Custom, citizenship and rights: Community voices on the repeal of the Black Authorities Act

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Introduction:
Repealing the Black Authorities Act is only a first step

Mazibuko Jara

On 20 and 21 July 2010, Parliament's Rural Development and Land Reform Portfolio Committee conducted public hearings on the repeal of the Black Authorities Act 68 of 1951 (BAA, which was also known as the Bantu Authorities Act). Virtually all of the 16 oral and written submissions made at these hearings supported the repeal of the BAA. The overwhelming majority of these voices came to say much more: the repeal of the BAA must go forth, together with the effective removal of its controversial, divisive and oppressive legacy of undemocratic tribal authorities, punitive tribal levies and imposed tribal boundaries. It is remarkable that there was not a single submission that opposed these calls.

These calls were made by people who came from rural communities in far-flung parts of the country that are under traditional leaders. They told parliament many stories that explain the reality of life under traditional leaders. They came to tell parliament that the legacy of the BAA lives on in their villages today. They came to ask a basic question: where is the constitutional promise of equality and rights for rural women who are still subjects of BAA-established structures? Many of them also brought forward serious allegations of violations of human rights and democracy under the watch of traditional leaders. In some of the cases, the community representatives shared examples of localised and living customary practices that also integrate constitutional principles of equality, gender equality, and non-discrimination. For example, in many rural areas, single women are now being granted rights to land in their own name by such localised systems of living customary law. This contrasts sharply with the tragic story of Mrs. Miriam Mateza, whose freehold land was dispossessed from her by a chief who told her that no woman can hold land in her name (see page 34). Many of the community representatives also told parliament of their views on how new post-apartheid laws entrench the BAA's controversial legacy.

These community voices are a direct appeal to policy- and law-makers to heed their call for change in how rural communities are governed under traditional leaders. These are voices for the recognition, promotion, support for and development of living and dynamic expressions of customary systems in line with the values of democracy, equality, rights and citizenship as enshrined in our country's constitution.

This booklet is a tribute to these bold torch-bearers for democracy and development in rural areas. This booklet publishes their heart-wrenching stories as they presented them to parliament. This booklet also includes submissions from the Law, Race and Gender (LRG) Research Unit at the University of Cape Town and the Legal Resources Centre (LRC). Given that the BAA was one of the early laws passed by the apartheid regime, leaders such as Albert Luthuli, Govan Mbeki and Nelson Mandela wrote scathing critiques of this legislation. The ANC itself also critiqued the BAA in official correspondence with the apartheid government.

In the same week that parliament conducted hearings on the repeal of the BAA, the National and Mpumalanga Houses of Traditional Leaders appeared before Parliament's Constitutional Review Committee with submissions that called for significant changes to the constitution of the country. In essence, these submissions called for constitutional amendments that would give the powers, functions and duties of local government in rural areas to traditional leaders. This is significant.

By publishing this booklet, the LRC and the LRG believe not only that the voices of rural communities on the tribal system that was established by the BAA will be recorded in written form, but also that these voices can then reach those who ultimately hold power. The point is not just to reach them but to also make them use the power they have to ensure that they heed the calls of rural communities.

Indeed, the repeal of the BAA is an important historical and symbolic step in moving away from our apartheid past. As the Repeal Bill itself states, *"the Black Authorities Act, 1951 … established statutory ''tribal'', regional and territorial authorities to (amongst other things) generally administer the affairs of Blacks"*. The Repeal Bill further states that *"the Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanised, and is reminiscent of past division and discrimination. The provisions of the Bill are both obsolete and repugnant to the values and human rights enshrined in the Constitution".*

Aside from the symbolic value of the repeal itself, however, a set of post-1994 laws effectively entrench and even exacerbate the legacy of the very Act that is the subject of the repeal. [1] In all the stories in this booklet, the most controversial post-1994 law is the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), and the provincial Traditional Leadership Acts passed in terms of the TLGFA. The Communal Land Rights Act 11 of 2004 (CLARA), that was declared "unconstitutional in its entirety" by the Constitutional Court in May 2010, also comes up for significant criticism. The pending Traditional Courts Bill (TCB) was also singled out as a point of major concern. All these new laws do not undo the tribal authorities and boundaries established by the BAA but instead provide for their continuation as traditional councils with significant powers for rural governance, land allocation and many other aspects of rural life. These laws also open the door for chiefs to impose tribal levies on rural "subjects", a form of double taxation that is patently unconstitutional. The repeal of the BAA is therefore an inadequate step on its own, given a set of post-1994 measures and legal provisions that, in effect, entrench and even exacerbate the legacy of the very Act that is being repealed. How these new laws build on the logic of the BAA, and thereby entrench second-class citizenship for people living in the rural areas of the former homelands, is elaborated and reiterated throughout this booklet.

