

The legality of the 2015 demarcation proposals by
the Minister of Cooperative Governance to the
Municipal Demarcation Board

By

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The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment, rendered in a light blue color. Below the building, the text "UNIVERSITY of the WESTERN CAPE" is written in a serif font, with "of the" in italics.

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WESTERN CAPE

A research paper submitted in partial fulfilment of the requirements for award of the degree LLM (Local government and Decentralisation) in the Faculty of Law, University of the Western Cape.

Supervisor: Professor Nico Steytler

KEYWORDS

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Development

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Democracy

Municipal Boundary

Metropolitan Area

Dysfunctionality

Service delivery

Sustainability



DECLARATION

I, Sipho Matthews Mzakwe, hereby declare that **“The legality of the 2015 demarcation proposals by the Minister of Cooperative Governance to the Municipal Demarcation Board”** is my own work. It has never been presented to any other tertiary institution. Where other people’s works have been used herein, references have been duly provided, and in some cases, quotations made. This dissertation is, therefore, submitted in partial fulfilment of the requirements of the LLM Degree in Local Government Law and Decentralization, University of the Western Cape.

SIGNED:.....

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MARCH 2016



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MARCH 2016

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DEDICATION

I dedicate this dissertation to God and my late parents.

Sipho Matthews Mzakwe



LIST OF ABBREVIATIONS

SALGA	South African Local Government Association
FFC	Financial and Fiscal Commission
CoGTA	Cooperative Governance and Traditional Affairs
SARChI	South African Research Chair Initiative
Stats SA	Statistics South Africa
Cities Network	South African Cities Network
MDB	Municipal Demarcation Board
Demarcation Act	Municipal Demarcation Act
Structures Act	Municipal Structures Act
DMA	District Management Area
Metro	Metropolitan Municipality
LM	Local Municipality
CC	Constitutional Court
DM	District Municipality
IDP	Integrated Development Plan
ANC	African National Congress
SA	South Africa
DA	Democratic Alliance

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Chapter One: Introduction

1. Problem Statement

The Department of Cooperative Governance and Traditional Affairs (CoGTA) conducted in 2014 an assessment of the state of municipalities South Africa. Based on its assessment CoGTA classified municipalities into three categories: namely, municipalities that are doing well, those that are functional but at risk of becoming dysfunctional and those that are nonviable and “frankly” dysfunctional.¹ The Minister of CoGTA (hereafter referred as the Minister) sought to rectify the problem, specifically that of nonviable and dysfunctional municipalities (the third category), and thus proposed the following options. First, the Minister requested the Municipal Demarcation Board (MDB) to re-demarcate the municipal boundaries of those dysfunctional and nonviable municipalities before the 2016 local government elections and merged them with functional municipalities in order to make them functional and viable.² However, if this option would not make them functional, the whole municipal area should be declared as District Management Area (DMA).³ In other words, declaration of DMAs was advanced as an alternative to amalgamation. This option for DMAs however disappeared in subsequent correspondences made by the Minister to the MDB, and amalgamation became the only option advanced as a solution.⁴ Finally, the Minister proposed the establishment of three new Metropolitan Municipalities.⁵

In terms of the Demarcation Act 27 of 1998 the authority to draw outer boundaries of municipalities, the declaration of metropolitan municipalities and district management areas is vested to the MDB. The Act also provides for the legal framework governing the demarcation of municipal boundaries. Sections 24 and 25 of the Demarcation Act sets out the objectives of demarcation and factors which must be considered by the MDB when re-determining municipal boundaries. In light of these two provisions, however, dysfunctionality and non-viability, which seemed to be the motive behind

¹ Cooperative Governance and Traditional Affairs *Back to Basics* policy document available at: <http://www.cogta.gov.za/summit2014/wp-content/uploads/2014/10/LG-Back-to-Basics-Approach-Document.pdf> (Accessed on 20/05/2015).

² MDB Circular 1/2015.

³ MDB Circular 1/2015.

⁴ MDB Circular 2/2015; 3/2015; 4/2015.

⁵ MDB Circular 1/2015.

the minister's requests, are not criteria and/or the objectives of demarcation but are factors relevant to demarcation. However, CoGTA's proposals seem to treat both concepts as if they are criteria for demarcation. The distinction between criteria, objectives and factors is vital and the failure to distinguish between these concepts may result to incorrect decisions.

The legal framework governing the declaration of both the metropolitan municipalities and district management areas is provided for in the Municipal Structures Act 117 of 1998. In terms of the Act, a DMA is an area where the establishment of a category B municipality in that particular area would not be conducive to the fulfilment of local government objectives.⁶ Here the focus is on the "area" as opposed to a municipality; the nature of an area must be incapable of enabling a municipality to fulfil its constitutional objectives. Again, nowhere in the Act does dysfunctionality and non-viability appear as grounds for declaring DMAs.

With regard to the request of creating new metros; one of the areas that have been proposed to be a metro is UThungulu District Municipality in Kwa-Zulu Natal. The proposal is to the effect that the entire district should be declared a metro with Richards Bay (UMhlatuze LM) as its core.⁷ In this regard, section 2 of the Structures Act sets out the definition of a metropolitan area. The term "conurbation" as provided for in section 2⁸ is defined as an extended urban area, consisting of several towns merging with the suburbs of a central city.⁹ The problem in this regard is that most of the areas within uThungulu DM are mainly rural and not urban areas.

The minister's request has in any case given rise to many questions and confusion, as to what really constitutes a metropolitan municipality. To evidence this fact, President Jacob Zuma in Parliament was quoted by the media stating:

"I'm not sure the proposal is accurate. That you put Mthonjaneni, Nkandla and others and make a metro out of them... That is not a city. I thought metros are actually derived from places that can become cities and cities that are big enough to become metros. Now, if what you are

⁶ See s 6(2) Municipal Structure Act 117 Of 1998.

⁷ MDB Circular 2/2015.

⁸ See s 2 Structures Act.

⁹ New Pocket Oxford Dictionary.

counting are small little towns... Nkandla is a small town, Mthonjaneni is very small, it is just a hotel".¹⁰

In light of the minister's requests about 35 local municipalities are to vanish either through amalgamation or being declared as DMAs. Of great concern are the cost implications of this major restructuring of local government. Re-demarcation processes are costly, disruptive and can also complicate future projections and budgeting of the receiving municipalities. The transitional costs for the merger of Metsweding district municipality and two local municipalities into the City of Tshwane Metropolitan Municipality were estimated at R1.04-billion. Thus, the merger of more than thirty local municipalities will certainly require much more expenditure.

2. Research questions

The number of the proposed municipalities for merger gives rise to the research questions of this paper.

The main research question of this paper is: Whether CoGTA's demarcation proposals are compatible with the law?

And the following are sub-questions of the main research question-

- (a) Are dysfunctionality and non-viability legitimate criteria for re-demarcating municipal boundaries?
- (b) Is the declaration of dysfunctional and non-viable municipalities as district management areas compatible with the legal framework of DMAs?
- (c) Do the proposed metro areas meet the definition of a metropolitan area?

3. Argument

As noted above, the driving principle behind CoGTA's proposals to the MDB was to eliminate dysfunctional and nonviable municipalities. Thus, the question is whether are these two concepts legitimate criteria for demarcating municipalities? This paper argues that both concepts are not criteria for demarcation. Section 25 of the

¹⁰President Zuma responding to presidential questions (11 March 2015) available at: https://drive.google.com/file/d/0B_-sIGu8-FTxeEo0SFJWZ0NqWEU/view?pli=1 (Accessed on 29/05/2015).

Demarcation Act, specifically lists financial viability as one of the factors that must be considered during the demarcation process. Unlike financial viability, the concept of dysfunctionality/functionality is not expressly provided but implied in section 24(b) as forming part of section 24, but only as factor not a criterion and/or the objective of demarcation.

Furthermore, with regard to the declaration of DMAs; it is submitted that both concepts do not form part of the framework governing the declaration of DMAs. In other words, dysfunctionality and non-viability do not constitute grounds for declaring DMAs. Thus, the proposal to replace dysfunctional and unviable municipalities by a declaration of DMAs is contrary to the Structures Act.

Finally, it is submitted that all three proposed metropolitan areas do not qualify to become metros because they do not conform to section 2 criteria. All three areas are predominately rural and the definition of a metro militates against the creation of a 'rural metro'. In light of section 2 criteria, it is observed that an area should be more urbanised in order to be eligible for a metro status.

4. Literature Review

Very little has been written on the demarcation of South African municipal boundaries, the establishment of metropolitan areas and the declaration of district management areas.

(a) Analysis of section 24 and 25 of the Demarcation Act

In the book titled *Local Government Law of South Africa*, Steytler and De Visser wrote about the legal framework governing municipal demarcation in South Africa.¹¹ However these authors simply cited the legal framework exactly as provided for in the legislation, without providing a detailed analysis of it. Therefore, they have not covered the issue. Furthermore Bekink,¹² same as Steytler and De Visser, in his work did touch on the framework of municipal boundaries but did not attempt to analyse the framework in question. Moreover, a book that was edited by Steytler¹³

¹¹ Steytler N and De Visser J *Local Government Law of South Africa* (2014) 2-12.

¹² Bekink B *The principles of South African Local Government* (2005) 11-151.

¹³ Steytler (ed) *The First Decade of the Municipal Demarcation Board: Some Reflections on Demarcating Local Government in South Africa* (2010) 32.

was consulted but also did not cover the issue as no attempt was made to analyse the legal framework in question.

(b) Declaration of DMAs

The South African Local Government Association (SALGA) took part in the debate on re-demarcation of municipal boundaries and made submissions in this regard. A report titled "Possible boundary re-determination and its impact on local democracy and governance" stated that SALGA is of the view that resurrection of district management areas (DMAs), as proposed in the Ministerial options, is surprising given their previous existence and complete abolishment in 2011.¹⁴ According to this report, SALGA asked if the DMAs were deemed surplus to our developmental requirements just three years ago, why would their application now be suggested as a solution to the challenges currently being experienced in many of the 'dysfunctional' municipalities? SALGA took a view that a decision regarding the viability and non-viability in terms of performing functions or being a municipality at all should be informed by a realisation that a particular municipality, irrespective of the efforts to provide support and build its capacity, will not be viable to perform the functions of a municipality unless the objective characteristics (e.g. physical and socio-economic characteristics) of the area concerned were to change significantly.¹⁵ Size and scale is often not the best response in such instances (which are the majority of the cases cited by the Minister).¹⁶

As observed by Steytler, there is no generally accepted concept of, or policy on, "municipal viability" among key stakeholders.¹⁷ According to Steytler, the MDB has in the past worked with the concept only when declaring DMAs in very sparsely populated areas.¹⁸ The proposals therefore, transform one of the factors relevant to demarcation into a requirement.¹⁹ Section 25 of the Demarcation Act lists "financial viability and administrative capacity of the municipality to perform municipal functions

¹⁴ SALGA National Working Group: A report on possible boundary re-determination and its implications for local democracy and governance (2015) Unpublished document. (SALGA Report, 2015).

¹⁵ SALGA Report, 2015.

¹⁶ SALGA Report, 2015.

¹⁷ Steytler N "Questions about over demarcation proposals" <http://www.bdlive.co.za/opinion/2015/04/30/questions-about-over-demarcation-proposals> (accessed on 29/05/2015).

¹⁸ Steytler (2015) 1.

¹⁹ Steytler (2015) 1.

efficiently and effectively" as one factor, among 12 other factors, that must be weighed against the others.²⁰ Important, if one factor determines the outcome, the decision is contrary to the law and thus void. Furthermore, financial viability is not a financial principle of multilevel government in SA. All provinces rely on transfers for 97% of their revenue and so do district municipalities.²¹ Important, no academic work has been done to show how the new proposed LMs, joining two or more grant-dependent, impoverished municipalities, will somehow become financially viable.²²

(c) Creation of Metropolitan municipality

Kroos Smith's article on aspirant metropolitan areas, argues that section 2 criteria/definition of metropolitan municipality place a high premium on the economic character of a metropolitan area.²³ He further observe that there is a direct link between the required intense movement of people, goods and services, multi business districts and industrial areas, and a complex and diverse economy.²⁴ Consequently, analysis of the economic character of an area may determine whether an area is a metropolitan area or not. If the economy of an area is dominated by primary economic activity (agriculture, forestry etc) it cannot become a metropolitan area. However, if primary economic activity is present but not a dominant economic characteristic, the area may become a metropolitan area.²⁵ According to Smith, analysis of the economic character of an area should take into account the daily commuting patterns and the number of people who commute within the area: the movement of goods and services within the area: and the distinction between primary and secondary business district.²⁶ In addition the area must also feature extensive development. According to Smith the legislature by the term "extensive development" might have contemplated that metropolitan area would be entirely built up.²⁷ Therefore a metropolitan area should be an urban settlement in its entirety.

²⁰ Steytler (2015) 1.

²¹ Steytler (2015) 1.

²² Steytler (2015) 2.

²³ Smith K 'Aspirant metropolitan municipalities: prospects, problems and requirements' (2001) (3) *Local Government Law Bulletin* 175.

²⁴ Smith (2001) 175.

²⁵ Smith (2001) 175.

²⁶ Smith (2001) 175.

²⁷ Smith (2001) 175.

In contrast, Sutcliffe, the former chairperson of the MDB disagreed with Smith argument that the legislature placed a high premium on the character of a metropolitan area.²⁸ Sutcliffe argued that it is much more the economic significance of metropolitan area that must be addressed.²⁹ The MDB did not limit its definition of extensive development and that each case is analysed on its own merits. According to Sutcliffe, South African metropolitan areas differs from international metropolitan areas because we have become world leaders in producing integrated, developmental vision for metropolitan municipal areas.³⁰ South Africa's approach to integrated developmental local governance means that even metropolitan areas may contain large portions of land used for commercial and communal farming purposes.³¹

According to Steytler, three important elements can be observed from section 2. First, if the criteria are present, the MDB has no discretion but to declare a metro.³² If they are not there, the MDB must declare the area a category B municipality. The discretion of the MDB comes in, however, in the interpretation and application of the criteria. Second, all the criteria must be present before a declaration can be made.³³ All the criteria are linked by the conjunctive "and".³⁴ Moreover if one is not present, then the MDB cannot declare an area a metro. The third element is the definitions of the criteria. They are, in general, broad and open-ended. While they may be given a broad interpretation, the provisions may not be stretched beyond a reasonable use of the terms.³⁵

In light of the above literature, it is clear that not much has been written on the legal framework governing the creation of municipalities in South Africa. The literature therefore reveals that most of the work done on this issue, does not in depth analyse the legislative framework but rather cite it exactly as provided for in legislations. Therefore, because legislations provide the demarcation objectives and factors

²⁸ Sutcliffe M 'Aspirant metropolitan municipalities: A response' (2001) (3) *Local Government Law Bulletin* 179.

