



3 February 2009

**SUMMARY AND ANALYSIS OF THE CONSTITUTION SIXTEENTH AMENDMENT BILL [B1-2009]
AND CROSS-BOUNDARY MUNICIPALITIES LAWS REPEAL AND RELATED MATTERS
AMENDMENT BILL, 2008 [B3-2009]**

1. INTRODUCTION

Section 103 of the Constitution of the Republic of South Africa recognises the boundaries of the nine provinces of South Africa. In order to alter a provincial boundary, a constitutional amendment must be enacted. The Constitutional Sixteenth Amendment Bill seeks to alter the provincial boundaries of the North West and Gauteng provinces in order to re-incorporate the Merafong City Local Municipality into the province of Gauteng. The Cross-boundary Municipalities Laws Repeal and Related Matters Act of 2005 is also amended to facilitate the re-demarcation of the Merafong municipality and other affected areas.

2. BACKGROUND

In 2001, due to administrative and technical challenges, the President's Coordinating Committee decided to abandon cross-boundary municipalities. The process of eliminating cross boundary municipalities was completed in December 2005 with the adoption by the National Assembly of the Constitution Twelfth Amendment Act and the Cross Boundary Municipality Repeal Act. Both pieces of legislation effectively eliminated the reality of cross boundary municipalities and demarcated affected municipalities to specific provinces. As a result, Bushbuckridge, Khutsong (Merafong municipality) and Matatiele have been respectively incorporated into the Mpumalanga, North West and Eastern Cape provinces.¹ Merafong City Local Municipality was incorporated into the Southern District Municipality which was later renamed Dr Kenneth Kaunda District municipality.

A protracted confrontational conflict between the residents of Merafong City Municipality (Khutsong in particular) and authorities ensued, based on the former's refusal to be incorporated into North West from Gauteng.

The Merafong Demarcation Forum legally challenged² sections of the Constitutional Twelfth Amendment Act on the basis that the Gauteng Provincial Legislature had failed to facilitate public participation in its deliberation on the Act and that it had acted irrationally in supporting this amendment. The Constitutional Court upheld the validity of the challenged sections. It found that it could not "conclude the Gauteng Provincial Legislature failed to facilitate public involvement in its procedures leading to its support for the Twelfth Amendment in the NCOP."³ The Court further held

¹ Mavungu, E. (2007) University of Witwatersrand

² *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171

³ *Merafong Demarcation Forum and Others* para 61



that the Legislature "did not exercise its powers irrationally"⁴ when it supported the Constitutional Twelfth Amendment.

A process has now been set in motion for the re-incorporation of Merafong City Local Municipality into Gauteng. This re-alignment gives effect to the will of the people and indicates a paradigm shift in government's approach. Previously the approach was premised on the fact that South Africa is one territorial space and provinces and municipalities are instruments of effective service delivery. In technical terms, the national government adopts a functional approach to regional planning whereas local communities call for a territorial approach that ensures that local preferences and social equity are given priority over any other national goal. The community adopts a regional approach based on the perception that regional location matters with regard to prospects of economic advancement and service delivery. The government seems to be attempting to harmonise the two approaches to restore normality in the affected communities.

3. CLAUSE BY CLAUSE SUMMARY

3.1 Constitution Sixteenth Amendment Bill

The Constitution is amended to effect the re-demarcation of Gauteng and North West Province.

Clause 1

Schedule 1A of the Constitution lists the maps outlining the geographical area falling under a province. This clause amends schedule 1 A to include maps that indicate the re-demarcated provinces of Gauteng and North West.

Clause 2

The Act will come into operation on a date determined by the President by proclamation in the Gazette.

3.2 Cross-Boundary Municipalities Laws Repeal and Related Matters Amendment Bill, 2008

This Bill seeks to amend the Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005 (the principal Act) to effect consequential changes arising from the redetermination of the Gauteng and North West provincial boundaries and also provides for other incidental matters.⁵

⁴ *Merafong Demarcation Forum and Others* para 116

⁵ Objects Clause. Cross-Boundary Municipalities Laws Repeal And Related Matters Amendment Bill, 2008



Clause 1

A definition for a 'section 17 notice' is inserted into the definitions section of the principal Act. A 'section 17 notice' is a notice issued by the MEC of local government in a province when municipal boundaries established in terms of section 12 of the Local Government Municipal Structures Act, 1998, are re-determined.

Clause 2

This is an incidental amendment that directs that the Cross-boundary Municipalities Laws Repeal and Related Matters Amendment Act, 2009 and the Constitution Sixteenth Amendment Act of 2009 must be considered when the principal Act is applied.

Clause 3 (e)

The MEC is empowered to reduce or increase the number of councillors of a municipal council, referred to in Schedule 4 when that municipality is re-demarcated in terms of section 2(4)(a) of the principal Act.

Clause 3 (f)

The section 17 notice repeals the section 12 notice⁶ when a municipality is disestablished in terms of section 17 of the Local Government: Municipal Structures Act, 1998.

