the order of invalidity for 18 months to allow Parliament and the KwaZulu-Natal legislature to adopt a new amendment consistent with section 118(1)(a) of the Constitution. Should they fail to do so within the given period, the Court will have to (re)determine the consequences.

key points

- The Court held that Parliament, provincial legislatures and municipal councils are the primary democratic institutions in the country and, as such, the people have a voice in those institutions.
- The judgment is of critical importance to local government inasmuch as the duty to facilitate public involvement extends to all organs of state, including municipal councils.
- A court can now review whether or not a municipal council has complied with the public participation requirements for adopting a by-law. If it finds that a council did not comply, the by-law will be invalid.

Comment

The significance of this judgement, for all organs of state including municipal councils, is immense. The Court's willingness to review compliance with public participation in the legislative and other processes of those organs of state has particular implications for local government. A court can now review whether or not a municipal council has complied with the public participation requirements for adopting a by-law. If it finds that a council did not comply, the by-law will be invalid. Significantly, the Court developed a set of criteria for determining whether public participation is reasonable.

While this case dealt specifically with the conduct of provincial legislatures, the wider ramifications of this judgment in relation to public involvement in the affairs of – and the duties on – municipal councils will be critically analysed in the next issue of the *Bulletin*.

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The views expressed in this article are those of the author and do not represent the Gauteng Department of Local Government.

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