²⁹ Sutcliffe (2001) 179.

³⁰ Sutcliffe (2001) 179.

³¹ Sutcliffe (2001) 179.

³² Steytler N 'Single-tier local government for major urban areas' (2007) available at: file:///C:/Users/user/Downloads/copy3_of_planact-urban-land-pamphlet.pdf (Accessed on 20/05/2015).

³³ Steytler (2007) 9.

³⁴ Steytler (2007) 9.

³⁵ Steytler (2007) 9.

without defining them there is a gap and it remains unclear what these factors actually entails. Same applies to the criteria for declaring metros, there are only three authors who attempted to shed a light on what section 2 criteria entails. Be that as it may, the authors did not fully engaged with each criterion, but rather provided an overall impression of section 2.

5. Overview of Chapters

This study will be divided into five chapters.

- Chapter 2 will discuss the existing legislative framework for demarcation to ascertain whether or not dysfunctionality and non-viability are criteria and/or factors of demarcation.
- Chapter 3 will discuss the legislative framework and the history of declaring DMAs in South Africa, after which the CoGTA proposal will be examined against the framework in question. The purpose of this chapter is to ascertain whether dysfunctionality and non-viability form part of the framework of DMAs.
- Chapter 4 will discuss the criteria of a metropolitan area after which the proposed areas will be examined against the criteria to ascertain their eligibility to become metros.
- Chapter 5 will be a conclusion and recommendations

6. Methodology

This study was carried out using a desktop research methodology. In this regard, legislation, case laws, research papers, journal articles and reports were used.

Chapter Two

The legislative framework governing the demarcation of municipal boundaries in South Africa: Are dysfunctionality and non-viability criteria and/or factors?

1. Introduction

This chapter examines the legislative framework for demarcation of municipal boundaries in South Africa to ascertain whether 'dysfunctionality' and 'non-viability' form part of the legal framework in question. To answer this question, the chapter begins by an analysis of how CoGTA measured and defined dysfunctionality and non-viability as suggested in CoGTA's *Back to Basics* policy document.³⁶ It then proceeds to discuss the existing legislative framework for demarcation.

This part of the chapter is divided into two sections: the first section is a discussion of section 24 demarcation objectives, while the discussion on the second section focuses on demarcation factors. At the end of each section an assessment of dysfunctionality and non-viability in light of the framework is undertaken. Before concluding, the chapter reflects on the reaction of the MDB to CoGTA's proposals, whether the MDB accepted any of the proposals and what was the final decision. In essence this chapter seeks to illustrate that dysfunctionality/functionality by implication does form part of section 24 demarcation objectives, but does not establish itself as criterion for demarcation. Further, non-viability is merely a factor to be taken into account during demarcation, but not an objective of demarcation. Overall, the chapter concludes that both concepts are not criteria and/or objectives of demarcation but factors relevant to demarcation and should thus be treated as such.

2. Dysfunctionality and Non-viability

2.1 Meaning of Dysfunctionality

There is no express meaning of the word dysfunctionality in terms of CoGTA's *Back to Basics* policy document and the Demarcation Act. According to CoGTA the following indicators were employed to measure functionality of municipalities:

³⁶ CoGTA *Back to Basics* policy document available at: www.cogta.gov.za/summit2014/wp-content/uploads/2014/10/LG-Back-to-Basics-Approach-Document.pdf (Accessed on 20/05/2015).

Community satisfaction, institutional and financial management, service delivery, governance, and political stability.³⁷ Based on the above indicators, CoGTA concluded that a functional municipality is one that has a satisfied community, good governance and sound financial and institutional management, good service delivery and a stable political system.³⁸ By implication, a dysfunctional municipality would be the opposite of a functional municipality described above. According to the *Pocket Oxford Dictionary* dysfunctionality is described as referring to something that is not operating properly. This dictionary meaning is consistent with the observation that dysfunctionality, in the context of municipal administration, can only refer to how badly a municipality is governed, delivers services and accounts for the collection and expenditure of its revenue.³⁹ Furthermore, as observed from the *Back to Basic* policy document, similarities among all the municipalities that were classified as being 'frankly dysfunctional' include poor governance, poor service delivery, and poor institutional and financial management.⁴⁰ These are all human factors that can influence the functioning of a municipality. Seen in this light, dysfunctionality is equated to poor management of the municipality.

2.2 Meaning of Non-viability

The Department of CoGTA measured financial viability by using the following indicators: 'tax sustainability, economic viability, financial viability and dependence on inter-governmental transfers.'⁴¹ This meant that municipalities that showed persistent financial distress and high degree of dependence on intergovernmental grants to fund their services were regarded as non-viable. In other words, a municipality that largely depends on intergovernmental grants as result of not having sufficient tax base is therefore deemed to be unviable. In terms of CoGTA's presentation at the municipal financial viability colloquium, a viable municipality is one that has a sound tax base, prudent financial management and less dependent on intergovernmental transfers.⁴² By including 'prudent financial management' CoGTA links both objective factors - the revenue base which may be slow to change

³⁷ FFC/SARChI Colloquium report on Municipal Viability, 15 July 2015, available at: www.ffc.co.za (Accessed on 07/07/2015) (FFC/SARChI Report, 2015).

³⁸ FFC/SARChI Report, 2015.

³⁹ Steytler (2015) 2.

⁴⁰ CoGTA *Back to Basics* policy document.

⁴¹ CoGTA *Back to Basics* policy document.

⁴² FFC/SARChI Report, 2015.

with the current human agency which may change quickly. Municipal own revenue constitutes on average 73 percent of the municipal total revenue. However, this is not the case in all municipalities especially district and rural municipalities. In district and rural municipalities 80 percent of their total revenue comes from intergovernmental grants and only 15 to 20 percent constitutes their own self raised revenue.⁴³ While on the other hand, metros, secondary cities, and larger towns are financially dependent on intergovernmental grants by merely 20 percent or less.⁴⁴ Implied from CoGTA's definition of viability is that all district municipalities are unviable.

What 'municipal viability' actually entails remains a mystery for many stakeholders. In actual fact, the report of a recent colloquium on municipal financial viability indicates that there is no shared understanding of municipal viability among the stakeholders.⁴⁵ In terms of this report for some stakeholders, financial viability is the same as economic viability or financial sustainability, while for others, financial sustainability is synonymous with financial self-reliance.⁴⁶ Notwithstanding the fact that there is no common understanding of municipal viability among the stakeholders, for the purpose of this chapter, the above CoGTA's definition of municipal viability shall be used and examined against the legal framework for demarcation.

3. Legal Framework

According to section 24 of the Demarcation Act when the MDB determines a municipal boundary its objective must be to establish an area that would-⁴⁷

- (a) enable the municipality for that area to fulfil its constitutional obligations,

⁴³ National Treasury._2012. The state of local government finances and financial management as at 30 June 2012. Available at: http://mfma.treasury.gov.za/Media_Releases/The%20state%20of%20local%20government (Accessed on 11/1/2016).

⁴⁴ FFC/SARChI Report, 2015.

⁴⁵ The colloquium was on municipal financial viability, hosted by Financial and Fiscal Commission in collaboration with the South African Research Chair in Multilevel Government, Law and Policy on the 5th of July 2015. Some of the stakeholders that made presentations and took part on the discussions included: Municipal Demarcation Board, Financial and Fiscal Commission, City of Tshwane, National Treasury, Gariiep Local Municipality and National Depart of Cooperative Governance and Traditional Affairs, just to mention a few.

⁴⁶ FFC/SARChI Report, 2015.

⁴⁷ See s 24 Municipal Demarcation Act, 27 of 1998.

including-

- (i) the provision of democratic and accountable government for the local communities;
 - (ii) the provision of services to the communities in an equitable and sustainable manner;
 - (iii) the promotion of social and economic development; and
 - (iv) the promotion of a safe and healthy environment;
- (b) enable effective local governance;
- (c) enable integrated development; and
- (d) have a tax base as inclusive as possible of users of municipal services in the municipality.

Most of these objectives are derived directly from section 152 of the Constitution, which sets out the objectives of local government. However the last three are added objectives. In total these objectives reflects the ideal state of South African local government.

3.1 Defining section 24

3.1.1 Interpretative approach

What method of interpretation should be used to interpret sections 24 and 25 of the Demarcation Act? The approach to the interpretation of constitutional and statutory provisions in our law is not harmonious.⁴⁸ In *Dadoo v Krugersdorp Municipal Council* Solomon JA (majority) once asserted that '[i]n interpreting a statute a court is entitled to have regard not only to the words used by the legislature but also its object and policy.'⁴⁹ The Constitutional Court has also made it clear that the approach to be adopted in interpreting the Constitution is a purposive one.⁵⁰ The court while accepting this approach also cautioned against the adoption of a pure purposive approach that completely disregard the language used by the legislature. Kentridge AJ stated

“the Constitution does not mean whatever we wish it to mean...even a Constitution is a legal instrument, the language of which should be

⁴⁸ Devenish G E *Interpretation of Statutes* (1992) 52.

⁴⁹ *Dadoo v Krugersdorp Municipal Council* 1920 AD 530 para 558.

⁵⁰ In actual fact, this was the approach adopted in the first judgment of that court in *S v Zuma and others* 1995 (2) SA 642 (CC) at 650H to 653B.

respected. If the language used by the lawgiver is ignored in favour of a general resort to “values” the result is not interpretation but divination”⁵¹.

This method of interpretation was later confirmed in *S v Makwanyane and another*.⁵² Accordingly, this approach was applied in relation to subsequent judgments under the 1993 Constitution⁵³ and has continued to be applied in relation to the 1996 Constitution.⁵⁴ Dodson J also signaled his support for this approach by stating

‘even though the law of statutory interpretation has not wholeheartedly adopted a purposive approach, it seems that where one is dealing with a statute which the Constitution specifically requires to be enacted in order to give content to the right concerned, it would be absurd to adopt a different approach to the statute’s interpretation. This is all the more so in respect of a part of the statute which substantially retains the wording of the corresponding constitutional provision’.⁵⁵

In this regard, it should be noted that the promulgation of the Demarcation Act under discussion in this chapter was specifically mandated⁵⁶ by the Constitution. Du Plessis note that a purposive interpretation could in the course of time have an impact on courts’ approach to the interpretation of non-constitutional legislation too.⁵⁷ This is especially true where the legislation is closely associated with socio-economic and political transformation.⁵⁸

In view of this approach to interpretation and authority cited above the various demarcation objectives are discussed.

3.2 Demarcation objectives

⁵¹ *S v Zuma and others* 1995 4 BCLR 401 (SA) para 17-18.

⁵² *S v Makwanyane and another* 1995 (3) SA 391 (CC) at 403C to 404A.

⁵³ See for example, *S v Mhlungu and others* 1995 (3) SA 867 at 873H to 875A and 896H to 897A. The minority judgment expressly refers to and applies a purposive approach.

⁵⁴ See for example, *Soobramoney v Minister of Health, KwaZulu - Natal* 1998 (1) SA 765 (CC) at 772F to 773A and at 779B to I.

⁵⁵ *Minister of Land Affairs and Another v Slamdien and Others* 1998 (1) BCLR 413 (LCC) para 13.

⁵⁶ See s 155(3)(a)-(b) Constitution.

⁵⁷ Du Plessis M *Re-interpretation of Statutes* (2002) 115.

⁵⁸ Du Plessis (2002) 115.

3.2.1 Distinction between objectives, criteria and factors

Before unpacking sections 24 and section 25, let us first draw a distinction between an “objective”, “factor” and “criteria”. An objective is what the decision maker sought to achieve. It is a goal that a process or person strive to achieve. The *Oxford Dictionary* defines a factor as fact or situation that contributes towards the end result. It is a fact that should be considered and not disregarded by the decision maker. As pointed out earlier, section 24 sets out the objectives of demarcation, while section 25 contains a list of demarcation factors. The manner in which the MDB decides to demarcate should strive towards the attainment of the objectives set out in section 24. Further, such a decision should be influenced by the consideration of all the factors contained in section 25. In this regard, the MDB is obliged to consider section 25 factors but not to abide by them as a particular factor may be outweighed by other factors. The consideration of factors during the decision making process is thus meant to influence and help to properly structure the ultimate decision. However, criteria are not factors nor are objectives. The *Concise Oxford Dictionary* defines criteria as principles or standards by which something may be judged or decided. These are rules that apply in an all or nothing fashion. If most of the criteria are met but one or two criteria are not, then the decision to demarcate cannot succeed. From this perspective, criteria are more of requirements that must all be met before a decision can be made. The distinction drawn above is of essence to this chapter as CoGTA’s proposal regard factors as if are requirements. As shall be further explained later, dysfunctionality and non-viability are factors relevant to demarcation and not criteria for demarcation. However, if a decision to demarcate is only based on dysfunctionality and non-viability then both concepts cease to be factors and become requirements a situation which is inconsistent with the Demarcation Act.

3.2.2 Section 24 (a)(i): ‘the provision of democratic and accountable government for the local communities’

Key to this provision is the concept of democratic and accountable government. Generally, a democratic government is broadly defined as government of the people, for the people, and by the people. This is understood to mean that people have a say on who should govern, and how they want their area be governed. Apart from representative democracy, community participation in municipal governance is an

essential component of a democratic government. Mechanisms that are used to facilitate community participation includes among others, ward committees, public meetings, izimbizo (informal gatherings with councillors where questions can be asked regarding any municipal matter), consultative sessions and report back sessions with the local communities.⁵⁹ The central idea of participation is to give citizens a meaningful role in local government decisions, while accountability means that people will be able to hold local government responsible for how the decisions affect them.⁶⁰ Together, these two processes are what constitute the heart of the “democratic” component of democratic local governance.⁶¹

The overall objective of participation and accountability is to make local government more responsive to the needs of the locals and effective in service delivery. If this objective is to be realised through demarcation consideration of a size of an area to be demarcated should be a priority. Demarcation of large areas for local government is less conducive to the realisation of a democratic local government. Local authorities need to be ‘local’ enough for every citizen to be able to identify with.⁶² In large municipalities, however, due to large population present, people live far apart from each other making it difficult for certain local citizens to know their local authorities. In this case, it becomes difficult if not impossible for the locals to voice out their wishes to local authorities that they do not know and eventually hold them accountable for decisions that badly affect them. And vice versa, if local authorities are not local enough to the residents they cannot be aware of the community needs and aspirations. The end result is that local government become less responsive to community needs, and leaving municipal service delivery function badly affected.

An overview of South African local government post 2000 by Cameron and Game, revealed that councillors in rural communities have large constituencies and this makes it difficult for them to represent communities adequately.⁶³ The long distance that the locals have to travel when attending ward committee meetings may deter

⁵⁹ Thornhill C ‘Local government after 15 years: issues and challenges’ in De Villiers B (ed) *Review of Provinces and Local Government in South Africa: Constitutional Foundations and Practice* (2008) 71-5.

