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Partie I les expériences françaises et sud-africaines dans le mouvement universel de recomposition territoriale

Michael SUTCLIFFE (Demarcation Board):

The South African municipal demarcation process

THE SOUTH AFRICAN MUNICIPAL DEMARCATION PROCESS

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The first democratic municipal elections, held on 5 December 2000 brought to an end the interim system of local government and put in its place a democratic system based on our Constitution.

PROGRAMME TO CREATE MUNICIPALITIES:

The new system of municipal governance will be established throughout South Africa and must be in line with the constitutional requirements for municipal government. It must also accord with national legislation, such as:

- **Municipal Demarcation Act:** The independent Municipal Demarcation Board is given the power to determine the categories of municipality, their outer boundaries and wards. Additional functions of the Board are to provide advice to government and work with government Departments to align municipal boundaries and government’s service delivery regions.
- **Municipal Structures Act:** The policy proposals allow for different types of municipality (Executive Mayor, Executive Committee and Plenary) and define the relationship between traditional authorities and local government.
- **Municipal Systems Bill:** This Bill should be passed in September 2000 and it ensures that municipalities must base their developmental initiatives on Integrated Development Plans for the municipality as a whole. Administrations will be made to account directly to the councils and electorate.
- **Property Rating Bill:** This legislation creates a more rational system of property rating and extends the principle of property rates as a source of income to new sectors and across the country as a whole.
- **Financial Management Bill:** This Bill ensures effective and efficient administrations which have to ensure there is proper financial accounting and reporting.

THE DEMARCATION PROCESS:

Section 21 of the Municipal Demarcation Act states that the Board must determine, or redetermine, municipal boundaries in South Africa. It also states that any person aggrieved by such determination can object to the Board, and that the Board, after considering the objection, can either confirm, vary or withdraw its determination.

Section 24 and 25 of the Municipal Demarcation Act sets out the criteria for demarcation and, more specifically, the objectives of demarcation and factors to be taken into account by the Board when it determines a municipal boundary.

These objectives and factors to be taken into account informed the entire demarcation procedure followed by the Board. The process of determining a municipal boundary starts with notifying stakeholders and the public in general of the Board's intention to consider the matter, and inviting members of the public to submit their views on the matter (section 26 of the Municipal Demarcation Act).

Once the period for written representations and views has expired, the Board must consider all submissions by the public and then take a decision on the determination. Before this decision the Board can decide to hold a public meeting or conduct a formal investigation.

In addition to complying with the legal requirements for communicating with and consulting stakeholders in the demarcation process and the public in general, the Board takes special care to ensure that the process is as inclusive as possible. For example:

- National stakeholders' workshops were held where presentations were made on the demarcation process and research undertaken by the Board.
- Policy and discussion documents (for example, “An integrated framework of nodal points for metropolitan and district council areas in South Africa” released in June 1999) compiled by the Board were released to the public for comment.
- The Board held numerous ad hoc meetings with interested parties, such as business organisations, residents' associations, traditional leaders, etc.
- The Board took great trouble with reading and analysing all submissions and objections – a specially appointed team was responsible for this. Reports on submissions and objections were regularly tabled at meetings of the Board.

DEMARCATING METROPOLITAN AND DISTRICT MUNICIPALITY BOUNDARIES

The process of demarcating metropolitan (Category A) and district (Category C) municipality boundaries started with the publication of a policy statement by the Board, which was released for public comment at the end of June 1999.

The policy statement identifies metropolitan and district municipality nodal points, and contains the Board's preliminary views on the possible number and location of metropolitan and district municipalities in South Africa.

The process of determining these boundaries was completed at a meeting of the members of the Board on 5 and 6 October 1999. However, in view of the judgement of the Constitutional Court on 15

October 1999, pertaining to the constitutionality of certain provisions of the Municipal Structures Act, and after obtaining legal advice on the matter, the Board decided to again publish a section 26 notice to invite the public to submit their views and representations to the Board on the Board's intention to determine the boundaries of metropolitan and district municipalities.

The section 26 notice was republished in October 1999, and new boundaries republished, in terms of section 21 of the Municipal Demarcation Act, in November 1999. The delay in the boundary determination allowed for a more integrated approach and, in some instances, a re-examination of metropolitan and district municipality boundaries.

In December 1999 the Board published a number of redetermined metropolitan and district municipality boundaries. In total, the Board demarcated six metropolitan and 47 district municipalities.