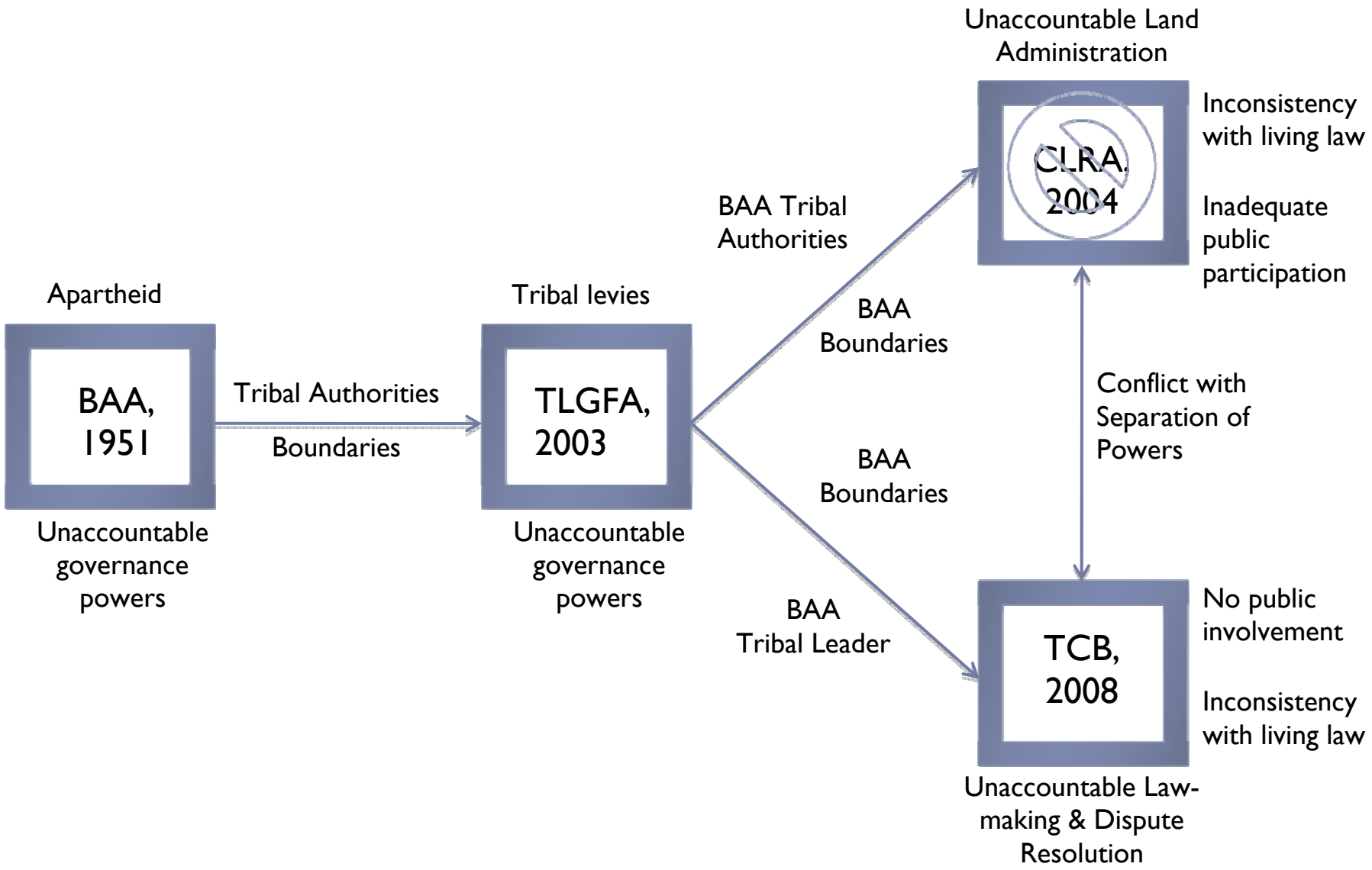
We have to ask ourselves what the repeal of the Black Authorities Act means if the Act's effects live on in new laws. This brings the focus back to parliament, to government and other decision-makers: will they limit their power to merely repeal the BAA on paper or will they also lay the foundation for the review of