⁶⁰ Blair H ‘Participation and Accountability at the Periphery: Democratic Local Governance in Six countries’ (2000) 28 *World Development* 22.

⁶¹ Blair (2000) 22.

⁶² MDB Report on sizes of municipalities in South Africa: prepared by Cameron R and Game C, 2010 (Cameron and Game, 2010).

⁶³ Cameron and Game, 2010.

them from doing so. Unlike large municipalities, smaller local government are geographical close to the locals, thereby making it easy for them to recognize local authorities, attend and participate in ward committee meetings, and ultimately hold the authorities to account. Therefore smaller local government units are perfectly in line with local government vision of being a sphere closest to the citizens, while large units hinders the realization of this vision.

3.2.3 Section 24 (a)(ii): ‘the provision of services to the communities in an equitable and sustainable manner;’

Local government as sphere closest to the people is entrusted with a responsibility of delivering services and developing communities. The Constitution specifically in schedule 4B and 5B outlines municipal services as including: electricity and gas reticulation, health services, water and sanitation, solid waste disposal and general municipal infrastructure. These services should be provided in an equitable and sustainable manner. The words ‘equal’ and ‘equitable’ are not synonymous. The latter implies substantive equality. Given South African history this concept recognizes that other communities are more developed while others are still lagging behind. It suggests that a municipality in providing services to local communities must do so fairly taking into account extenuating factors that may justify one community getting more services than the other. However equitability must not be understood to mean that other communities would not get services. According to Bekink, ‘all communities should have access to at least a minimum level of services. This is not a goal, but a constitutional obligation.’⁶⁴ Within the meaning of sustainability, a municipality is expected to maintain the provision of services probably not only for the benefit of the present generation but also for the future generation. Seen in this light, sustainability suggests that service delivery is an ongoing process.

In this regard, consideration of physical and geographical characteristics of an area during demarcation becomes imperative. The MDB should avoid demarcating areas where there exist rivers and mountains that cut across between certain communities. This is so because an area that has a river or mountain that cut across local communities may make it difficult for a municipality of that area to provide services to

⁶⁴ Bekink (2005) 283.

communities that are situated over the mountain. Furthermore, to sustain the provision of services to communities situated over the mountains may have immense financial implications for that municipality. Another important consideration, once again is the issue of size for local government units. It is generally accepted that there is a relationship between the size of a local authority and the quality of its performance. There is a strong argument for larger local units if local authorities are to provide and sustain quality services to local communities. Advocates of larger units base their arguments on economies and efficiencies of scale.⁶⁵ The argument is that larger local government units are necessary if they are to have a tax base enabling them to be financially viable, to attract professional staff and to deliver a reasonable standard of services.⁶⁶ Although smaller local government units are preferable for municipal political functions, their financial weakness renders them incapable of fulfilling the service providing function. Therefore, demarcation can give effect to this objective by demarcating larger local government areas.

3.2.4 Section 24 (a)(iii): ‘the promotion of social and economic development’

Municipalities must undertake developmentally oriented planning to ensure that they fulfill their socio-economic obligations to the communities.⁶⁷ From this perspective, social and economic development would mean improvement of people’s quality of life through enhanced infrastructure, education, creation of jobs and skills development. Same as the previous objective, demarcation can assist municipalities to fulfill the promotion of social and economic development by creating larger local government areas. They must be large enough of provide economies of scale. Local government areas that are too small are not conducive to the promotion of social and economic development. Cameron and Meligrana observe that, if emphasis is placed on efficiency, “financial strength”, the role of local governments within the larger regional, national, global economies and “social and economic development”, the preference tends to be for larger units of local government.⁶⁸ Therefore to give effect

⁶⁵ Cameron and Game, 2010.

⁶⁶ Cameron and Game, 2010.

⁶⁷ Steytler N ‘Socio-economic rights and basic municipal services’ 2004 (6) *Local Government Law Bulletin* 339.

⁶⁸ Cameron R and Meligrana J, Criteria for determining municipal boundaries and categorization of metropolitan municipality (2010) a report prepared for the Municipal Demarcation Board (Cameron and Meligrana, 2010).

to this objective, the MDB should establish larger local government area that works as a functional whole.

3.2.5 Section 24(a)(iv): ‘the promotion of safe and healthy environment’

This objective is closely linked to socio-economic rights articulated in section 24 of the Constitution. In terms of this section, everyone has the right to an environment that is not harmful to their health or well-being.⁶⁹ According to Mbazira the promotion of socio-economic rights by municipalities can take place through educating the public on how best to enjoy them.⁷⁰ Depending on the nature of right, this can be done through all forms of information dissemination on various aspects of the right.⁷¹ Therefore, there is no direct link between demarcation and the realization of this objective. Once the MDB has established a municipality, then the municipality itself can come up with ways of promoting a safe environment. Here, the purpose is to protect the well-being of the public against life threatening waste e.g hazardous waste, spread of deadly diseases. Furthermore, air pollution by industries is another area where a municipality can regulate to ensure safety of the public.

3.2.6 Section 24(b): ‘enable effective local governance’

Governance means a process of decision-making and the process by which decisions are implemented or not implemented.⁷² Effectiveness is regarded as one of the principles of good governance. From this perspective, effectiveness is generally understood as referring to processes and institutions that produce results that meet needs while making the best use of resources.⁷³ The *Oxford Dictionary* describes the word ‘effective’ as referring to something that produce the intended results. How best can demarcation ensure that local government system produces the intended results? Drawing from the *White Paper on Local Government*, effective local governance is a system that assures accountability for the decisions taken and responsiveness to the priorities of the citizens. As already discussed in section 24(a)(i) above, demarcation of larger units is not desirable for participatory

⁶⁹ See s 24 (a) Constitution.

⁷⁰ Mbazira C *Realisation socio-economic rights in the South African Constitution: the obligations of local government: A guide for municipalities* (2006) 4.

⁷¹ Mbazira (2006) 4.

⁷² United Nation Economic and Social Commission for Asia and Pacific ‘What is good governance’ available at: www.unescap.org/sites/default/files/good-governance.pdf (Accessed on 04/09/2105).

⁷³ Graham, Amos & Plumpre *Principles for good governance in the 21st century: Policy Brief No.15*, 2003.

democracy. Proximity is a fundamental value underlying local government.⁷⁴ In smaller sized municipalities local authorities are close to the communities they serve. And thus, unlike in larger units, the interaction between the locals and councillors is enhanced. The locals can easily identify their councillors, voice out their wishes and ultimately hold them accountable for municipal decisions that affect them. Local government in this regard becomes responsive to the needs of the communities and effective in service delivery. Governance thus means the link between the council and the residents; how they collectively produce governance through accountable government. This point is important as it runs against CoGTA's criterion of functionality. Effective local governance is not the same as functional local government. Demarcation can thus give effect to this objective of effective local governance by demarcating smaller sized local municipalities.

3.2.7 Section 24(c): 'enable integrated development'

Key to this objective is the word "integrated". The opposite of integration is separation. This objective implies that the MDB should guard against the separation of areas that are dependent on each other or function well together. It suggests that development should include looking at suitable areas for integrated development at local government level but it would also be integrated with national and provincial programmes.⁷⁵ The focus must be on the functionality of an area; not demarcating the area into small areas, but rather integrate areas that functions as whole. In this regard, a municipality of that area would be able to have an integrated development plan for the entire area.

3.2.8 Section 24(d): 'have a tax base as inclusive as possible of users of municipal services in the municipality'

This objective is important in the current debate as it explicitly make mention of the municipal tax base. The concept of the municipal tax base is often used to describe the total amount of assets or revenue that the municipality can tax. Property rates are thus the most important local taxing power. Cameron and Meligrana observe that this objective attempts to link economic boundaries with administrative boundaries.⁷⁶ The rationale behind section 24(d) lies in the history of South African local

⁷⁴ FFC/SARChI Report, 2015.

⁷⁵ Cameron and Meligrana, 2010.

⁷⁶ Cameron and Meligrana, 2010.

government. This objective specifically responded to the apartheid system where the tax revenue gathered in central Johannesburg business district, to which all communities contributed, was only used for the benefit of white areas. From a historical point of view, citizens from black areas (Soweto) contributed heavily to the growth of commercial and industrial areas in many white local authorities in their capacity as workers and consumers, yet they did not receive concomitant financial benefits.⁷⁷ In 1987 alone it was estimated that sowetans spent about R1 billion in Johannesburg central business district.⁷⁸ In this regard, Cameron and Meligrana notes that section 24(d) was an attempt to give effect to the 1980s slogan, 'One city, one tax base' by amalgamating rich white areas with poorer townships.⁷⁹ The aim is to ensure that the people who use services should be the same people who pay for them.⁸⁰ From this perspective, the aim was not necessarily to create municipalities that are financially self-funded as implied in CoGTA's definition of viability. The MDB thus took this objective into account when it demarcated municipalities in 1999/2000.⁸¹

3.3 Assessing the validity of dysfunctionality and non-viability as objectives in light of section 24

Is the disestablishment of a dysfunctional municipality compatible with any of the listed objectives in section 24? It must be pointed out that CoGTA seem to confuse functional local government with the section 24(b) objective of effective local governance. Government and governance are two different words yet related. Government, on one hand, refers to the elected and appointed persons who govern or run the administration of a municipality. Governance, on the other hand, refers to the link between the council and the residents; how they collectively produce governance through an accountable government system. As discussed above, the focus of demarcation is only one of size. The question is which size of local government unit (smaller or larger) has a potential to provide effective local governance. The question of whether once an area is established that "potential" will

⁷⁷ Cameron R 'Central-local financial relations in South Africa' (2002) 28 *Local Government Studies* 118.

⁷⁸ Cameron (2002) 118.

⁷⁹ Cameron and Meligrana, 2010.

⁸⁰ Cameron and Meligrana, 2010.

⁸¹ Cameron and Meligrana, 2010.

eventual materialise, is an issue that is beyond the scope of demarcation: it largely depends on the caliber of administrators of that particular municipality.

The Department of CoGTA defined a dysfunctional municipality as one that has poor governance, poor service delivery, and poor institutional and financial management. These are all human factors that influence the functioning of a municipality and thus cannot be resolved through demarcation. Although it is desirable that demarcation should result in functional local government, there is very little that it can actually do to that effect. It therefore cannot be an objective of demarcation as it lies beyond the control of the MDB. Dysfunctionality is the opposite of effective local governance. However, demarcation on its own either through smaller or larger local government units cannot eliminate dysfunctionality. From this perspective, it is appropriate to regard functionality as factor as opposed to objective of demarcation. At the start of demarcation it can never be known how a municipality will actually perform. And thus, to regard municipal actual performance as an immediate objective will be highly problematic for demarcation. In line with this argument is the observation that socio-geographic indicators such as population and density tend to be static indicators while performance indicators are non-static in the sense they can vary substantively from year to year.⁸² Boundary criteria focus more on socio-geographic criteria rather than performance indicators.⁸³ A municipality which meets all of section 24 objectives can still be badly governed, but this is a temporary problem.⁸⁴ Functionality is not a conditional criterion which later if a municipality is not performing well disqualifies it from being one. Otherwise each and every municipality must be assessed in terms of its maladministration. CoGTA's functionality criterion covers issues that are not directly relevant to boundaries, with many relating to broader performance and compliance issues.⁸⁵ The relationship between a municipal boundary and the actual performance of a municipality is unclear, as the municipality may be dysfunctional for many reasons that are not necessarily linked to a boundary.

The concept of non-viability as the other driving principle underpinning CoGTA's proposals is equally flawed. As noticed from the discussion of section 24, financial viability is not expressly listed as one of the objectives of demarcation. Nor do any of

⁸² Cameron and Meligrana 2010.

⁸³ Cameron and Meligrana 2010.

⁸⁴ FFC/SARChI Report, 2015.

⁸⁵ FFC/SARChI Report, 2015.

the expressly listed objectives imply that financial viability is the objective of demarcation. As shall be discussed later in this chapter, financial viability is specifically listed in section 25 as factor which the MDB should consider when drawing municipal boundaries. Thus, it is not criteria or the objective of demarcation.

Of importance is that local government has two main important functions, that is a political function and service-providing function. Both of which are constitutional objectives of local government. If financial viability is regarded as referring to municipal own revenue then many local municipalities will never be financially viable. As property rates and service charges are the main sources of municipal own revenue,⁸⁶ in many municipalities there is no strong property market on which rates could be imposed, for example in rural areas with communal land – few services that can generate income. In this regard, the fiscal equalisation system through equitable share transfers was specifically designed to offset the fiscal gap that exists between municipalities.⁸⁷ Nowhere in the Constitution is it said that municipalities should be financially self-reliant. In contrast, the Constitution⁸⁸ specifically guarantees provincial and local government spheres an equitable share of nationally raised revenue. Thus, financial dependency on intergovernmental grants should not be perceived as problem. It is also incorrect to regard municipalities that are dependent on intergovernmental grants as unviable, while performing their political and service functions very well. The same could be said of provinces. Collecting only three percent of their revenue, they cannot be regarded as unviable for that fact alone.

3.4 Defining section 25 factors

According to section 25 of the Demarcation Act, in order to attain the objectives set out in section 24, the MDB must, when determining a municipal boundary, take into account a number of factors.⁸⁹

3.4.1 Section 25(a): ‘the interdependence of people, communities and economies’

The MDB should consider the interdependence of people, communities and economies of areas. Here, the aim is on functionality of a municipality. The term

⁸⁶ See s 229(1)(a) Constitution.

⁸⁷ FFC/SARChI Report, 2015.

⁸⁸ See s 214 (1) (a) Constitution.

⁸⁹ See s 25 (a)-(e) Demarcation Act.

‘interdependence’ refers to dependence of two or more areas. In light of this definition, and for the purpose of functionality, the legislature envisaged that areas with internal linkages should be combined to form one area. In determining the interdependence of people, communities and economies the following indicators should be taken into account: employment; commuting and dominant transport movements; spending; the use of amenities, recreational facilities and infrastructure; and commercial and industrial linkages.⁹⁰ According to Cameron and Meligrana, spending patterns are an important indicator of socio-geographic interdependency.⁹¹ The economic status of different areas can be established by identifying the area served by markets and retail or wholesale outlets.⁹² Taking into account commuting and transport patterns implies that where people live should be linked to where they work.⁹³ Amenities and recreational facilities such as stadiums, entertainment complexes, and the like look at extent to which people in surrounding areas use these amenities and recreational facilities are further indicators of interdependence.⁹⁴

3.4.2 Section 25(b): ‘the need for cohesive, integrated and unfragmented areas’

This factor reinforces the previous one, in that a majority of people working in the city must also be living in the same municipality. A municipality should not be divided into a small number of areas. Moreover one should not fragment continuous urban development.⁹⁵ During apartheid a number of municipalities were fragmented along racial lines and a key objective of the 1999/2000 demarcation was to create non-racial unfragmented municipalities.⁹⁶ A municipality would easily come up with an integrated developmental plan for the entire area and provide services to all local communities within its territory if it is not artificially fragmented.