Clause 4

Section 4(2) of the principal Act is amended to extend the powers of the MEC and now allows the MEC to regulate any legal and other consequence arising in an area from which a municipality is removed.

Clause 5

These are technical amendments. This clause amends schedule 4 of the principal Act to re-demarcate Merafong City Local Municipality to Gauteng. Schedule 4 of the principal Act is also amended to indicate a new demarcations of the Southern District Municipality now known as the Kenneth Kaunda District Municipality and the West Rand District Municipality.

Clause 6

These are technical amendments to effect the re-demarcation of Merafong City Local Municipality to Gauteng.

⁶ A section 12 notice is a notice issued by the MEC for local government in the province establishing a municipality in terms of the Local Government: Municipal Structures Act 117 of 1998.



Clause 7

Schedule 6 is inserted into the principal Act to indicate that the Merafong City Local Municipality is disestablished from the North West province.

Clause 8

Indicates that section 2(4), 4 and (5) of the principal Act applies to the municipalities referred to in sections 4 and 5 of this Act.

Clause 9

This Act commences on the same day as the Constitutional Sixteenth Amendment Act.

4. GENERAL COMMENTS

4.1 Implications of Cross-Border Municipalities Amendment Bill

There are several other municipalities that are dissatisfied with their integration into other provinces, including Moute and Taung currently in Limpopo and North West whose residents prefer re-incorporation into Mpumalanga and Northern Cape respectively. The Minister of Provincial and Local Government has, since taking office in September 2008, engaged the affected communities in consultative processes to resolve the matter. This approach must be intensified to prevent the mounting frustrations which culminate in violence and the disruption of community life.

4.2 Service Delivery

The conflict around the demarcation of municipal boundaries is a costly affair as evidenced by the experience of the Khutsong dispute. There is an array of negative consequences flowing from the prolonged dispute including: destruction of property, loss of human life and civil strife, disruption of schooling, disruption of municipal operations, sustainable local economic development and service delivery obligations, and paralysis of municipal governance. The tragic episode of the Khutsong community is one which government and South Africans would not want to forget but rather to assess and ensure never to repeat. The normal life of the community was paralysed as grade 12 learners had to be accommodated in another province to complete their exams in 2007. In terms of physical infrastructure, the houses of African National Congress councillors in particular were destroyed and the general implementation of government programmes was disrupted. The recovery plan for the area must be prioritised especially investments to rehabilitate the economic potential and infrastructure development of the area.



4.3 Governance and Intergovernmental Relations

The Khutsong situation has had some untenable consequences in terms of governance, such as low voter turnout in the 2006 Local Government Elections in protest against the government's decision to incorporate Merafong into North West. Chasing away from their homes legitimate public representatives and disrupting normal life as well as damaging physical infrastructure are amongst the consequences of that decision.

In light of the re-incorporation into Gauteng there are intergovernmental relations issues that must be taken into account. In the first instance the Bill asserts that provinces must be cognisant with respect to shifts in population which necessitate budget shifts as well. A clearer resource allocation formula in relation to Equitable Share and Conditional Grants to the affected municipalities must be developed and adhered to. The municipality and the areas under its jurisdiction must be accommodated in the receiving province's growth and development plans to ensure that Local Economic Development initiatives and the Provincial Growth and Development Strategy are harmonised.

The other significant issue is ensuring that the implementation procedures and protocols for the departments as well as provincial administrations are clearly stipulated and coordinated to avoid confusion and overlap. It must also be borne in mind that because of the conflict most services were affected and other developments were hampered, therefore these areas must be prioritised in terms of personnel and other financial resources.

Municipal budgets and spending priorities, for instance the Municipal Infrastructure Grant and Municipal Systems Improvement Grant must also reflect the shift. In addition councillor allocations or remuneration must be addressed to ensure a smooth transition from the North West to Gauteng Province.

5. ISSUES FOR CONSIDERATION

- The Bill takes a step forward in resolving the disputes around cross-boundary municipalities. Is there a uniform approach for all municipalities involved in cross-border dispute or will this be carried out on a case by case basis?
- Local Economic Development was compromised because of the crises in Khutsong. What are the necessary steps that should be taken to ensure an economic recovery plan for the municipality guided by the Intergovernmental Fiscal Relations?
- In terms of transitional arrangements to ensure adequate implementation of programmes in the municipality there must be clear processes and protocols for government both vertically and horizontally.
- Spending priorities in terms of the Equitable Share and other municipal grants must be clearly channelled to reflect population movement.



Reference

Constitution Sixteenth Amendment Bill [B1-2009].

Cross-boundary Municipalities Laws Repeal and Related Matters Act 23 of 2005.

Cross-Boundary Municipalities Laws Repeal and Related Matters Amendment Bill, 2008. [B3-2009]

Local Government: Municipal Structures Act 117 of 1998.

Mavungu, E. (2007) Explaining Boundary Disputes In Post-Apartheid South Africa: Bushbuckridge, Matatiele And Khutsong University of Witwatersrand.

Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others 2008 (5) SA 171.
