SUBMISSION OF THE MAKULEKE TRADITIONAL COMMUNITY AND THE MAKULEKE COMMUNAL PROPERTY ASSOCIATION ON THE TRADITIONAL COURTS BILL, 2012

1. **Comments on the Traditional Court Bill**

This memo serves as the submission of the Makuleke Traditional Community and the Makuleke Communal Property Association on the Traditional Courts Bill , 2012. In our view it is inconsistent with both the Customary law and the Constitution. Description of the Makuleke community

We are a community which was forceful removed through racially discriminatory legislation and practices from the Pafuri Triangle, an area of land 26 500 hectares in extent, to Blocks H, I and J of the farm Nlthaveni 2 MU, which we now occupy. We were removed from the Pafuri triangle (an area which has since been returned back to us through the Restitution of Land Rights Act, No 22 of 1994) and the area included without limitation:

- The entire section of the Kruger National Park situated between the Limpopo and Levuvhu and Mutale rivers and the Western boundary of the Kruger National Park;

- the Pafuri area, in extent 19 842, 6291 hectares, situated in the former Released Area 26, District of Sibasa, Northern Province ("the Pafuri area"); and the area formerly known as Makuleke's Location 1 MU, 501, 676 5 hectares in extent, in the district of Sibasa, Northern Province ("Makuleke's location")

- the section of the Madimbo corridor between the western boundary of the Kruger National Park and the western boundary of the traditional lands of the Makuleke traditional community;

- the section of the former Venda between the Western boundary of the Kruger National Park and the Western boundary of the traditional lands of the Makuleke tribe lying to the north of the centre line of the Mutale river.

We now refer to this area the "Old Makuleke".

Makuleke's location (which was part of Old Makuleke) formed a part of the schedule of native areas in terms of the Natives Land Act No 27 of 1913 and became the property

of the South African Development Trust in terms of section 6 of the South African Development Trust and Land Act No 18 of 1936.

Following the forced removal of the Makuleke community from Old Makuleke in 1969 the Makuleke's location was excised from the scheduled native area in terms of section 3 (b) of the South African Development Trust and Land Act No 18 of 1936 in terms of Government Notice No 130 of 1975. It was incorporated into the Kruger National Park in terms of the National Parks Act, no 57 of 1976.

The remainder of old Makuleke formed part of released area number 26 of the previous Transvaal referred to in the first schedule to the South African Development Trust and Land Act No 18 of 1936. Subsequent to the forced removal of the Makuleke community, released area number 26 was excised from the released area in terms of section 2 of the South African Development Trust and Land Act in 1975.

Old Makuleke (except the part of it comprising Makuleke's location) was unregistered unalienated State owned land (which had not been surveyed into formally definable portions of land) and was also incorporated into the Kruger National Park after the forced removal of the Makuleke community from the area in 1969.

The community occupied Old Makuleke in terms of our traditional laws and customs as beneficiaries of the South African Development Trust. Thus the community had a right to Old Makuleke location in terms of our customary law interest and rights to it.

The Makuleke community occupied Old Makuleke as a whole in terms of our shared rules, which constituted a coherent system of customary indigenous law. These rules determined our access to the land. We held the land in common. The Makuleke community had so occupied Makuleke in accordance with our customary laws from the 1820's or 1830's prior to colonisation by European settlers. We had established an independent political, social, and economic lifestyle in Old Makuleke, led by the fore-fathers of our traditional leader Pahlela Joas Mugakula who were the rulers of our clan. Also, owing to the wealth of natural resources in the area, Old Makuleke was self-sufficient in food. We have retained our indigenous system at Ntlhaveni, in spite of the process of cultural change to which we have been subjected in the course of history, and in spite of the fact that we were under the administrative control of the colonial and apartheid regimes and authorities for many years.

Three villages were allocated for occupation by the Makuleke community at Ntlhaveni 2 MU upon our removal, namely: Makahlule (Block H), Makuleke (Block I) and Mabiligwe (Block J). They are close to the western boundary of the Kruger National Park and to the south of the road that leads to the Punda Maria gate entrance into the Kruger National Park.

Prior to our forced removal there were 10 villages at Old Makuleke each with a headman, under the fore- fathers of our traditional leader Pahlela Joas Mugakula who were the traditional leaders of the Makuleke community. We enjoyed autonomy from other traditional communities. Nthlaveni 2 MU was initially earmarked specifically for the relocation of the Makuleke people and divided into 10 blocks to accommodate the 10 respective villages of Old Makuleke. In the chaos of the forced removal, the Makuleke people were ultimately only placed into three blocks, namely blocks H, I and J. There was consultation with the community by the Makuleke Royal Family as to which headmen should continue to operate in the resettlement area. It was patently not possible for all of them to continue to operate.

The removal had disastrous consequences for the Makuleke community. We were moved into the area of jurisdiction of another tribe and another chief, Adolf Mhinga, who is the father of Cedric Mhinga. At the time, Adolf Mhinga was also Minister of Justice in one of the artificial institutions created by the apartheid government in the form of the Gazankulu homeland. Despite having been recognised as a separate tribe with a separate chief by the authorities as early as 1905 in the Native Locations Commission report, our traditional leaderwas effectively stripped of his status as chief and the Makuleke community was stripped of our status as an independent traditional community and of ourentitlement as an independent traditional community to be led by our hereditary chief, Pahlela Joas Mugakula.