3.4.3 Section 25(c): ‘the financial viability and administrative capacity of the municipality to perform municipal functions efficiently and effectively’

This factor is important in the current debate as it specifically makes reference to ‘financial viability’. It is widely accepted that local government units need to be large

⁹⁰ See s 25(a)(i)-(vi) Demarcation Act.

⁹¹ FFC/SARChI Report, 2015.

⁹² Cameron and Meligrana, 2010.

⁹³ Cameron and Meligrana, 2010.

⁹⁴ Cameron and Meligrana, 2010.

⁹⁵ Cameron and Meligrana, 2010.

⁹⁶ FFC/SARChI Report, 2015.

in size if they are to have a tax base enabling them to be “financially viable”.⁹⁷ From this perspective, the concept of financial viability seems to be directly linked to the municipal tax base. In South African context, however, this does not imply that a municipality must have a tax base that will enable it to cover all its expenses. A study conducted by National Regulatory System for Community Housing (NRSCH) defined financial viability as the ability to generate sufficient income to meet operating payments, debt commitments and, where applicable, to allow for growth while maintaining service levels.⁹⁸ It is necessary in this regard to outline key municipal sources of income which are: locally generated revenue (property rates, surcharges on service fees, and service fees) and transfers in the form of the equitable share and conditional grants. Therefore, the NRSCH definition of financial viability does not only refer to municipal own revenue but also include the equitable share. This is so because both financial streams when added together constitute an income that a municipality uses to meet all its constitutional responsibilities. Financial viability thus relates to the question: to what degree or extent a municipality can or cannot generate its own revenue, given that there is a system of fiscal equalization. Steytler note that financial viability is not a constitutional principle of multilevel government in South Africa.⁹⁹ The legislature in this regard correctly classified financial viability under the Demarcation Act as a factor relevant to demarcation, and not a demarcation requirement or objective.

On the issue of effective and efficient performance of functions, although there is little conclusive evidence on what the minimum or the optimal size should be, the literature on sizes of municipalities seem to be supporting demarcation of smaller jurisdictions. According to Cameron and Meligrana a minimum size for local authorities makes sense - particularly for hard services such as water, storm water drainage and wastewater management - not to duplicate expensive infrastructure.¹⁰⁰ Larger local authorities may well become inefficient, but it is difficult to establish, even for individual services, at what size they do so.¹⁰¹ Citizens have diverse preferences for public goods and services, and a multiplicity of jurisdictions will

⁹⁷ Cameron R *Democratisation of South African Local Government: A tale of three cities* (1998) 42.

⁹⁸ National Regulatory System Community Housing ‘financial viability guidance note’ available at: www.nrsch.gov.au (Accessed on 15/09/2015).

⁹⁹ Steytler (2015) 2.

¹⁰⁰ Cameron and Meligrana, 2010.

¹⁰¹ Cameron and Meligrana, 2010.

operate more efficiently and effectively than a very large area-wide body.¹⁰² The most obvious effect of amalgamation is an increase in administrative scale. Given that the number of administrators and council members do not increase proportionally with the population size, the capacity of administrators to effectively manage the entire area may be impaired.

3.4.4 Section 25(d): ‘the need to share and redistribute financial and administrative resources’

The formulation of this factor was aimed to meet the effects of apartheid, where local government was fragmented along racial lines and that led to disparities in service delivery. This factor implies that the MDB whenever possible it should demarcate municipal boundaries in such a way that an area with no financial resources will benefit from the resources of other area. One way of doing this, is to merge weaker areas with no financial resources with stronger areas that have resources in order to realise fiscally sustainable areas. There are several expectations emanating from this undertaking. First, areas with greater service delivery capacity could help enhance service delivery in the areas with fewer skills. In this case, consolidation is intended to allow the scarce managerial resource available in the better serviced areas to be used across the region. Second, the consolidation may be intended to redistribute financial resources from the higher fiscal base community to the lower capacity area.

3.4.5 Section 25(e): ‘provincial and municipal boundaries’

In the past the reference to provincial boundaries was highly relevant. In terms of the Constitution, it was possible for the MDB in 1999/2000 to establish a number of what are known as ‘cross boundary municipalities’. The creation of these municipalities led to problems of managing supervision across provincial jurisdiction. In this regard, following the amendment of the Constitution all cross boundary municipalities were abolished in 2006, and municipal boundaries now form the basis for provincial boundaries.¹⁰³ Thus provincial boundaries are not relevant any longer. The reference to “municipal boundaries” can only mean the existing municipal boundaries. This indicates that changes to existing municipal boundaries should not be taken lightly because of the disruption it will cause. This factor thus is essential in the current

¹⁰² Cameron and Meligrana, 2010.

¹⁰³ Cameron and Meligrana, 2010.

debate. However, this does not mean existing boundaries cannot be changed but rather should, as far as possible, be the building blocks for any future boundary reorganisation.¹⁰⁴

3.4.6 Section 25(f): 'areas of traditional rural communities'

Given the historical background of traditional leaders, this institution has an important role to play in many rural communities of South Africa. The interim and final Constitution of 1996 both made provision for the recognition and the role of traditional leaders. Furthermore, the promulgation of Traditional Leadership and Governance Framework Act 23 of 2009 was a first step towards achieving a co-operative relationship between local government and traditional leaders.¹⁰⁵ A traditional community, according to s 2(1)(a) and (b) of the Act, is a community subject to a system of traditional leadership in terms of its customs and which observes a system of customary law. However, traditional authorities are not governments. In local areas the legislative and executive powers are vested in municipal councils, and traditional authorities fall under the municipal council's jurisdiction.¹⁰⁶ Thus in areas where there exist traditional rural communities, the Demarcation Board should avoid drawing municipal boundaries in manner that would interrupt traditional leadership and consequently undermine the existence of this institution.

3.4.7 Section 25(g): 'existing and proposed functional boundaries, including magisterial districts, voting districts, health, transport, police and census enumerator boundaries'

Here, the attention of the MDB is directed on existing functional boundaries drafted by sectoral departments as well as the Independent Electoral Commission. Again the focus is not to cause too much of a disruption to existing boundaries. Many national departments carve up the country for their own purposes. e.g magisterial districts. The aim of this objective is to ensure greater efficiency so that municipal boundaries are not too different from other types of boundaries.

3.4.8 Section 25(h): 'existing and expected land use, social, economic and transport planning'

¹⁰⁴ Cameron and Meligrana, 2010.

¹⁰⁵ Fick G & Agherdien W *Constitutional law* (2009) 8.

¹⁰⁶ Bekink (2005) 151.

These factors were laid down for the very first demarcation in 1999/2000. The use of the word “existing” indicates that other national bodies may have had development plans for particular purposes. The aim was to ensure that such plans were not disrupted by new municipal boundaries. To be specific, the Demarcation Board had to be mindful of land use, social, economic and transport planning that existed prior 1999 and ensure that such plans were not nullified by new boundaries.

3.4.9 Section 25(i): ‘the need for co-ordinated municipal, provincial and national programmes and services, including the needs for the administration of justice and health care’

This factor is merely a repetition of section 25 (g), and its link with demarcation is not clear. The purpose of this factor is that municipal boundaries should not subvert national plans that are to be realized in particular areas. The meaning of ‘services’ is not limited to municipal basic services such as water, but also extend to health care services which according to the Constitution is a concurrent function shared by both national and provincial government. Furthermore, the organization of justice system in these areas must be feasible.

3.4.10 Section 25(j): ‘topographical, environmental and physical characteristics of the area’

Here, the attention of the MDB is drawn to the geographic set up of an area. The physical possibility of the municipalities to be interconnected. In this regard, consideration of geographic and environmental features such as rivers, lakes, hills and mountains becomes important. This is so because if not avoided these environmental features may result in the creation of fragmented municipal area. Consequently, the municipal efforts and provision of services to local communities would severely suffer.

3.4.11 Section 25(k): ‘the administrative consequences of its boundary determination on-’

This factor implies that changes to the existing municipal boundaries should not be made lightly. The MDB should consider the possible consequences of demarcation on effective administration of the new municipalities. While positive effects of amalgamation on administrative efficiency is widely accepted, it is also generally believed that there is a negative effect on effective administration. The argument is that in larger municipalities administrators become less effective the further removed

they are from their constituents and the operations they are supposed to coordinate.¹⁰⁷ Amalgamation inevitably results to increased population figures the local authorities are responsible for and may make it difficult for administrators to effectively manage the municipality. The ever increasing demands and expectations of service delivery by local residents may necessitate employment of specialists, new capacity building and training of staff, all of which may come at cost. According to Allers and Geertsema, amalgamation and uncertainties surrounding it may have disruptive effects on managerial behaviour and organizational outcomes.¹⁰⁸ There will be costs of restructuring different parts of the municipal organizations, new office buildings might be needed, IT-systems have to be integrated, and regulations must be harmonized, in the meantime service delivery may be seriously interrupted.¹⁰⁹

The word “creditworthiness” simply refers to the fact that a merger could enhance or reduce the creditworthiness of a new municipality. Enhance if a new economy of scale is created, but reduce if one bad municipality drags the other one down in the merger. This is particularly common where a merger involves incorporation of poorer communities, which will not contribute much to a tax base but will benefit from the existing budget. The consequences of the incorporation of Metsweding District municipality and other two local municipalities into the City of Tshwane boundaries serve as proof. The three municipalities did not improve the creditworthiness of the City of Tshwane as no new economies of scale were created, because the inherited municipalities were relatively poor and had high indigent populations.¹¹⁰ In terms of the FFC Submission for the 2015/16 Division of Revenue, the 2011 re-determination of the boundaries led to the city population increasing from nearly two and a half million (2 470 694) people in 2010/11 to nearly three million (2 916 785) people. The merger had far-reaching fiscal implications. The transitional costs were estimated at R1.04 billion.¹¹¹ The City of Tshwane also inherited huge debts from the incorporated municipalities. The standardisation of the IT and billing systems also came at a cost.

¹⁰⁷ Dollery, Byrnes & Crase (2007) 4.

¹⁰⁸ Allers M & Geertsema B ‘The effects of local government amalgamation on public spending and service: evidence from 15 years of municipal boundary reform’ (2014) 14019-EEF *SOM Research Reports* 6.

¹⁰⁹ Allers & Geertsema (2014) 6.

¹¹⁰ The impact of demarcation on municipal finances: FFC submission for the 2015/16 Division of Revenue, 135.

¹¹¹ FFC Submission for the 2015/16 Division of Revenue, 135.

3.4.12 Section 25(l): ‘the need to rationalise the total number of municipalities to achieve the objectives of effective and sustainable service delivery, financial viability and macro-economic stability’

This factor overlaps with the section 25(c) factor as it appears to cover more or less the same issues. What can be said here is that, this factor reflects the government policy encapsulated in the *White Paper on Local Government*, to the effect that the number of municipalities in the country should be reduced.¹¹² Following the establishment of the MDB in 1999, the number of municipalities was reduced from 843 to 284 through amalgamation.¹¹³ The number was further rationalised to 283 before the 2006 local elections, and then to 278 ahead of the 2011 local elections. The belief is that fewer and larger municipalities are capable of being ‘financially viable’, providing effective and sustainable service delivery. Indeed, literature on sizes of municipalities confirms that larger units are necessary, if local governments are to be ‘financially viable’, attract professional staff, support an efficient administration and provide a proper quality of services.¹¹⁴ As pointed out earlier, financial viability relates to the question: to what degree or extent a municipality can or cannot generate its own revenue, given that there is a system of fiscal equalization. Consolidation of well-resourced areas may increase a tax base of new municipality resulting in such municipality being less dependent on intergovernmental transfers. However the incorporation of poor community into the boundaries of a fairly resourced municipality will not necessarily increase the tax base of the receiving municipality. Thus such a municipality may become more dependent on transfers. Given the meaning of financial viability suggested in section 25(c) above (not CoGTA’s definition), this situation is perfectly acceptable in South Africa. The mere fact that a larger municipality is less dependent on transfers does not mean it is financially viable. Similarly, a poor municipality that is more dependent on transfers does not mean it is financially unviable.

In South Africa there is no generally articulated policy on municipal viability, the MDB has in the past worked with the concept when declaring DMAs in sparsely populated areas.¹¹⁵ In actual fact, the very first demarcation of municipal boundaries in South

¹¹² Craythorne DL *Municipal Administration Handbook* 6 ed (2006) 54.

¹¹³ MDB Annual Report: 1999/2000.

¹¹⁴ Cameron and Meligrana, 2010.

¹¹⁵ Steytler (2015) 1.

Africa did not result in all new municipalities having a tax base that enabled them to cover all their expenses. The MDB in its own research found that about 102 new municipalities-mostly B categories in the former independent and self-governing territories- were weak with limited financial resources.¹¹⁶ Financial viability is not a requirement nor is it a demarcation objective but rather a factor relevant to demarcation.

3.5 Assessing the validity of dysfunctionality and non-viability as criteria in light of section 25

In light of the above discussion it is clear that functionality/dysfunctionality is not a factor that is directly or indirectly mentioned in section 25. It thus does not require the MDB to take into account functionality during demarcation; it is neither expressly listed as one of the factors nor does one of the expressly listed factors has a meaning that imply functionality as factor. This observation should however be distinguished from the argument advanced earlier that functionality/dysfunctionality should merely be regarded as factor, not as the objective of demarcation.

However, the same cannot be said about financial viability. Section 25 of Demarcation Act expressly lists financial viability as a factor that must be taken into account during demarcation. Contrary to CoGTA's definition of financial viability, it is opined that financial viability simply relates to a question of degree or extent to which a municipality can or cannot generate its own income given that there is a fiscal equalisation system in place. Thus, the mere fact that a municipality has insufficient tax base does not necessary mean it is financially unviable. The current fiscal system was specifically designed to deal and address the issue of insufficient tax base faced by many municipalities. As discussion earlier, the Constitution does not require municipalities to be financial self-reliant. Seen in light, to confine the meaning of financial viability almost exclusively to the municipal tax base seem to be inconsistent with the Constitution. What is problematic about CoGTA's proposal is that, even though the content of non-viability is never clarified, it is deemed a requirement or criterion for the demarcation of a municipality. Financial viability is not an objective nor is it criterion for demarcation, but a factor that must be considered. As such financial viability could be outweighed by other factors. The

¹¹⁶ Cameron (2002) 128.

mere fact that a municipality proves to be financially unviable does not necessary suggests that financial viability as a factor was not considered by the MDB. It is merely one factor among others that must be considered. Therefore, if one factor (financial viability) determines the outcome, the decision is contrary to the law and thus void.¹¹⁷ On review, the court could set aside such a decision.