Metropolitan municipalities

Metropolitan municipalities are defined in the Constitution [section 155(1)(a)] as having exclusive municipal executive and legislative competence in their areas. The Board developed a preliminary framework for demarcating metropolitan and district municipalities which, in addition to the applicable legislation, guided the demarcation process for these two categories of municipality.

In determining the boundaries of metropolitan municipalities, the Board applied section 2 of the Municipal Structures Act, which provides the criteria for an area to be regarded as a metropolitan area. Section 2 stipulates that an area must have a metropolitan municipality if that area can be regarded as:

- A conurbation featuring areas of high population density; and intense movement of people, goods and services; extensive development; and multiple business districts and industrial areas.
- A center of economic activity with a complex and diverse economy.
- A single area for which integrated development planning is desirable.
- Having strong interdependent social and economic linkages between its constituent units.

For example, the Board felt that two transitional metropolitan councils in Gauteng (Lekoa Vaal and Kyalami) did not fulfil the criteria for a metropolitan municipality, whereas an agglomeration of a number of existing transitional local councils on the East Rand demonstrated strong functional and other linkages and, therefore, fulfilled the criteria for determination of a metropolitan municipality. So did the existing transitional local councils of Port Elizabeth, Uitenhage and Dispatch.

The Board demarcated the following six metropolitan municipal areas:

- Johannesburg;
- Pretoria (Cross boundary with North-West);
- East Rand (Cross boundary with Mpumalanga);
- Durban;
- Port Elizabeth;
- Cape Town.

The metropolitan area of Pretoria extends across the provincial boundaries of Gauteng and North West, while the East Rand metropolitan area extends across the Gauteng-Mpumalanga provincial boundary.

District municipalities

The Board argued that the existing district councils had to be strengthened and their areas redefined to ensure better coordination with other spheres of government, as well as better planning and resource allocation across the local councils that currently make them up. New boundaries were needed to create logical district planning and development areas.

The breakdown per province of district municipalities is as follows:

| Province | Number of district municipalities | Number of cross-boundary district municipalities (CBDMs) |
|-------------------|--|---|
| Eastern Cape | 6 | |
| Free State | 5 | |
| Gauteng | 1 | 1 with North-West 1 with Mpumalanga |
| KwaZulu-Natal | 10 | |
| Mpumalanga | 3 | 1 with Gauteng 2 with Northern Province |
| North West | 4 | 1 with Gauteng 2 with Northern Cape |
| Northern Cape | 3 | 2 with North-West |
| Northern Province | 4 | 2 with Mpumalanga |
| Western Cape | 5 | |
| Total | 41 | 6 |

DEMARCATING LOCAL MUNICIPALITY BOUNDARIES

The Board divided the process of demarcating local (Category B) municipality boundaries into four phases, namely:

- Policy formulation. The Board released a document that contained its initial thinking with respect to local municipality boundaries and which sets out key considerations such as settlement types, the rationalisation of municipalities, manageable size and functionality.
- Inviting public views and representations. Section 26 of the Municipal Demarcation Act stipulates that, before considering any determination of a municipal boundary, the Board had to publish a notice in the media to state its intention to demarcate boundaries and to invite written representations from the public. The Board received 219 submissions by the closing date, and an additional 37 afterwards. Each submission was assessed by a small team in terms of the Board's policy framework for demarcating local municipality boundaries.

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- **Boundary assessment.** The Board prepared a number of boundary options for investigation. Several workshops were held at which the framework for local municipality boundaries as well as sections 24 and 25 of the Municipal Demarcation Act were applied to the boundary options. Also, despite this not being a legal obligation, 147 public hearings on the demarcation or local municipality boundaries were held throughout the country, at which the public's views and comments on the boundary options were obtained. After the public hearings, the Board embarked on a thorough boundary-investigation process. This resulted in a report for each local municipality that sets out the investigations' findings in terms of the key considerations for local municipalities identified by the Board during the policy-formulation process.
- **Boundary determination.** On 15 December 1999 the Board determined 249 local municipality boundaries throughout South Africa, and published the section 21 notices for these boundaries from 20-22 December. The closing date for objections to the Board's determinations was set for 31 January 2000.
- As from 28 February 2000, the Board published its determinations of all metropolitan, district and local municipality boundaries, as well as its proposals for cross-boundary municipalities. On 30 September 2000, the final determinations of 231 local municipality boundaries were published. The breakdown per province is as follows:

| Province | Number of local municipalities | Number of cross-boundary Local municipalities |
|-------------------------|---------------------------------------|--|
| Eastern Cape | 38 | |
| Free State | 20 | |
| Gauteng with Mpumalanga | 7 | 1 with Mpumalanga 1 with North-West |
| KwaZulu-Natal | 50 | |
| Mpumalanga | 17 | 4 with Northern Province 1 with Gauteng |
| North West | 21 | 2 with Northern Cape 1 with Gauteng |
| Northern Cape | 24 | 2 with North West |
| Northern Province | 22 | 4 with Mpumalanga |
| Western Cape | 24 | |
| Total | 223 | 8 |

THE DELIMITATION OF WARDS

Criteria for delimiting wards

Schedule 1, section 4, of the Municipal Structures Act sets out the criteria for delimiting wards in metropolitan and local municipalities.

The ward delimitation criteria are different from the general criteria guiding decisions on outer boundaries. This is because the demarcation criteria are largely about ensuring viable, effective and

sustainable municipalities, whereas the ward criteria are almost exclusively about ensuring the conditions for local democracy and the representation of voters on the municipal council.

The ward criteria emphasize the need for ward boundaries to guarantee three basic things:

- The need to ensure that the spread of votes is fair and equitable. It is a sound democratic principle all over the world that wards should be drawn in such a way that they have roughly equal numbers of voters.
- The need to ensure that the voting process is not disrupted. All voters in a ward must be able to reach a voting station easily, electoral officials need to be able to communicate easily with each other, and the safety and security of voters and ballot boxes need to be ensured.
- The need to ensure that residents who think of themselves as a community are able to vote together and are able to participate in ward committees together. It is not always possible to ensure that communities are kept together in the same ward, but, as far as possible, boundaries have been drawn in such a way that individuals can vote and participate in local government together with people they see as their neighbours, and with whom they share common interests and concerns.

Section 4(a) of Schedule 1 of the Municipal Structures Act gives the formula for delimiting wards as follows: “The number of registered voters in each ward may not vary by more than fifteen per cent from the norm, where the norm is determined by dividing the total number of registered voters on the municipality's segment of the national common voters' roll by the number of wards in the municipality.”

Guidelines for the determination of the number of councillors per metropolitan or local municipality are set out in section 20 of the Municipal Structures Act.

The process of delimiting wards

The Board issued a circular on 11 April 2000 in which it clearly set out the process it planned to follow for delimiting wards. It identified several steps in this process:

Firstly, formulae compiled by the Minister of Provincial and Local Government for the number of councillors in each metropolitan or local municipality were published.

Secondly, the MEC for local government in each of the nine provinces determined the number of councillors for each municipality in the province concerned.

Thirdly, the Board published for public comment a set of working-draft maps that indicated how wards might be arranged throughout the country.

Fourthly, the Board organised public hearings throughout the country to explain the delimitation process, and to request stakeholders and the public to make their own suggestions. After the closing of

the objection period, Board members worked closely with technical assistants in evaluating all objections and implementing ward boundary amendments where applicable.

On 12 May 2000 the Board published maps of all wards throughout the country, and allowed 14 days for written objections to its delimitations. On 30 September 2000 the process came to an end with the publication of maps showing the final delimitation of wards.

DISTRICT MANAGEMENT AREAS

The Municipal Structures Act makes provision for the Board to declare part of an area that must have both a district and local municipality as a district management area if the establishment of a local municipality in that part of the area will not be conducive to the fulfillment of the demarcation objectives set out in the Municipal Demarcation Act.

District management areas are, therefore, areas in which the requirements of section 24 (demarcation objectives) of the Municipal Demarcation Act cannot be fulfilled. A separate local municipality can, therefore, not be demarcated for such an area, and neither can a municipality be established. However, each district management area falls within the boundaries of a district municipality, and voters who live in such an area can elect representatives to represent them on the district municipality.

The Board declared 25 district management areas, of which the Kruger National Park is probably the best known.

CROSS-BOUNDARY MUNICIPALITIES

Cross-boundary municipalities can be metropolitan, district or local municipalities, but their boundaries extend across provincial boundaries.