[1] See the flow chart at the end of this introduction which shows how the new laws entrench the legacy of Black Authorities Act.

problematic post-1994 laws that entrench the legacy of the BAA? How will parliament respond to the calls for constitutional amendments from traditional leaders? As difficult as this challenge may be, this is the time for political will that deepens democracy in rural areas. Will parliament heed the calls of rural dwellers as told in the stories published here? Will law and policy-makers be held back by emotive, obfuscating and uncritical appeals to tradition? Or will they assert the citizenship, equality and democratic rights of the millions of rural dwellers in our country? The LRC and the LRG hope that this booklet provides a useful backdrop against which law- and policy-makers can debate and decide on these important issues that affect the lives of so many.

Finally, the LRG wishes to acknowledge that the contents of this booklet are the outcome of a partnership between the LRG and the LRC, which was funded by The Atlantic Philanthropies. Without the assistance of these organisations, collaboration with community representatives and civil society would not have been possible.

BAA => TLGFA => CLARA & TCB



Analysis of Recent Laws and the Legacy of the Bantu Authorities Act

Aninka Claassens

The current Black Authorities Repeal Bill correctly states that:

> The Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanised, and is reminiscent of past division and discrimination. The provisions of the Bill are both obsolete and repugnant to the values and human rights enshrined in the Constitution of the Republic of South Africa, 1996.

This is consistent with what Albert Luthuli writing in 1962 said about the Bantu Authorities Act:

> The modes of government proposed are a caricature. They are neither democratic nor African. The Act makes our chiefs, quite straightforwardly and simply, into minor puppets and agents of the Big Dictator. They are answerable to him and to him only, never to their people. The whites have made a mockery of the type of rule we knew. Their attempts to substitute dictatorship for what they have efficiently destroyed do not deceive us.[1]

This factsheet welcomes the Repeal Bill but explains how the distorted legacy of the Bantu Authorities Act (BAA) lives on, and is in fact, entrenched by other recent laws. It begins with the Traditional Leadership and Governance Framework Act (Framework Act) of 2003.

1 The Framework Act entrenches the controversial structures and tribal boundaries created by the Bantu Authorities Act.

The traditional leaders and tribal boundaries that it confirms are not those found to be legitimate after commissions and consultation. They are the "official" leaders, structures and boundaries inherited directly from apartheid and the former homelands.

How does this come about?

Section 28 of the TLGFA states that any traditional leader, tribe and tribal authority that was previously established and still recognized in law is **deemed to be recognised by the Framework Act** as an official traditional leader, traditional community, or traditional council of the future.

This provision is tucked away near the end of Act and seemed to contradict section 2 of the Act which provides for the Premier to recognise a traditional community only

[1] *Let My People Go* p 200.

"after consultation" with various stakeholders including the community itself, and section 3 which sets out how new traditional councils should be established and recognized. There is no doubt, however, that section 28 takes precedence over the earlier, more "consultative" sections.

This was recently confirmed by the Constitutional Court judgment in the challenge to the Communal Land Rights Act. In the judgment the Chief Justice notes that:

> The Black Authorities Act gave the State President the authority to *establish* "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of CLARA apply. … *It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act*, 2003.[2] (emphasis added)

The Framework Act entrenches apartheid-created structures and boundaries into the future and opens the door (in section 20) for other laws to give these structures specific and wide-ranging powers. The Communal Land Rights Act (which has been struck down by the Constitutional Court) provided for wide ranging powers over land and the Traditional Courts Bill (discussed below) would provide traditional leaders with centralised legislative and judicial powers.