The assumption is that a municipality without a tax base may be unable to specifically fulfil its constitutional objective of providing services to local communities. Although to a certain extent this may be true, the matter has already been dealt with through the existing system of fiscal equalisation. From this perspective, the assessment of financial viability should not only consider a municipal tax base but should also include intergovernmental transfers (equitable share). Furthermore, a high degree of dependence on transfers does not mean a municipality is financial unviable. The urge to eliminate financially unviable municipalities can therefore not be justified in term of the Constitution as well as the Demarcation Act. A municipality may be “financially unviable” but still continue to fulfil all other constitutional objectives of local government.

4. MDB’s response to CoGTA’s proposals

Despite the argument advanced in this chapter, the MDB accepted all CoGTA’s proposals for consideration. As required by the law, the MDB published notices on these proposals for public comment. The MDB decided to consider 21 cases of out 34 cases ahead of 2016 local government elections. With regard to the 21 cases that were considered, the MDB only approved 13 cases of amalgamations and rejected the rest. In this regard, it is unclear why those 13 cases were approved as no reasons were provided, however, the MDB did comment why they rejected the others.

Some of the cases that were approved for amalgamations are:¹¹⁸ the re-determination of municipal boundaries of Ikwezi LM, Baviaans LM and Camdeboo LM to form a new category B municipality;¹¹⁹ the redetermination of municipal boundaries of Gariiep LM and Maletswai LM to form a new category B municipality

¹¹⁷ Steytler (2015) 1.

¹¹⁸ See MDB Circular 8/2015 for a list of all approved cases of amalgamations.

¹¹⁹ MDB Circular 16/2015.

(situated in Eastern Cape).¹²⁰ In Limpopo, the municipal boundaries of Fetakgomo LM and Greater Tubatse LM have been re-determined by amalgamating their municipal areas to form a new category B municipality.¹²¹ In Mpumalanga, the municipal boundaries of Umjindi LM and Mbombela LM have been re-determined by amalgamating their municipal areas to form a new category B municipality.¹²² Some of the rejected cases include:¹²³ the disestablishment of Maruleng LM and incorporate certain parts of this municipal area into other municipalities within the Mopani District Municipality (situated in Limpopo). The MDB measured the performance of Maruleng LM against that of Greater Tzaneen LM and Phalaborwa LM and thus concluded that Maruleng LM is performing fairly well.¹²⁴ The amalgamation of Great Kei LM with Buffalo City Metro Municipality was rejected. The only reason advanced in this regard was that this proposal was already considered by the previously MDB and it was not approved.¹²⁵ The MDB also declined to incorporate the Ikgomotseng/Soutpan community from the Masilonyana LM into the Mangaung Metropolitan Municipality. The MDB was of the view that this area already fall within Mangaung Metro area.¹²⁶

The mere fact that the MDB approved 13 cases of amalgamations clearly denotes that they did not find CoGTA's proposals to be flawed. By implication, the MDB approved the notion of elevating dysfunctionality and financial viability from being factors to criteria of demarcation. Thus, as argued in this chapter, the MDB's interpretation of the law was incorrect. It should be noted that the MDB's decisions and the manner which they dealt with CoGTA's proposals did not receive a warm welcome from everyone. Amongst these amalgamations, is a highly politically contentious amalgamation of Ikwezi, Baviaans, and Camdeboo local municipalities situated in the Eastern Cape.¹²⁷ According to the MDB's press release¹²⁸, the Democratic Alliance (DA) had challenged the MDB's decisions alleging that the MDB was biased and targeted municipalities falling under the DA's control and those

¹²⁰ MDB Circular 15/2015.

¹²¹ MDB Circular 15/2015.

¹²² MDB Circular 15/2015.

¹²³ See MDB Circular 8/2015 for a list of other rejected cases of amalgamations.

¹²⁴ MDB Circular 8/2015.

¹²⁵ MDB Circular 8/2015.

¹²⁶ MDB Circular 8/2015.

¹²⁷ MDB Circular 16/2015 & Circular 20/2015.

¹²⁸ MDB Press Release (2015) available at www.demarcation.gov.za (Accessed on 20/01/2015).

where the party (ANC) has prospects to lose control in the near future. According to the DA the MDB was not supposed to have entertained the Minister's proposals without establishing with certainty the motives behind the proposals.¹²⁹ Seen in this light, it is clear that the DA is of the opinion that there is more to CoGTA's proposals than the stated aim of alleviating dysfunctional and nonviable municipalities.

5. Conclusion

The driving principle behind CoGTA's proposals was to eliminate dysfunctional and financially non-viable municipalities. The Demarcation Act sets out the framework for demarcation of municipal boundaries. In particular sections 24 and 25 outline the objectives of demarcation and factors relevant to demarcation. The distinction between a factor, requirement and objective is critical. A factor is a fact or condition that must be considered and not disregarded. An objective refers to a goal which something is directed at. A factor is different from a requirement in that it is never an obligation. Unlike the requirement, the obligation is to consider and not to abide. In this chapter it has been observed that dysfunctionality is neither a criterion nor is an objective of demarcation. The Act lists financial viability as one of the factors relevant to demarcation but not as criteria or an objective of demarcation. CoGTA has sought to make the two concepts criteria for the existence of a municipality. This is legally unattainable as in the Demarcation Act they are not criteria. Secondly, the concepts are not even objectives of demarcation in terms of section 24. With regard to dysfunctionality, CoGTA seem to confuse effective local government with 'effective local governance'. The latter is expressly listed in section 24(b) as an objective of demarcation. Local governance means the link between the council and the residents; how they collectively produce governance through a system of accountable government. The relevance of this objective to demarcation is that of size. In other words, the MDB can give effect to this objective by demarcating smaller local government units. Financially viability as factor could be outweighed by other factors during the demarcation process. The fact that a municipality cannot generate its own revenue does not mean such a municipality is financially unviable given that there is a fiscal equalisation system in place.

¹²⁹ MDB Press release 2015.

Chapter Three

Declaring dysfunctional and unviable municipalities as District Management Areas

1. Introduction

The main issue of this chapter is whether or not CoGTA's solution to dysfunctional and unviable municipalities by declaring them as district management areas (DMAs) is compatible with the legal framework of DMAs. In addressing this issue, the chapter is structured as follows: it begins by discussing the existing legislative framework governing the establishment of DMAs in South Africa. It then discusses how the courts and the MDB have interpreted the legal framework. Before assessing CoGTA's proposal, the chapter briefly reflects on the history of DMAs in South Africa. In light of the legislative framework and the history of DMAs, the CoGTA proposal is then discussed. The chapter argues that DMAs were not established to deal with large populous areas that are poor and badly governed. The proposal to declare DMAs in large populous areas does not only fail to take cognisance of the DMAs' history but is also contrary to the law.

2. Legal framework and statutory definition of DMAs

2.1. Municipal Structure Act

The Structures Act provides for the framework of establishing DMAs. However this does not suggest that other legislation are irrelevant to the establishment of DMAs. For example, the Demarcation Act although it does not provide for the legal framework of DMAs it is still relevant to the declaration of DMAs. As shall be explained below, there is direct link between the establishment DMAs and the fulfilment of local government objectives. The latter is not provided for in the Structures Act but in the Demarcation Act and the Constitution. Thus the consideration of these other laws is also important and relevant when the MDB exercise its own discretion to declare DMAs. In terms of the Structures Act the MDB has, under specified circumstances, a mandate to declare DMAs.

2.2. Statutory definition of DMA

The Act defines a DMA as part of category C municipality that has no local municipality and is governed by a district municipality alone.¹³⁰ As it is not a local municipality it forms part of district municipality, hence called district management area. The Act further provides that '[i]f a part of an area that in terms of section 3 must have municipalities of both category C (district) and category B (local municipality), is declared as a district management area, that part does not have a category B municipality.¹³¹ Of importance is that the MDB may declare a part of an area that must have municipalities of both category C and category B as a district management area if the establishment of a category B municipality in that part of the area will not be conducive to fulfilment of the objectives set out in section 24 of the Demarcation Act.¹³² In DMAs a district municipality has all the municipal responsibilities and powers.¹³³

In light of the above legal framework, it is clear that the establishment of DMAs is only possible in areas of category C municipalities but not in that of category A (metro) municipal areas. The word "if" in section 6(1) denotes that the declaration of DMAs is a conditional act. The condition is that the area must be such that the establishment of a local municipality will not be conducive to the objectives of local government. Seen in this light, the establishment of DMAs in areas that are conducive to the objectives of local government would be contrary to the Structures Act and thus unlawful. Furthermore, the word "may" suggest that the MDB has discretion when it comes to the establishment of DMAs.

3. Judicial interpretation of DMAs

In 1999 shortly after the Structures Act was promulgated, constitutionality of certain sections of the Act were challenged. Among these sections that were challenged were sections 6(1) and (2). As pointed out above, section 6(1) provides for the declaration of DMAs in certain parts of the District municipalities. In terms of subsection 2 the Minister of local government could establish DMAs on the recommendations of the MDB and after consulting MEC for local government in the province concerned. The challenge levelled against these sections was that, first,

¹³⁰ See s 1 Structures Act.

¹³¹ See s 6(1) Structures Act.

¹³² See s 6(2) Structures Act.

¹³³ See s 89 Structures Act.

DMAs constitutes a fourth category of municipalities and their declaration in terms of section 6(1) was unconstitutional because the Constitution only permits three categories of municipalities.¹³⁴ Second, the authority vested in the Minister to determine whether or not there should be a district management area within a category C municipality was inconsistent with the power of provinces to establish municipalities.¹³⁵

In response to the arguments above, Ngcobo J interpreted the legal framework of DMAs as follows. A district management area is neither a category nor a type of municipality.¹³⁶ It is a geographical area that is governed by only one municipality. Furthermore, a DMA is not a separate municipality, but is part of the district municipality by which it is governed. It is, therefore, also not a fourth category of municipality.¹³⁷ The court further noted that the scheme for the allocation of powers relating to the structure, functioning and establishment of municipalities contemplates that the MDB should determine municipal boundaries without being constrained in any way by the national or provincial governments.¹³⁸ Thus the discretion accorded the Minister by section 6(2) to either accept or reject the recommendations of the MDB was accordingly regarded as impermissible. And thus section 6(2) was inconsistent with sections 155(2) and (3) of the Constitution. Following this judgment section 6(2) was amended to give effect to the findings of this court.

4. MDB's interpretation of the DMAs

The MDB in its 1999 policy took the statutory definition of a DMA further by specifically suggesting two types of areas that qualified to be DMAs. These areas were: desert and semi-arid areas with low population and state protected and conservation areas.¹³⁹ This policy was later revised and its final policy was published

¹³⁴ *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development and others* 1999 (12) BCLR 1360 (CC) para 63 (*Western Cape government v Minister for Provincial Affairs*)

¹³⁵ *Western Cape government v Minister for Provincial Affairs* para 63.

¹³⁶ *Western Cape government v Minister for Provincial Affairs* para 65.

¹³⁷ *Western Cape government v Minister for Provincial Affairs* para 66.

¹³⁸ *Western Cape government v Minister for Provincial Affairs* para 68.

¹³⁹ MDB.1999. Policy for the Determination of District Management Areas. Pretoria. (MDB Policy on DMAs)

on 13 February 2000. In addition to the areas above, the MDB final policy added special economic areas as other areas that qualified to be declared as DMAs.¹⁴⁰

In respect of desert and semi-arid areas, the MDB observed that approximately one third of the territory of the Republic has less than 100 000 people living in it. Therefore the MDB was of the view that the objectives of local government are unlikely to be met through establishing local municipalities in arid and semi-arid areas and such areas should be declared as DMAs.¹⁴¹

Regarding state protected and conservation areas- the MDB final policy stated that in deciding which conservation areas should be DMAs, management and size, rather than ownership, should be the main criteria on which the decision to determine conservation areas as DMA's should be based.¹⁴² The final policy further stated that conservation areas owned by local authorities and the private sector were generally well managed as part of their local government or daily business functions. In many towns, these areas are located within or close to existing urban areas for which Category B boundaries have already been established.

Special Economic Areas included areas which, for national strategic investment reasons, should not form part of local municipalities.¹⁴³

5. History of the DMAs

The MDB in 2000 declared 25 DMAs in various areas of the country. Out of these 25 DMAs, ten were areas of low population in the Northern Cape, Western Cape and Eastern Cape, two World Heritage sites, nine provincial parks and four national parks.¹⁴⁴ This meant that every province in South Africa had at least one DMA. Table 1 illustrates areas of low population that were previously declared as DMAs in various parts of certain district municipalities.

Table 1: DMAs as declared in 2000

¹⁴⁰ MDB Policy on DMAs.

¹⁴¹ MDB Policy on DMAs.

¹⁴² MDB Policy on DMAs.

¹⁴³ MDB Policy on DMAs.

¹⁴⁴ PAPER II Redefining the role and application of District municipalities: Local Government Project by Community Law Centre (2007) 20.

PROVINCES	NAMES OF DMAs	POPULATION CENSUS 1996	REGISTERED VOTERS 2000 LOCAL GOVT ELECTIONS
Northern Cape	Namaqualand	1471	575
	Diamondfields	4556	1564
	Bo-Karoo	4639	1507
	Kalahari CBDC	8483	3157
	Benede Oranje	8688	2682
Eastern Cape	Aberdeen Plain	6443	2184
Western Cape	West Coast DC	4674	1847
	Breede River DC	6543	2489
	Central Karoo DC	6851	2628
	South Cape DC	12428	5199

Source: MDB (2003) Draft Report on District Management Areas in South Africa.

In light of section 89 of the Act, this meant that district municipalities provided all the services traditionally provided by local municipalities.¹⁴⁵ Immediately after 2000 local elections the capacity of district municipalities to perform all municipal functions in DMAs was strongly questioned. The argument was that in DMAs, such as national parks, services are rendered by the park authorities, and very few, if any, municipal functions were performed by District Municipalities.¹⁴⁶ Furthermore, certain district municipalities did not possess the capacity to perform all municipal services in

¹⁴⁵ National Study of service delivery in DMAs: by Human Sciences Resource Council Democracy and Governance: Final Draft 2005 Available at <http://www.hsrc.ac.za/en/research-data/view/1935> (Accessed on 20/09/2015). (National study of service delivery in DMAs, 2005)

¹⁴⁶ Mlokothe V 'District management areas: MDB changes policy' (2005) (7) *Local Government Bulletin* 472.