Due to certain legal requirements, the boundaries of cross-boundary municipalities could not be determined at the same time as non-cross-boundary municipalities. A fairly complex process was followed to demarcate cross-boundary municipalities. The demarcation of cross-boundary municipalities required provincial legislatures to concur with the Board, and national legislation authorising the establishment of cross-boundary municipalities had to be enacted. This legislation was promulgated in late 1999. However, the Board published for public comment proposed boundaries for these municipalities, and also submitted its proposals to the relevant provincial legislatures for consideration and agreement.

Parliament passed the Local Government: Cross-Boundary Act in June 2000, authorising the establishment of cross-boundary municipalities in the areas proposed by the Board.

On 21 July 2000, the Board published its determination of cross-boundary municipality boundaries in the relevant Provincial Gazettes. After considering all objections, the Board published its final determinations.

Elections were held for cross-boundary municipalities as follows:

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- Gauteng/North West: one metropolitan municipality (Pretoria); one district municipality (CBDC8); and one local municipality (CBLC8).
- Gauteng/Mpumalanga: one metropolitan municipality (East Rand); one district C municipality (CBDC2); and one local municipality (CBLC2).
- Northern Province/Mpumalanga: Two district municipalities (CBDC3 and CBDC4); and four local municipalities (CBLC3, 4, 5 and 6).
- Northern Cape/Northern Cape: Two district municipalities (DC9 and CBDC1); and two local municipalities (CBLC1 and 7).

The total number of cross-boundary municipalities, therefore, is:

- Two cross-boundary metropolitan municipalities.
- Six cross-boundary district municipalities.
- Eight cross-boundary local municipalities.

Provincial governments have different options available to them to exercise executive authority in these areas.

Subsection 90(2)(b) of the Municipal Structures Act allows the MECs for local government of the affected provinces to jointly exercise executive authority with regard to a cross-boundary municipality. The establishment of a municipality is an involved process and requires the MEC for local government to exercise various discretionary powers in terms of the Municipal Structures Act, the most important of which are contained in sections 12, 14, 18(3) and (4), 20(3) and 85 of the Act. The Municipal Structures Act also confers other powers on the MEC in relation to municipalities once they have been established, for instance, sections 48(1), 55(1), 81, 86, 87(1), 88(3) and 91. Subsection (2)(b) provides for the exercise of all these powers by the relevant MECs by way of joint decisions and actions. For instance, if a provision empowers the MEC to make a determination in relation to a municipality by notice in a provincial gazette, the two MECs will in the case of a cross-boundary municipality have to agree on the determination and then publish it as a joint decision in the provincial gazettes of both provinces.

Subsection (2)(b) refers to executive authority granted to MECs for local government not only by the Municipal Structures Act, but also in terms of other legislation. The other legislation referred to in the section includes both provincial and national legislation, which confers executive authority with regard to a municipality on an MEC for local government.

The joint exercise of executive authority in terms of subsection (2)(b) does not apply if the two provinces enter into an agreement contemplated in subsection (3). Such an agreement may provide for an arrangement whereby the functionaries of only one of the affected provinces exercise executive authority in the whole cross-boundary municipality. In terms of such an arrangement:

The functionaries of one province may on an agency or delegation basis exercise powers in the area on behalf of the functionaries of the other province.

The legislation of the one province may for the sake of uniformity be applied to the cross-boundary municipality as a whole.

To apply the legislation of the one province (the administering province) to the cross-border area as a whole would, in terms of subsection (4), require special legislation enacted by the legislature of the other province whereby that province “incorporates” the laws of the administering province in that part of the cross-boundary municipality that falls within its jurisdiction. The incorporating legislation would identify the laws of the administering province to be applied in the area simply by way of a reference to the title and number of the law, and contain a statement to the effect that the province adopts these laws as its own for the relevant area. There is no need to re-enact the full text of the other province's laws.

The system of joint exercise of executive authority contained in subsection (2)(b) 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 will be jointly administered in the cross-boundary area, while other provincial legislation will have to be administered in the area by the two provinces separately.

The alternative system contained in subsection (3) is far wider and more flexible, as it could be applied, apart from the MECs for local government, to other provincial MECs and functionaries as well, depending on the terms of the agreement between the two provinces. The “executive authority” referred to in the subsection is not confined to that which a province may exercise with regard to the municipality, but includes any executive authority that may be exercised by the province in the cross-boundary area, for instance health, transport, etc. This system, however, requires complete consensus between the two provinces and a willingness of the one province to relinquish a measure of political and executive power in the area concerned.