2 Addressing the justification that traditional councils will be transformed' by new composition requirements

The main caveat to section 28 of the Framework Act is that existing tribal authorities are required to comply with new composition requirements within a specified period in order to be deemed the traditional councils of the future. The composition requirements are that 40% of the members of a traditional council should be elected and a third of its members should be women.[3]

Speeches and government pronouncements about the new laws repeatedly refer to this reform component. They fail to mention however that the vast majority of tribal authorities have repeatedly failed to meet the deadline for holding elections and that **despite two legislative extensions so far** many have still not complied. They also fail to mention that the 'elections' held so far have been fraught with problems. Or that the fully elected community authorities that were also created in terms of the Bantu Authorities Act and used to exist alongside tribal authorities have been done away with by the Framework Act.

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[2] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* May 2010 at para 24.
[3] The women need not be elected, they can be appointed by the "senior traditional leader".

Moving the goalposts

In 2003 the Framework Act provided that tribal authorities must comply with the new composition requirements **within a year**[4] in order to be deemed traditional councils. However the vast majority failed to meet the deadline and so would have fallen away had the new provincial traditional leadership laws that were enacted in 2005 and 2006 not extended the period for another year from when they were enacted. However once again many provinces and tribal authorities simply failed to hold elections or appoint women members within the second cut-off period. Thus the Framework Act was amended in 2010 to extend the legal life of tribal authorities by another 7 years and give them yet another chance to hold elections and appoint some women members. This has led to a flurry of activity in the Eastern Cape but provinces like Limpopo have, seven years later, not even started the "election" process for the 40% component.

Problems with the 'elections'

The elections held so far in the Eastern Cape, KwaZulu Natal and North West provinces have serious weaknesses. During the recent Eastern Cape elections various traditional leaders objected to having to include elected members and many CBOs and civics objected that the election process reinforced contested apartheid boundaries that are no longer operational. The responsible MEC publicly admitted that government *'failed to properly inform communities about the provincial traditional council elections'*.[5]

In KwaZulu-Natal there were insufficient funds to hire the IEC to monitor and support the elections. Yet, the IEC ballot boxes and other equipment were used, creating the impression that the elections were properly monitored and run by the IEC. In North West many rural people are not even aware that 'elections' took place in their areas. The process was supervised by the Provincial House of Traditional Leaders and held at 'royal kraals'. Residents in some areas complain that when they attempted to nominate their own candidates they were ignored by the person in charge who accepted only those nominations consistent with a pre-agreed list of names. Many people object to the fact that only 40% of council members are elected, and the majority continue to be appointed by the 'senior traditional leader'.

3 What does entrenching apartheid structures and boundaries do to customary law?

The manipulation of tribal boundaries and chiefly appointments during apartheid is widely recognized. Nelson Mandela wrote in 1959:

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[4] The Bill initially provided for a two year period, but the deeming provision was controversial and Members of Parliament insisted that untransformed tribal authorities should not have such a long "grace" period before being required to change.

[5] 18 March 2010. 'Traditional council voting fiasco'. Front page article in EC Today Newspaper. Author Mandlenkosi Mxengi.

> Moreover, in South Africa, we all know full well that no Chief can retain his post unless he submits to Verwoerd, and many Chiefs who sought the interest of their people before position and self -advancement have, like President Luthuli, been deposed....Thus, the proposed Bantu Authorities will not be, in any sense of the term, representative or democratic.[6]

During apartheid millions of people were forcibly removed during the process of "Bantustan consolidation" in an effort to try to bring the untidy reality of intermingled identities in line with the mythology of "separate tribes" each with their own homeland. Time and again Bantustan consolidation removals favoured compliant traditional leaders who were rewarded with large tracts of land, and punished those who resisted - by putting them under the authority of the collaborators. The Framework Act and the new provincial laws now entrench those contested boundaries and make it virtually impossible for groups who were put under the wrong tribal authority during apartheid to fix the problem. Moreover other laws such as the CLRA and the Traditional Courts Bill give senior traditional leaders far-reaching centralised power over the people living within those boundaries. No provision is made for the recognition of authority at lower levels than the apex of the tribe. The Framework Act does not acknowledge or support the role played by councils operating at village level, or the powers of headmen. The only 'traditional' structure given statutory authority is the traditional council (i.e. resuscitated tribal authority) and only 'senior traditional leaders' are provided with statutory powers.

Structural minorities within larger "traditional communities"

Groups of people who were put within the "wrong" tribal boundaries during apartheid were made structural minorities within larger tribal units, and thus unable to challenge decisions taken by "the majority of the tribe". By endorsing the controversial tribal boundaries inherited from apartheid the Framework Act entrenches the problem. This is one of the reasons that the election process for traditional councils is fundamentally flawed. Apartheid boundaries have been made the default boundaries for voting districts - condemning those who challenge them to being structurally out-numbered.