DMAs.¹⁴⁷ This debate was sufficient to convince the MDB to reconsider the usefulness of DMAs and eventually deciding to disestablish six DMAs before 2006 local elections. In 2009 the MDB decided to completely disestablish all DMAs and incorporated them into various jurisdictions of local municipalities. There are currently no DMAs in South Africa.

6. Assessment of CoGTA's proposals in light of the legal framework and history of DMAs

According to CoGTA's proposal, the solution to "dysfunctional" and "unviable" municipalities lies in amalgamation of these municipalities with functional and viable municipalities or declaring their municipal areas as DMAs.¹⁴⁸ As discussed earlier, the declaration of DMAs was subsequently withdrawn by CoGTA as solution leaving amalgamation as the only suggested solution. It is still worth examining whether the initial proposal had any merit, or whether it was merely an unthought through proposal.

As pointed out earlier, a DMA is an area where the establishment of a municipality in that particular area will not be conducive to the fulfilment of local government objectives. One of the essential objectives of local government in terms of section 152(1)(a) of the Constitution is to provide a democratic and accountable government for local communities. Local authorities should thus be local enough in order to be recognized, be well informed about the aspirations of their constituencies and eventually be held to account for decisions that badly affect the local residents. Accountability implies that when a promised standard of service is not delivered, the community should be offered an apology, a full explanation, a speedy and effective remedy.¹⁴⁹ This objective however is unlikely to be fulfilled by a municipality situated in a desert or semi-arid area, where people are sparsely spread over a huge geographical area. In such areas, acquaintance of local authorities is serious issue for the local residents. Consequently, there can be no accountability if the residents are unaware of their councillors. Therefore, the interaction between the residents and their local authorities envisaged in section 152(1)(a) of the Constitution would be extremely difficult for a municipality to achieve. It is widely believed that community

¹⁴⁷ Mlokothe (2005) 472.

¹⁴⁸ See MDB Circular 1/2015.

¹⁴⁹ A Study of service delivery in DMAs, 2005.

participation in local governance enhances democracy. Therefore, the principle of proximity becomes important if indeed the aim, as provided for in section 152(1)(e) Constitution, is to encourage the involvement of local communities into local government affairs. The nature of a desert and semi-arid area (geographic area and demographics) is such that a municipality would find it difficult to ensure the provision of services to communities in a sustainable manner. Sustainability of services depends on available funds and resources in terms of staff and skilled employees who can do the job well. Since financial viability as argued in chapter 2 is not an objective of demarcation, the inability of a municipality situated in a semi-arid area to attract skilled staff, may have negative effect on sustainability of service delivery.

The definition of a DMA makes no reference whatsoever to the performance aspect of a municipality. It should be noted that the Act place more emphasis on an area as opposed to a municipality. In contrast, dysfunctionality as discussed in chapter 2 refers to how badly a municipality is managed but not the nature or set up of an area. The fact that a municipality is badly managed and poor does not suggest that the “area” a municipality is located, is such that the establishment of a municipality would not be conducive to the fulfilment of local government objectives. The MDB had a legitimate reason to declare desert and semi-arid areas as DMAs; there are few residents in these areas to warrant a fully fledged local municipality. It is too costly to have a municipal council and full staff to service few people. The CoGTA proposal does the opposite; it suggests the establishment of DMAs in large populous areas.

In contrast to CoGTA’s proposal, none of the previous DMAs were established in areas with large population not to mention being poor and badly governed. For example one of the local municipalities that were classified as dysfunctional and unviable is Maletswai local municipality. This municipality is located in the Eastern Cape and covers areas (towns) such as Aliwal North and Jamestown and has a total population of 43 800.¹⁵⁰ The population number of this municipality when compared to that of previous DMAs shown in table 1, appears to be nearly eight times higher than the population of the largest DMAs. According to CoGTA’s proposal this

¹⁵⁰ The local government handbook: A complete guide to municipalities in South Africa Available at: www.localgovernment.co.za/locals/view/30/Maletswai-Local-Municipality#demographic (Accessed on 04/01/2016).

municipal area despite having a large number of people should be disestablished and declared as DMA. This proposal therefore contradicts the history and the legal framework of DMAs. The concept of dysfunctionality and financial non-viability does not form part of the legal framework of DMAs. Non-viability was partially recognized: in that there are very few people in a DMA for it to be worthwhile to have a local municipality. But this is a different kind of viability. Therefore the proposal to disestablish a dysfunctional municipality despite having large number of people and have it replaced by a DMA is incompatible with the Structures Act. It is not only contrary to the law but is also inconsistent with the previous MDB's interpretation of the DMAs legal framework and its policy on DMAs.

7. Conclusion

The proposal to disestablish and replace a dysfunctional and unviable municipality is contrary to the Structures Act. As noted above both dysfunctionality and non-viability, as defined by CoGTA do not form part of the legal framework of declaring DMAs. The legal framework in question makes no reference to the performance aspect of municipality. It places more emphasis on the area where a municipality will be established. In contrast, dysfunctionality relates to the performance of a municipality and thus speaks directly to the caliber of municipal administrators. From this perspective, the fact that a municipality is dysfunctional does not necessarily suggest that the area in which a municipality is situated is of such nature that a municipality would not be conducive to the fulfilment of local government issues. The MDB correctly declared desert and semi-arid areas with low population and state protected and conservation areas. In these areas a municipality would not be conducive to the fulfilment of local government objectives. People are sparsely populated and very few. And because there are very few residents, it is too costly to warrant a fully fledged local municipality with council and full staff to only service few people. The same cannot be said about the dysfunctional and nonviable municipalities. First, in these municipal areas there many people present. Second, their "areas" are not necessary the cause of dysfunctionality. Unlike in desert and semi arid areas, the nature of these municipal areas is not such that a municipality situated there would unable to fulfil the objectives of local government.

Chapter Four

Declaration of 'rural' metropolitan municipalities

1. Introduction

The South African Constitution makes provision for three different categories of municipalities namely category A, B, and C, with category A being a metropolitan municipality. The ruling party (ANC) is said to have always preferred the establishment of a single tier authorities as a way of redistributing resources and services.¹⁵¹ In February 2015, CoGTA proposed to the MDB that three new metropolitan municipalities be established by declaring the UThungulu District Municipality, the UMgungundlovu District Municipality and the Western Areas District Municipalities as metros. All three areas are composed mainly of rural areas.

This chapter thus looks at the legal framework governing the demarcation of metropolitan areas. It assesses whether or not, the proposed metropolitan areas which largely covers rural areas, meet the legal definition/criteria of a metropolitan area. To this effect, the chapter begins by discussing the criteria of a metropolitan area after which it assesses the criteria in line with the notion of a 'rural metro'. The chapter proceeds to examine the proposed metro areas against the criteria to ascertain whether they qualify to become metros. In essence, the chapter argues that all three proposed areas do not qualify to become metros because they do not conform to the criteria of a metropolitan area. The mere fact that they are predominately rural implies that the basis of these proposed metros would be a large rural area. In contrast, the definition of a metropolitan area points to urban regions as the basis of a metropolitan area. Thus all three proposed areas are the opposites of a metropolitan area envisaged by the Structures Act. The presence of a small urban area within a predominately rural municipality does not necessarily make that municipality a metropolitan area or even a city for that matter.

2 Current legal framework of a Metropolitan area

2.1 Municipal Structures Act

¹⁵¹ Cameron R 'Local government boundary re-organisation' in Pillay U, Tomlison R and Du Toit J (eds) *Democracy and Delivery Urban Policy in South Africa* (2006) 80 - 4.

In terms of the Act, the legal definition of a metropolitan area is provided for in section 2. The section reads as follows:¹⁵²

An area must have a single category A municipality if that area can reasonably be regarded as a:

- (a) conurbation featuring—
 - (i) areas of high population density;
 - (ii) an intensive movement of people, goods and services;
 - (iii) extensive development;
 - (iv) multiple business district
- (b) A centre of economic activity with a complex and diverse economy;
- (c) A single area for which integrated development is desirable; and
- (d) Having strong interdependent social and economic linkages between its constituent units.

The preceding chapter outlined the difference between a factor, objective and criteria. The discussion will not be repeated here. In contrast to both sections 24 and 25 of the Demarcation Act, section 2 sets out criteria or requirements, as opposed to objectives or factors. As discussed in chapter two, criteria are requirements or rules that apply in an all or nothing fashion. It is immaterial that an area meets most of the criteria; if one or two of the criteria are not met such an area cannot be afforded a metropolitan status. Reinforcing the distinction between criteria and factors is section 3 of the Act, which stipulates that an area that does not meet section 2 “criteria” must have municipalities of both category C and category B.¹⁵³ This section suggests two important points. First, areas that can be afforded a metropolitan status are only those that conform to the criteria as a whole. In 1999/2000, for example, the MDB determined certain areas as aspirant metropolitan areas.¹⁵⁴ This was because at that time those areas complied with some of the section 2 criteria, but not all the criteria. Second, if all criteria are not met the MDB has no discretion but to declare a

¹⁵² See s 2 Structures Act.

¹⁵³ See s 3 Structures Act.

¹⁵⁴ Smith (2001) 175.

municipality of both category C and B. As noted by Steytler, the discretion of the MDB however only comes in the interpretation and the application of the criteria.¹⁵⁵

3. Defining the criteria of metropolitan area

As pointed out in chapter 2, a purposive interpretation entitles the interpreter of a statute to have regards not only to the words used by the legislature but also its object and policy. Furthermore, it requires that one must: ‘ascertain the meaning of the provision to be interpreted by an analysis of its purpose and, in doing so, have regard to the context of the provision in the sense of its historical origins’.¹⁵⁶ In view of this approach to interpretation, section 2 criteria shall be unpacked and individually discussed.

3.1 ‘A Conurbation’

The Act does not expressly define what a conurbation is. In the *Pocket Oxford Dictionary* a conurbation is defined as the extended urban area, consisting of several towns merging with the suburbs of a central city.¹⁵⁷ This dictionary meaning thus implies two important elements about a metropolitan area. First, the size of a metro area has to be a significantly big urbanized area. In this regard, Craythorne notes that the word “conurbation” is much broader and amounts to something almost like a region.¹⁵⁸ Secondly, there ought to be more than one urban area (towns) involved. Of importance is that the Act does qualify a conurbation as having the following features:

3.1.1 “areas of high population density”

Key to this criterion is the word “areas”. It implies that there should be more than one area involved. In each of these areas there ought to be a large number of people present. Population density is calculated by dividing the total population for the municipal area by its geographical size – some people per square kilometer.¹⁵⁹ According to Steytler the presence of more than one area reinforces the idea that an

¹⁵⁵ Steytler (2007) 9.

¹⁵⁶ *Minister of Land Affairs and Another v Slamdien and Others* 1998 (1) BCLR 413 (LCC) para 14.

¹⁵⁷ *Pocket Oxford Dictionary*.

¹⁵⁸ Craythorne (2006) 50.

¹⁵⁹ Cameron and Meligrana, 2010.

integrated development plan is required for the proper management of the area as a whole.¹⁶⁰

3.1.2 “an intensive movement of people, goods and services”

The previous criterion identified the need for more than one area involved. This criterion therefore takes the matter further by suggesting that there ought to be a relationship between these areas. This relationship relates to the movement of people between these different areas- either travelling to work, shopping, attending school, or even for the use of recreational facilities.¹⁶¹ However, the movement of goods and services exhibit the business aspect to this relationship. It clearly suggests that there has to be a trading of goods and services amongst the areas. The word “services” refers to commercial services – metropolitan areas function as one entity because such services are provided across the area. Thus the ease with which the movement of such services is provided in different areas becomes an essential consideration.¹⁶² Overall, this criterion speaks directly to interdependence of people, communities and economies. The degree of intensity is of paramount importance as it separate a metropolitan area from a non-metropolitan area.¹⁶³ For an area to qualify for a metro status the movement of people and goods between different areas should be significant.

3.1.3 “extensive development”

First of all, a proper meaning of this feature requires an understanding of the word “development”. The legislature’s omission to define development makes it difficult to readily give a meaning to this criterion. Nevertheless there seem to be a consensus among the academics that this criterion presumably refers to business and industrial development.¹⁶⁴ This observation thus implies that the legislature might have contemplated that a metropolitan area would have extensive economic development. This is so because the existence of business and industries in municipal areas leads to greater prosperity and that prosperity can result in job creation and more funds for development.¹⁶⁵ This requirement was first introduced by the Local Government

¹⁶⁰ Steytler (2007) 9.

¹⁶¹ Steytler (2007) 10.

¹⁶² Steytler (2007) 10.

¹⁶³ Cameron and Meligrana, 2010.

¹⁶⁴ Steytler (2007) 10.

¹⁶⁵ Craythorne (2006) 144.

Transition Act into the previous definition of a metropolitan area.¹⁶⁶ According to that Act, the legislature did not differentiate between an extensively developed area and urbanized area. In other words, the two were regarded as analogous. From this perspective, the notion of extensive development thus points to almost entirely urbanized area, with basic urban infrastructure plus roads, business and industrial areas.

3.1.4 “Multiple business districts and industrial area”

In addition to the requirement of areas with high population, a conurbation must also feature multiple business districts and industrial areas. This is important because it calls for integrated development. This criterion suggests that there should be more than one business and industrial areas. By implication, a big town with one business sector would not meet this criterion. A Business District which is sometimes referred to as the central business district (CBD) is core of a metropolitan area. It is characterized by high population density, significant economic activities and so forth. Seen in this light, a cluster of small shops in a given area cannot be regarded as CBD. A business district must be significant.¹⁶⁷

3.2 “a centre of economic activity with a complex and diverse economy”

Key to this feature is the inclusion of the words “complex” and “diverse”. They both suggest that the basis of the economic centre should not be a single sector. Notably this reinforces the need for integrated planning and development. Therefore a diverse economy is one that consists of a variety of economic activities. It further consists of primary and secondary industries, services providers, a financial services sector, airport and so forth.¹⁶⁸ Seen in this light, an area with a single economic activity would not suffice.

3.3 “a single area for which integrated development planning is desirable”

The concept of integrated development planning was first introduced and defined by the Local Government Transition Act. However the definition was later replaced by the Municipal Systems Act which defined it as follows: “the principal strategic planning instrument which guides and informs all planning and development, and all

¹⁶⁶ See s 1(vii)(c) Local Government Transition Act 209, 1993.

¹⁶⁷ Craythorne (2006) 50.

¹⁶⁸ Craythorne (2006) 50.

decisions with regard to planning, management and development in the municipality".¹⁶⁹ The fact that there are multiple centres, and commuting indicates that there will be a need for integrated governance of the area in order to eliminate the jurisdictional barriers that small municipalities will impose. Here the focus is on what is desirable. In this regard, the Act does not spell out what should inform a desirable area for an IDP.