Subsection (5) recognises the consensus principle underlying the whole concept of cross-boundary municipalities, and provides for the disestablishment of a cross-boundary municipality if a provincial legislature no longer supports the continuation of the municipality.

ESTABLISHING THE NEW MUNICIPALITIES

After the boundaries of a metropolitan, district or local municipality have been demarcated by the Board, each MEC for local government in a province must establish a municipality in that area. Such establishment must be done in terms of section 12, read with section 14, of the Municipal Structures Act.

The establishment of a municipality entails the publication of a section 12 notice. The MEC must, in terms of existing legislation:

- 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.
- Before publishing the section 12 establishment notice, consult organised local government in the province and the existing municipalities affected by the proposed establishment.
- Publish, after such consultation, particulars of the proposed notice for public comments.

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The MEC must, among others, address the following matters in the section 12 notice:

- The category of municipality;
- The boundaries of the municipality;
- The proposed name of the new municipality;
- The proposed type of the new municipality;
- Exemptions from legal provisions;
- Adjustments in the division of powers and functions;
- The designation of full-time councillors;
- The legal, practical and other consequences of the disestablishment of the existing municipalities in the new municipal area as envisaged in section 14(2) of the Municipal Structures Act, including:
 - The transfer of staff from the existing municipalities to the municipality to be established in the area (with due regard to the Labour Relations Act);
 - The transfer of assets, liabilities and administrative and other records from the existing municipalities to the new municipality, taking into account the interests of the creditors of the existing municipalities;
 - The continued application of any by-laws, regulations and resolutions of the existing municipalities to or in the new municipal area, and the extent of such application.

The New Municipal System

In brief, then, the Municipal Demarcation Board determined that there will be:

- 6 (A Category) Metropolitan areas (Johannesburg, Pretoria, East Rand, Durban, Port Elizabeth and Cape Town);
- 47 (C category) District Municipalities;
- 231 (B category) Local Municipalities.

These new municipalities were formally established through provincial proclamations which ensure that the assets, liabilities and existing programmes of local government are carried through into the new system and constituted through the 5 December 2000 elections.

Alignment of Government Service Delivery boundaries

The Cabinet has decided that Government’s service delivery boundaries must be aligned more properly. Presently, you may live in one municipality, go to a school in a different municipality, have to go to a magistrate’s court in another municipality, and so on.

The Municipal Demarcation Board is working with all National and Provincial Government Departments to try and get the service delivery boundaries of government to be more effectively aligned with municipal government. The building blocks for this new system should be the 6 Metropolitan and 47 District municipalities which are to be created.

Using these as the building blocks it will be possible to ensure that electricity, transport, justice, policing, education, welfare and so on are properly aligned. Hopefully this will mean that government as a whole will be able to plan one-stop service centres where you can go to get governmental assistance. Also, it would be very good if organs of civil society (such as sport, business, trade unions, political parties, etc.) align their districts with combinations of the new municipalities too.

Transition and Transformation

Clearly, the new municipal system of governance is only just beginning to be transformed. In the short-term there will obviously be many teething problems as the system takes shape. When coupled with the serious shortfalls of capacity throughout our country and the existing spatial inequalities in resource provision it is clear that the transformation process will require intensive monitoring and adjustments to be made as the system evolves.

More detailed studies on transitional and transformation costs are being conducted which should provide recommendations on matters including:

- The allocations of intergovernmental Grants;
- Addressing capacity in underresourced municipalities;
- Restructuring of Municipal debt;
- Assignment of property rates;
- Allocation of levy income;
- Dealing with the electricity restructuring process quickly and fairly;
- Dealing with backlogs of financial statements and audits and getting fixed asset registers sorted out.

Many short-term matters will have to be addressed, such as, appointing the new CEOs who can guide the development of a new municipal administrative system, deciding on the ‘seat’ for the ‘new’ municipalities, and the like. These will be dealt with only after the elections and after the new councils have been sworn into office, although, as the Facilitation Committees discuss the establishment of the new municipalities, these issues will become much clearer.

CONCLUDING COMMENTS

The process of demarcation remains on track. There is a process underway to deal with the concerns of traditional leaders about their role, status, functions and powers. The municipal establishment process is underway with some of the major problem areas being: (i) definition of functions and powers, (ii) assignment of particularly fiscal powers and (iii) issue of staff transfer. It is clear that longer-term capacity building programmes are going to be required.