There are many examples of groups who challenge existing tribal boundaries, including the thousands[7] of rural African communities who bought land through exemptions from the 1913 Land Act in the former Transvaal and Natal, only to find their farms subsequently included within the homelands and put under the jurisdiction of traditional leaders. Hundreds of these communities challenged this, especially when the traditional leader then started to allocate their land to others in return for *khonza* fees. These and other groups challenged the apartheid government (including through litigation) and many ended up with elected community authorities rather than tribal authorities. Unbeknown to them the Framework Act has now "phased out" community authorities and landowners such

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[6] Verwoerd's Grim Plot, No.36, May 1959.
[7] H. Feinberg 'Challenging the Natives Land Act: African land acquisitions between 1913 and 1936', 1997.

as the Daggakraal Community in Mpumalanga now find to their shock that a traditional leader has been given jurisdiction over their area.

The problem is not limited to people who bought land historically, it also applies to groups who opposed the Bantustan policies of 'betterment' and homeland independence and were then forcibly removed and put within the jurisdiction of traditional leaders who were also Bantustan cabinet ministers. The Makuleke community in Limpopo is a case in point. After their removal their traditional leader was demoted to a headman under the authority of Chief Mhinga who had co-operated in their removal. They now live within the Mhinga Traditional Council boundaries, where they are doomed to be a structural minority unable to effectively challenge the authoritarian powers vested in Chief Mhinga by new laws including the CLRA and the Traditional Court's Bill (TCB).

Imposed boundaries change the nature of customary law – and undermine indigenous accountability mechanisms

The new laws (particularly the CLRA and the TCB) give traditional leaders extensive powers within the jurisdictional boundaries confirmed by the Framework Act. This power is not based on the key customary principles of voluntary affiliation and consensus. Instead it is based on the apartheid precedent of top-down statutory power within fixed geographical boundaries. Leaders such as Albert Luthuli, Nelson Mandela and Govan Mbeki highlighted the fundamental change that comes about when power is no longer referred upwards from below, but is imposed from above. In *The Peasants Revolt* Mbeki wrote:

> [m]any Chiefs and headmen found that once they had committed themselves to supporting Bantu Authorities, an immense chasm developed between them and the people. Gone was the old give-and-take of tribal consultation, and in its place there was now the autocratic power bestowed on the more ambitious Chiefs, who became arrogant in the knowledge that government might was behind them. [8]

The layered nature of customary institutions at clan, village and family level is well documented, as is its central role in mediating and balancing power. Leaders are forced to take into account the views and deliberations of other levels of authority which provide people with alternative forums in which to express their views. The power of different levels in the traditional hierarchy expands and contracts depending on the confidence people have in leaders at the different levels. Unpopular or dictatorial traditional leaders will find sub-groupings referring fewer and fewer issues to them, and instead dealing with issues internally at lower levels. Secession was historically the primary mechanism of accountability in customary systems, and the underlying dynamic continues to be played out in myriad disputes concerning the status of chiefs and headmen relative to one another.

However once fixed jurisdictional boundaries are imposed by the state, and traditional leaders are given centralised statutory authority within those boundaries, the dynamics of indigenous accountability are fundamentally undermined.

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[8] The Peasants Revolt 1964: 119–20.

4 The centralised and top-down version of power entrenched by the new laws

The Framework Act makes tribal authority boundaries the default boundaries for future 'traditional communities' and vests power exclusively at this level. Laws such as the CLRA and the TCB, which provide power to these structures, similarly centralise power and authority to the 'senior traditional leader' who appoints 60% of traditional council members.

The Traditional Courts Bill

The bill vests statutory power in the presiding officer of a traditional court, who must be an officially recognised senior traditional leader or his delegate. No role, functions or support is provided for village level councils, nor to the council members who, in practice, play the pre-eminent role in existing customary courts. In this respect the bill follows the precedent set by the Black Administration Act of 1927, except that the Black Administration Act did at least provide for the recognition of headmen's courts.