3.4 “having strong interdependent social and economic linkages”

This feature adds a little value to the criteria of a metropolitan area as it is a repetition of the previous features. Hence Cameron and Meligrana recommend that it should be left out of the definition of a metropolitan area.¹⁷⁰ What can be said here is that there should be several constituent units. The constituent units in question must be mutual dependant on each other and linked together by social and economic linkages. As discussed earlier, social and economic linkages may include movement of people between the units for various reasons ranging from employment, shopping, schooling, enjoyment of sports facilities and recreational amenities.

4. Assessing the criteria of a metropolitan area in line with the notion of a “Rural Metro”

In view of the above discussion, it is clear that the overall meaning of a metropolitan area points to urban region as the basis of a metropolitan area which would consist of economically vibrant and interdependent suburbs or towns linked to an urban core. From this perspective, the notion of a “rural metro” (that is- a large rural area with a small urban core) cannot be justified in terms of the criteria of a metropolitan area. Most of the criteria militate against the creation of a rural metro.

Let us take the requirement of “areas with high population density” as an example. It is widely accepted that the basic distinction between a rural area and an urban area is the population density, that is, how many people are there in a given square km. Many people tend to leave rural areas to urban areas in search of jobs, better education and improved standard of life (urbanization). As the result of this process, a rural area tends to be characterized by low population density and an urban area

¹⁶⁹ See s 35(1) Municipal Systems Act 32 of 2000.

¹⁷⁰ Cameron and Meligrana, 2010.

by high population density. By implication this requirement refers to urban areas rather than rural areas. Thus one has to clearly distinguish between rural and urban households.¹⁷¹ Metropolitan areas have multiple business districts and industrial areas. Many secondary cities which normally have one business district and industrial area find it difficult to meet this criterion. How about a rural area which hardly has one business district, other than a cluster of small shops? Furthermore, the intensive movement of people, goods and services should largely occur between multiple urban centres not between rural areas.

Of equal relevancy is the requirement of extensive development. As noted by Cameron and Meligrana, the rationale is to distinguish metros which have extensive development from secondary cities which often have a reasonable degree of development which cannot be classified as being extensive.¹⁷² Thus there same can be said about rural areas whose development is not even near than that of secondary cities, not to mention that of metropolitan municipalities. According to Cameron and Meligrana a small urban area (rural metro) would not qualify to have a Category A municipality.¹⁷³ The Cities Report stipulates that, as result of apartheid planning many South African municipal areas today have a combination of urban centres, rural villages and traditional authority areas within their boundaries.¹⁷⁴ In this regard, Cameron and Meligrana argue that the criteria of a metropolitan area should not be interpreted liberally to mean that Black townships which are not extensively developed must not be included into a metropolitan area.¹⁷⁵ Be that as it may, the vast portion of a metropolitan area cannot be a rural area with a small urban core. A 'rural metro' is a direct opposite of a metropolitan area envisaged by the section 2 of the Structures Act. The bottom line is that the urban region constitutes the basis of a metropolitan area. It is thus vital for the MDB to pay attention on the nature of the area- whether it is more rural or urbanized. This discussion is critical for the purpose of this chapter as the proposed areas perfectly match the description of a rural metro.

¹⁷¹ Steytler (2007) 9.

¹⁷² Cameron and Meligrana, 2010.

¹⁷³ Cameron and Meligrana, 2010.

¹⁷⁴ South African Cities Network Report (2012) Secondary Cities in South Africa: The start of a conversation 7. Available at: http://sacitiesnetwork.co.za/wp-content/uploads/2014/07/secondary_cities_in_south_africa.pdf (Accessed on 04/01/2016).

¹⁷⁵ Cameron and Meligrana, 2010.

5. Case studies and meeting the metropolitan criteria

5.1 Profile of the case studies

The CoGTA's proposal was that the district municipality of UThungulu District be transformed into a Category A municipality with UMhlatuze local municipal area as its core. UThungulu DM is a category C municipality situated in the north eastern region of Kwa-Zulu Natal.¹⁷⁶ The municipality is home to six local municipalities; UMhlatuzi LM, Nkandla LM, Umlalazi LM, Mthonjaneni LM, Ntambanana LM and Mfolozi LM (previously known as Mbonambi LM). The population densities of these local municipalities per square kilometer (km) are as follows;¹⁷⁷ UMhlatuzi has 422 persons per square km, Umlalazi has 96 persons per square km, Ntambanana has 69 per square km, Mfolozi has 69 persons per square km, Nkandla has 63 persons per square km, and finally Mthonjaneni has 44 persons per square km. In terms of its size the district covers an area of approximately 8,213 square km.¹⁷⁸ The district is predominantly rural with few scattered urban areas and the majority of its population resides in rural areas.

UMgungundlovu District is the second largest district municipality in KwaZulu-Natal. The district is made up of seven local municipalities; Msunduzi LM, UMshwathi LM, UMngeni LM, Richmond LM, Mkhambathini LM, Mpofana LM and Impendle LM. The population densities of the local municipalities are:¹⁷⁹ Msunduzi has 976 persons per square, Mkhambathini has 71 persons per square km, UMshwathi and UMngeni each have 59 persons per square km, Richmond has 52 square km, Mpofana has 21 persons per square km, and Impendle has 22 persons per square km. The district covers an area of approximately 8500 square km.¹⁸⁰ In this regard, CoGTA's proposal is to the effect that the entire district with Msunduzi as its core should be afforded a metropolitan status. Although in terms of population size, UMgungundlovu is much bigger than UThungulu they are predominately rural.

¹⁷⁶ UThungulu District Municipality Integrated Development Plan 2014/15.

¹⁷⁷ Statistics South Africa Census 2011 Available at: <http://www.statssa.gov.za> (Accessed on 03/01/2016).

¹⁷⁸ UThungulu District Municipality: Integrated Development Plan 2012/13 – 2016/17

¹⁷⁹ Statistics South Africa Census 2011 available at: <http://www.statssa.gov.za> (Accessed on 03/01/2016).

¹⁸⁰ UMgungundlovu District Municipality Integrated Development Plan Review 2014/15.

The Western areas district is category C municipality. It is located on the south western edge of Gauteng province; and covers an area of approximately 4,095 square km.¹⁸¹The district consists of four local municipalities namely; Mogale City LM, Randfontein LM, Westonaria LM and Merafong City. According to Stats SA census 2011 the population densities of the municipal areas are:¹⁸² Randfontein has 314 persons per square km, Mogale City has 270 persons per square km, Westonaria has 175 persons per square km and Merafong City has 121 persons per square km. The Mogale City has the largest population estimated at 362 422 people within the district, which has a total number of 820 995 people. In terms of the estimated population, Mogale City is twice that of Randfontein which has 149 289 persons and three times that of Westonaria which has 111 769 persons. In this regard, CoGTA proposal is to the effect that the whole district should be declared a metropolitan area with Mogale City as its core. Although there are urban areas within the district but the greater part of the area is mainly rural.

5.2 Meeting the criteria of a metropolitan area

For every municipality regardless of whether is a category A, B or C municipality an integrated development for its territory is desirable and necessary. Thus section 2 (c) and (d) criteria are of less significance to the purpose of this chapter. Section 2(d) is a mere repetition of the aforementioned criteria (intensive movement of people and goods between different areas). Therefore the examination of metropolitan criteria against the case studies, shall omit section 2(c) and (d).

5.2.1 Areas of high population density

As discussed earlier, the Act requires a conurbation to be featured by more than one area with each having high population density without having to meet a predetermined number. In UThungulu District there are more than one (five) municipal areas surrounding UMhlathuze, however these areas are rural with low population densities. UMhlathuze local municipality which has 422 persons per square km seems to be the only area with a fairly high density. Though its density is

¹⁸¹ West Rand District Municipality Integrated Development Plan Review 2014/15 (West Rand IDP Review 2014/15).

¹⁸² Statistics South Africa Census 2011 available at: <http://www.statssa.gov.za> (Accessed on 03/01/2016).

comparatively smaller than that of the existing big three metros (Johannesburg, eThekweni and Cape Town) it is nevertheless higher than the least dense metros namely; Buffalo City and Mangaung. According to Stats SA census 2011, Buffalo City has 298 persons per square km and Mangaung has 119 persons per square km. Seen in this light, the population density of Buffalo City is nearly a half of Mhlathuze density while that of Mangaung is almost four times smaller.

The same can be said about UMgungundlovu district area. Although there are seven municipal areas surrounding Msunduzi area, these areas are not urban areas; they are rural in nature with low population densities. Msunduzi LM which has 976 persons per square km is the only area that has a high population density within UMgungundlovu district. Its density is certainly higher than that of Buffalo City, Mangaung, City of Tshwane which has 464 persons per square km and Nelson Mandela Bay which has 588 persons per square km. When compared with these four metros, the density of Msunduzi appears to be three times higher than that of Buffalo City; eight times higher than that of Mangaung. The density of City of Tshwane constitutes almost a half of Msunduzi while that of Nelson Mandela Bay is just above the half of Msunduzi's density.

Unlike in UMgungundlovu and UThungulu, all four municipal areas of the Western Areas District appear to have fairly high population densities. The population density of each area is at least above hundred persons per square km. When compared with the metros, their densities are above that of Mangaung but below the density of Buffalo City (Randfontein LM is an exception). However, when one closely examines the nature of these municipal areas they seem to be more rural with small urban areas. For example: Although Mogale City local municipality calls itself a "city" Krugersdorp is the only town/urban area amongst seven townships and rural areas that make up the municipality. In the case of Randfontein local municipality, Randfontein is regarded as the only town. The same can be said about Westonaria town located within the Westonaria municipal area. Amongst the seven townships and rural areas of Merafong City municipality, Carltonville is classified as being the only town. Seen in this light, the greater part of the Western Areas District is rural with a small urban core that is made up by Krugersdorp, Westonaria, Randfontein and Carltonville. Adding more rural areas together increase the size of a municipal

area but certainly does not amount to a metropolitan area (which is almost entirely urbanized).

5.2.2 Intensive movement of people, goods and services

The application of this criterion must be understood in the context of the previous criterion. Areas of high population densities are urban areas, not rural areas; thus the intense movement of people and goods should largely occur between multiple urban areas as opposed to rural areas. Logically, the failure to meet the requirement of having areas of high population densities (urban areas) will inevitably result in the failure to meet this criterion. The fact that these proposed areas are predominately rural clearly exhibits the absence of an intense movement of people and goods between several urban areas in each district area. In light of the profile of each district area the most likely scenario is as follows.

In the case of UThungulu District, the movement of people, goods and services is probably occurring only within UMhlathuze municipal area (specifically between Richards Bay and Empangeni) instead of the whole district area. Two reasons can be advanced in this regard. First, UMhlathuze area is the most populated area within the district. Secondly, according to the Cities Network report it is the most urbanized area within the context of UThungulu District with Richards Bay, Empangeni and Eskhawini as its main urban areas.¹⁸³ . As noted by the Cities Network report, UMhlathuze LM also has rural areas within its boundary. Thus this movement of people and goods within UMhlathuze municipal area cannot be described as intensive because of its low level of urbanization.

The profile of UMgungundlovu District resembles that of UThungulu District. UMsunduzi local municipality is the most populated area within UMgungundlovu District. In addition to its high population density, Msunduzi is the most urbanized area within UMgungundlovu District with Pietermaritzburg as the main urban centre. Indeed, the MDB declared UMsunduzi a metro in 2008, but withdraw the declaration in 2009. The lack of other recognizably urban areas within Msunduzi connotes that the movement of people and goods occurs within the Pietermaritzburg area. As there are no multiple urban centres, the extent of this movement of people and goods

¹⁸³ South African Cities Network Report: UMhlathuze gateway to globalisation or forgotten harbour town? Available at: http://econ.ufs.ac.za/dl/Userfiles/Documents/00001/593_eng.pdf (Accessed on 13/02/2016).

within Pietermaritzburg cannot be deemed to be intensive in the context of both Msunduzi municipal area and UMgungundlovu District.

The same can be said about the Western areas district. As pointed out earlier, Krugersdorp, Randfontein, Westonaria and Carltonville are the only urban areas within their respective local municipalities.¹⁸⁴ All four areas are not contiguously located; in between there are several townships and rural areas which by far outweigh the presence of these towns in their respective municipal areas. When added together these towns constitute a small urban core of a rural Western Areas District. Seen in this light, the nature of the local municipal areas within the Western Areas District does not ascribe to the intense movement of people and goods between different areas.

5.2.3 Extensive development

Of importance is that, here the focus is on the degree or extent of development within the whole district area. As discussed earlier, extensive development implies that an area should be almost entirely urbanized with basic urban infrastructure, roads, business and industrial areas. In other words, the greater part of the area should be urbanized. However, what is common amongst the three proposed metro areas is that they are predominately rural. From this fact alone, it is clear that the greater part of these areas is not extensively developed.

In the case of UThungulu District area, Richards Bay and Empangeni are the only areas that have a reasonable degree of development. Richards Bay and Empangeni as urban areas they do have the basic urban infrastructure and roads, business and industrial areas. They are also said to have significant economic centres that shape the district; Richards Bay with its harbour facilities which have been the prime reason for large-scale industrialisation in the district, and Empangeni, an industrial and service centre whose higher-order services is said to attract many people from the adjacent rural settlements.¹⁸⁵ Thus, as noted by the Cities Network report, UThungulu District character, excluding Mhlathuze, is that of a deep rural traditional

¹⁸⁴ West Rand District Municipality IDP Review 2014/15.

¹⁸⁵ Cooperative Governance and Traditional Affairs: UThungulu District Municipality Report.

tribal area with sparse scatterings of formal towns and commercial farms.¹⁸⁶ In terms of the Cities Network report, Richards Bay combined with Empangeni form the third largest urban area within the district. UThungulu District is rural in nature with only 18.1 percent of its population urban, 2.6 percent on commercial farm and 79.3 percent residing in traditional authority areas.¹⁸⁷

Likewise, UMgungundlovu district area is not extensively developed. Extensive development can only be witnessed in Pietermaritzburg (situated in Msunduzi LM). Pietermaritzburg as the administrative capital of Kwa-Zulu Natal and the economic hub of UMgungundlovu District certainly has well developed urban infrastructure, roads, manufacturing and retail sectors. In actual fact, Pietermaritzburg as provincial capital pride itself as having well developed economic infrastructure and educational facilities. Seen in this light, Pietermaritzburg is a small urban core within a largely rural area of UMgungundlovu district.

Likewise, Krugersdorp and Randfontein are fairly urban towns within the Western Areas District. Most businesses and industrials areas are located within Mogale City Krugersdorp (Mogale City), followed by Randfontein (Randfontein local municipality).¹⁸⁸ In Westonaria and Carltonville there is an economic activity taking place but much less than that of Krugersdorp and Randfontein.¹⁸⁹ Otherwise, the Western Areas District remains largely rural with only few scattered urban areas. From this perspective, the district area as whole is not extensively developed.