The forced removal completely disrupted the settled and successful existence we had had at Old Makuleke. It was a removal motivated by and implemented in terms of the racist and discriminatory laws and policies of the time. To a substantial degree, it reduced us to poverty and dependency on cheap wage labour in industrial Johannesburg in the period following the removal. The prosperous way of life that we had had at Old Makuleke was destroyed.

As appears from Government Notice No. R. 230, 1986 the remainder of Ntlhaveni Location 2 MU was transferred to the Government of Gazankulu in terms of section 36

of the National States Constitution Act, no 21 of 1971, section 4 of the Development Trust and Land Act, no 18 of 1936 and section 25(1) of the Black Administration Act, no 38 of 1927, read with section 21(1) of the Development Trust and Land Act. This land had been added to released area number 26 on the excision of the Pafuri area from released area number 26 in 1975.

The dispossession of rights was carried out for the underlying purpose of the creation and development of the homeland of Gazankulu. In the premises the community was dispossessed of their rights to Old Makuleke forcibly under and for the purpose of the furtherance of laws which would have been inconsistent with the prohibition of racial discrimination contained in section 9 of Constitution of the Republic of South Africa, 1996.

The Makuleke Community lodged and won a claim of restoration of the land in the Pafuri Triangle from which they were removed in terms of the Restitution of land Rights Act 22 of 1994. This land (now described as the farm Makuleke 6MU) was restored to the Makuleke Community on condition that we form the Makuleke Community Property Association ("CPA") in terms of the Community Property Association Act 28 of 1996, to take transfer of it, that we preserve its ecological integrity, and use it only for purposes consistent with the preservation of its ecological integrity.

The Makuleke CPA's main objective is to use Makuleke 6MU in a manner that is compatible with the protection of wildlife and the area's ecology and not to inhabit it, nor use it for agriculture or mining. The Makuleke CPA has full commercial rights to the land and has initiated an advanced programme for the development of a range of eco-tourism enterprises in partnership with investors from the private sector. The Makuleke CPA uses Makuleke 6MU, for eco- tourism and related activities to alleviate poverty, provide employment and revenues, and to remedy the negative effects that the forced removal had on the livelihoods of the Makuleke community.

Of importance to the current submission is the fact that part of the agreement resolving the claim was that the State recognised the rights the Makuleke Community has to Blocks H, I and J Ntlhaveni. At the same time, the State waived any right it might have to the return of that land.

It is worth noting that during May 1996 the previous premier of Limpopo, Adv Ngoako Ramathlodi, appointed a commission of enquiry to investigate, inter alia, instances where legitimate traditional leaders had, during the apartheid era, been banished,

deposed or driven into exile because they differed with the government of the day. Other provinces such as the Eastern Cape and Free State also appointed similar commissions. The Commission's two-year investigation, headed by Professor Victor Ralushai, operated from three offices in the former homelands of Venda, Gazankulu and Lebowa, and investigated a total of 222 cases, 110 of which were in Venda, 68 in Lebowa and 44 in Gazankulu.

It is worth noting also that the Ralushai Commission found that the status of some traditional leaders had been undermined because of forced removals. It suggested that some traditional authorities disband and that headmen within these authorities be made autonomous so that each cultural group had at least one senior traditional leader. In so far as it relates to the status of our traditional leader as a chief or traditional leader, Professor Ralushai, after weighing all the evidence, recommended that the Makuleke chieftainship should be restored. It is however sufficing to mention that the outcome of the Ralushai Commission was then referred it to the Commission on Traditional Leadership Disputes and Claims created in terms of the Traditional Leadership Governance Framework Act .We are saying today that the same matter has been referred to another the third commission and we are still waiting our case to be heard by this commission.

In the light of the above, the Makuleke community and the Makuleke CPA hereby submit our comments on the Traditional Court Bill as follows:

That traditional courts under our traditional leader Pahlela Joas Mugakula are valuable institutions as they provide thousands of the Makuleke people access to justice they would not otherwise have. We argue that this Bill will end up working to wrongly expand the power of the state and of the Traditional Leaders recognised under the apartheid system at the expense of those discarded under the apartheid system as was the Makuleke traditional leadership, and thus polluting the traditional justice system and its values, which should be based on restorative justice and reconciliation and also polluting the structure and functioning of traditional courts in a manner inconsistent with the constitutional imperatives and values and customary law.

The fact that this Bill is going to give more powers, indeed very wide powers to the appointed presiding officers of these courts , who are according to this Bill be the currently recognised so called Senior Traditional Leaders who were created under the apartheid system, to create and to enforce customary law within the bounded

jurisdictional areas created under apartheid, and that this is going to undermine some of the existing legislation, e.g. the Restitution of Land Rights Act and the functioning of the Commission on Traditional Leadership Disputes and Claims;

According to this Bill, the presiding officers will have powers over everyone within traditional council's jurisdiction area which existed virtually wall to wall in the former homelands regardless of whether boundaries or authority is disputed by, for example, by other traditional communities, private land owners, Trusts and Communal Property Associations to mention but a few.

If this Bill goes through, it will undermine our rights on the land that we have acquired through the Restitution of Land Rights Act. This will be absurd, especially given that the Restitution of Land Rights is mandated and required by section 25 (7) of the constitution. This is in line with the background above.

Accordingly we call upon our government to take this in to consideration:

- That the content of this Bill still needs more time for engagement so that it produce the result that will be more amicable and beneficial to all people of South Africa.

- That the content of the Bill needs more time for engagement so that it does not undermine and or infringe the rights of the people.

We hope that our comments will be receiving your urgent attention.

Thanks,

Lamson Maluleke

(on behalf of the Makuleke Traditional Community and the Makuleke Communal Property Association)