5.2.4 Multiple business district and industrial areas

The Western areas district seems to be the only area that has more than one business district amongst its municipal areas. A business district within UThungulu district can only be found in Mhlathuze (Richards Bay) and within UMgungundlovu area, it can be found in Msunduzi (Pietermaritzburg). In Western areas district, business districts can be found in Mogale city and Randfontein. Although Merafong city and Westonaria have business districts the main anchor economic activity is mining.

¹⁸⁶ South African Cities Network Report: UMhlathuze gateway to globalisation or forgotten harbour town? 17.

¹⁸⁷ South African Cities Network Report: UMhlathuze gateway to globalisation or forgotten harbour town? 17.

¹⁸⁸ West Rand District Municipality: Regional Growth and Development Strategy Report (2012) prepared by Kayamandi Development Services (Pty) LTD (Kayamandi Report 2012).

¹⁸⁹ Kayamandi Report (2012) 45.

5.2.5 Centre must have complex and diverse economy

There is no doubt about the highly industrialized nature of Richards Bay in Mhlathuze area. The economy of Richards Bay and Empangeni consists of primary and secondary industries. Sectors that dominate their economies are; manufacturing of metal products, machinery and households appliances; land and water transport; wood and wood products; mining of metal ores (Richards Bay minerals, Tronox); education, real estate and finance and insurance.¹⁹⁰

Msunduzi municipality has a vibrant and well balanced economy and thus makes an important contribution to the economy of both UMgungundlovu district and KwaZulu-Natal. Pietermaritzburg as the administrative capital of Kwa-Zulu Natal and the main economic hub of UMgungundlovu has a variety of industries; manufacturing, finance and real estate and retail sector.

When compared with other district municipalities within Gauteng (excluding Metropolitan municipalities), the Western areas district is said to contribute the most to the province economy in terms of sectors.¹⁹¹ Its economy is driven by manufacturing, community services, mining, construction, trade and finance.¹⁹² Although the mining sector is said to dominate the economy of the Western areas district, its economy is nevertheless diverse. There different sectors within the area, with the mining sector more pronounced in Westonaria, Merafong city and Randfontein areas; Manufacturing in Mogale city and Randfontein: and the construction sector in Mogale city and Randfontein.¹⁹³

6. MDB's response to CoGTA Metro proposals

The MDB accepted the proposals for consideration and sent section 26 notices to all stakeholders as required by the law. The expectation was that the MDB would make its ruling on the matter before 2016 local government elections. However the decision on all three proposed metro areas was postponed. In the case of UMgungundlovu District the MDB asserted that the previous MDB had in the past considered the matter and was not approved. Regarding UThungulu District the

¹⁹⁰ South African Cities Network Report: UMhlathuze gateway to globalisation or forgotten harbour town? 29.

¹⁹¹ West Rand District Municipality IDP Review 2014/15.

¹⁹² West Rand District Municipality IDP Review 2014/15.

¹⁹³ West Rand District Municipality IDP Review 2014/15.

MDB felt that the proposal required a more detail investigation and would accordingly not be concluded before 2016 local government elections. In respect of both proposals, KZN CoGTA is said to support the proposals to declare both districts as metropolitan areas but only with effect from 2021. In the case of Western Areas District, same as UThungulu District, the MDB felt that the proposal requires a more detailed investigation and would accordingly be considered in the near future. Therefore up to date, no decision has been made regarding all three proposed areas.

7. Conclusion

In order for any municipal area to qualify to become a metro it has to meet section 2 criteria. If one of the criteria is not met then such an area cannot be afforded a metro status. In terms of the Act, an area can only be afforded a metro status if can be reasonably regarded as a conurbation. As discussed earlier, a conurbation is an extended urban area. Each of the proposed metro areas cannot be reasonably regarded as conurbation because they are not extensively developed and are mainly rural. As demonstrated above, UThungulu and UMgungundlovu districts fail to meet the following requirements; having areas of high population densities, intensive movement of people and goods, the areas are not extensively developed and there are no multiple business districts across these areas. Within UMgungundlovu District Pietermaritzburg is the only area that has a reasonably level of development. Same goes for UThungulu District, Richards Bay and Empangeni both located in Mhlathuze LM are there only urbanized areas within the entire district. The situation in the Western Areas District is also the same. The area also fails to meet the requirements of having areas with high population densities, intense movement of people and goods, and extensive development. Seen in this light, all three proposed areas do not meet the criteria. Thus, in their current state these areas do not qualify to become metros.

Chapter Five

CONCLUSION AND RECOMMENDATIONS

1. Introduction

This paper dealt with the demarcation proposals made by the Minister of CoGTA to the MDB as well as the current legal framework governing the demarcation of municipal boundaries in South Africa. It was motivated by the fact that about 35 'dysfunctional' and 'unviable' local municipalities were to disappear either through amalgamation or declaring their municipal areas as district management areas. Amalgamations by nature are very disruptive, costly and require much more expenditure. This paper endeavoured to assess whether in terms of the current legal framework, a municipality can cease to exist solely because it is badly governed (dysfunctionality) and deemed to be financially unviable. In this chapter thus, a summary of the findings and conclusions that can be derived from the analysis are presented.

2. Summary of the findings

In chapter 2 the paper dealt with the legislative framework governing the demarcation of municipal boundaries, in particular sections 24 and 25 of the Demarcation Act. In light of the demarcation framework, its purpose was to assess whether dysfunctionality and non-viability are criteria, factors and/or objectives of demarcation. The distinction between these three concepts is essential for the MDB's discretion to either demarcate or not. Criteria are requirements that must be met before decision to demarcate can be taken. Factors on the other hand, are facts that must be taken into account during the decision making process. Unlike the requirements, the decision maker is obliged to consider, but not to abide because a factor can be one of many. An objective refers to a goal which something is directed at.

In this chapter it has been observed that dysfunctionality and non-viability are not criteria of demarcation, but are merely factors to be considered by the MDB during the demarcation of municipal boundaries. First, sections 24 and 25 contain the objectives and factors of demarcation. Dysfunctionality/functionality as defined by

CoGTA relates to the issue of functional local government. In light of section 24 objectives the observation was that dysfunctionality is not expressly listed as one of the objectives of demarcation. However, the concept is closely linked to the section 24(b) objective of effective local governance. Functional local government is the opposite of effective local governance. By implication the concept does form part of section 24 but as factor not the objective of demarcation. This is because the focus of demarcation is on the size of a municipal area to be demarcated (smaller or larger areas). The literature on municipal size reveals that smaller sized municipalities are better placed to give effect to effective local governance. The MDB can therefore translate this objective into demarcation by creating smaller sized municipal areas. However the same cannot be said about dysfunctionality; demarcation of smaller or larger local government areas cannot eliminate dysfunctionality. As observed in the FFC Report dysfunctionality cover issues that are not directly relevant to a municipal boundary.¹⁹⁴ Dysfunctionality can be caused by managerial lapses, bad choices/decisions and instability at senior levels.¹⁹⁵ The mandate of the MDB does not extend to resolving issues of functionality (stability within municipal councils and competence of administrators). Seen in this light, to regard dysfunctionality as criteria and/or the objective of demarcation would be highly inconvenient for demarcation. The performance of a municipality does not exclusively depend on the demarcated municipal area; it also largely depends on the caliber of a municipal leadership. Though functional municipalities are desirable it is unclear how demarcation can guard against dysfunctionality. It cannot play any role in the demarcation process.

With regard to financial viability, it has been observed that the concept is expressly listed in section 25 as one of the factors to be taken into account. However, CoGTA in their proposals sought to make these concepts criteria for demarcation. This is legally unattainable as both concepts are merely factors but not criteria for demarcation. Municipality cannot be disestablished solely because it is dysfunctional and financially unviable. Furthermore, the confinement of the meaning of financial viability almost exclusively to the municipal tax base is somewhat questionable. Municipal own revenue is not the only source of income for municipalities. The

¹⁹⁴ FFC/SARChI Report, 2015.

¹⁹⁵ FFC/SARChI Report, 2015.

Constitution does not require municipalities to be financially self-reliant. Thus CoGTA's definition of non-viability seems to be inconsistent with the Constitution. In this chapter it has been suggested that financial viability relates to the question of extent to which a municipality can or cannot generate its own income given there is fiscal equalisation system in place. Therefore, financial viability is neither a criterion nor is it the objective of demarcation.

In chapter 3 the focus was on the declaration of DMAs. In terms of the Structures Act, a DMA is an area where the establishment of a municipality will not be conducive to the fulfilment of local government objectives.¹⁹⁶ In this chapter it has been observed that emphasis is placed on of the "area" to be demarcated as opposed to the municipality. The nature of the area should such that a municipality located in that particular area would not be conducive to the fulfilment of local government objectives. The MDB in 1999/2000 correctly declared desert and semi-arid areas with low population, state protected areas and conservation areas as DMAs.¹⁹⁷ Indeed, a municipality located in these areas is unlikely to meet the objects of local government; particularly the provision of democratic and accountable government for local communities; to ensure the provision of services to local communities in a sustainable manner; and to encourage the involvement of local communities and community organisations in the matters of local government.¹⁹⁸

In this regard, CoGTA's proposal to declare dysfunctional and financially unviable municipalities as DMAs is not only contrary to the Structures Act but also inconsistent with the MDB's previous policy on DMAs. According to the previous MDB policy, the DMAs were never declared in areas with high population density. However CoGTA seem to be doing the opposite by suggesting the declaration of DMAs in large populous areas with dysfunctional and financial unviable municipalities. Dysfunctionality and non-viability do not constitute the grounds to declare a municipal area as DMA. As argued in Chapter 2, both concepts are not criteria nor are objectives of demarcation. The fact that a municipality is badly governed and financially poor does not suggest that the "area" a municipality is located, is such that the establishment of a municipality would not be conducive to

¹⁹⁶ See s 6(2) Structures Act.

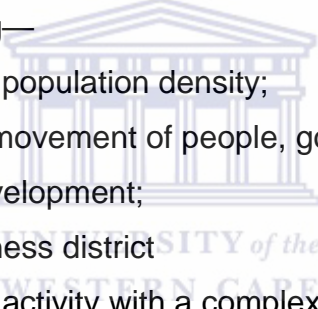
¹⁹⁷ MDB Policy on DMAs.

¹⁹⁸ See s 152(1)(a)-(b) Constitution.

the fulfilment of local government objectives. However, viability was partially recognised by the MDB policy; in those semi arid areas, having only very few people it is not worthwhile to have a fully fledged municipality. Thus, this viability is different from that of CoGTA, which is linked to insufficient municipal tax base.

In chapter 4 the paper discussed the legislative framework governing the establishment of metropolitan municipalities in South Africa. The purpose was to examine whether the three proposed metro areas namely; UThungulu District Municipality, UMgungundlovu District Municipality and Western Areas District Municipality meet the criteria of becoming a metro. The Structures Act, in section 2 set out the definition/criteria of a metropolitan area. In terms of the Act:

An area must be afforded a metropolitan status if can be reasonably regarded as;¹⁹⁹

- 
- (a) conurbation featuring—
 - (i) areas of high population density;
 - (ii) an intensive movement of people, goods and services;
 - (iii) extensive development;
 - (iv) multiple business district
 - (b) A centre of economic activity with a complex and diverse economy;
 - (c) A single area for which integrated development is desirable; and
 - (d) Having strong interdependent social and economic linkages between its constituent units.

Section 2 set out the requirements of metro which must all be met before an area can be declared as a metropolitan area. It has been observed that the concept of a 'rural metro' does not ascribe to the section 2 criteria of metro. A rural metro is a large rural area with a small urban core. The profiles of these proposed metro areas do not fit the definition of a metropolitan area; they are mainly rural with few scattered urban areas. In other words, these areas are rural and not urbanized. They are thus the opposite of the metropolitan area contemplated in section 2.

The UThungulu District Municipality is made up of six local municipalities. However, the towns and business centres of Richards Bay, Empangeni and Eskhawini, all in

¹⁹⁹ See s 2 Structures Act.

the Mhlathuze LM, cannot by themselves render the entire district a metro. In UMgungundlovu District there are seven municipal areas but uMsunduzi LM (Pietermaritzburg) is the only urbanized area. The same can be said about the Western Areas District which consist of four LM and four areas can be reasonably regarded as towns; namely Krugersdorp, Randfontein, Westonaria and Carltonville.

This chapter highlighted that all three proposed metro areas fail to conform to section 2 criteria, specifically of having areas with high population density; intense movement of people and goods; extensive development and multi business districts. The large portion of these areas is rural and not urbanized.

The chapter concluded that all three propose areas in their current state do not conform to section 2 criteria and thus cannot be afforded a metro status.

3. Recommendations

On the basis of the above findings, the following recommendations are made:

The meaning and substance of 'municipal viability' as one of the factors listed in section 25 needs to be clarified. There should be a policy that precisely defines viability and the substance thereof, taking into account the following factors; the Constitution does not require municipalities to be financial self-reliant; the constitutional entitlement of municipalities to an equitable share; the existing fiscal equalisation system; and the objectives of local government mainly the service providing function and their democratic role.

Financial viability (insufficient municipal tax base) as defined by CoGTA should not be perceived as problem. The issue has already been addressed by the existing fiscal equalisation system. The concept of financial viability should remain as a factor and not elevated to a criterion and/or the objective of demarcation in conflict with the Demarcation Act.

Dysfunctionality should have no place in the demarcation process. As noted in the FFC Report that a municipality may be dysfunctional because of many factors that are not necessarily linked to a municipal boundary.²⁰⁰ As noted in the FFC Report that a municipality may be dysfunctional because of many factors that are not

²⁰⁰ FFC/SARChI Report, 2015.

necessarily linked to a municipal boundary.²⁰¹ There are many measures that government can use to address the issue of dysfunctionality.²⁰² Professionalisation is at the core of the realisation of functional municipalities. Thus, CoGTA should implement its own rules to effect professionalisation of municipal administration.²⁰³ One option which may work in this regard will be to make the position of municipal managers a profession, just like lawyers whose conduct is regulated and monitored by independent institutions such as the Law society. Although it is desirable that demarcation should result in functional local government, unfortunately there is very little that it can do to that effect and thus functionality should not be regarded as factor.

The rationale behind CoGTA's proposal to establish three new metro municipalities is unclear. However, it is recommended that areas should strictly comply with section 2 criteria before afforded a metro status. The definition of a metropolitan area should not be interpreted in such a way that would justify the creation of rural metros.

CoGTA, as the department overseeing local government, should not make proposals that appear manifestly unlawful. Likewise, the MDB should be circumspect whether or not to accept such manifestly unlawful proposal for public comment.

²⁰¹ FFC/SARChI Report, 2015.

²⁰² FFC/SARChI Report, 2015.

²⁰³ Steytler (2015) 2.

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