The bill makes it an offence not to appear before a customary court once summoned by the senior traditional leader as presiding officer[9]. The decisions of the court (which are decisions made by the presiding officer) have the legal status of rulings made by the magistrates' courts. Having centralised power to the individual senior traditional leader the TCB enables him to determine and impose heavy sanctions. Certain of these sanctions are controversial. For example, according to clause 10(2)(g), the traditional court may issue:

> an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court.

The powers given to traditional courts override in-built indigenous protections that serious matters such as the cancellation of land rights be debated within the community at various levels, and ultimately require the endorsement of a general meeting of the entire community.

Again, the TCB does not recognise these levels of debate and decision-making and instead vests legal authority exclusively in the senior traditional leader in his role as presiding officer. The TCB is thus at odds with customary principles that build in important checks and balances.

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[9] The South African Law Commission recommended that people must have the right to opt out of customary courts, and appear before another court instead, should they so desire. Traditional leaders strongly opposed "opting out" on the basis that it undermines their authority. This was their main objection to the 2003 Law Commission report and draft bill, which subsequently disappeared without trace.

The bill has far reaching consequences for those who dare to dispute the authority of traditional leaders. It would enable traditional leaders to summon people who challenge unilateral actions to their courts and order them to perform forced labour, or deprive them of "customary entitlements". The bill enables the court, in the person of the presiding officer, to determine the content of customary law, notwithstanding contestations about its content in many areas. Common examples include contestation about traditional leaders "selling" land allocations for *khonza* fees, entering into unilateral mining deals or tourism ventures with outside investors, or demanding tribal levies for cars and *lobola* payments despite the state salaries they receive.

The Bill has been rejected by women's organizations who argue that it will exacerbate the problems women face in rural areas. Two of the serious problems facing women in existing customary courts are that generally the courts are composed of male councillors who are not sympathetic to women's issues, and women are not allowed to speak or represent themselves, but have to rely on male relatives to put their case. This puts women at a serious disadvantage, particularly in eviction cases arising from disputes with their male relatives, or where they have no adult male relatives available to represent them.

Clause 9(3)(a) bars lawyers from traditional courts. Clause 9(3)(b) provides that instead a party may be represented by "his or her wife or husband, family member, neighbour or member of the community, *in accordance with customary law and custom*". Instead of providing explicitly that women should be allowed to represent themselves if they so choose, the bill enables the continuation of the practice of male relatives representing women "in accordance with customary law and custom". This is justified on the basis that men, too, may be represented by their wives, a far fetched possibility which attempts to cloak the continuation of inequality in even-handedness.

In many areas customary courts operate according to flexible customary principles, and exist at all levels of society whether or not they were officially recognised in terms of the Black Administration Act. Some courts are changing to allow women to present their own cases and to encourage female councilors. Courts like that, run by respected and dedicated rural people, do not need laws like this to prop them up.

5 The practical consequences of the new laws for rural people

The kinds of problems facing people living the former homelands are recognised by the 2007 ANC resolution adopted at Polokwane to:

> 10 Ensure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local government is discontinued.

Typical problems in rural areas include the following:

- Community members finding themselves landless and outnumbered by 'newcomers' who have 'bought' land from traditional leaders in exchange for "khonza fees". In many areas (particularly along our borders) there is an incentive to "sell" land to "outsiders" because they pay substantially higher fees than locally born community members.
- Unilateral deals between traditional leaders and outside investors – including mining deals and tourism ventures – with the villagers directly affected neither consulted nor compensated.
- Disputes over restitution land. Traditional leaders object to people establishing trusts and CPAs on restitution land and insist that the land should instead be transferred to the tribal authority, often the very same structure that had colluded with the forced removal during apartheid. Again, those who were actually removed would become a structural minority within the larger 'traditional community' and so lose control over their restitution land.

Ordinary people's ability to challenge abuse of power and hold leaders to account would be severely undermined by the new laws. The Traditional Courts Bill for example enables the senior traditional leader to expel and punish anyone living within his jurisdictional boundaries who dares to challenge his authority, 'according to customary law' as he defines it.

Even apartheid did not provide traditional leaders with such draconian powers.

Levies and taxes

Since the introduction of the Framework Act there has been a resurgence of the practice of traditional leaders demanding that people pay annual tribal levies and also ad hoc levies for specific purposes, such as buying the chief a car or contributing to the payment of his *lobolo*. Those who refuse to pay are denied the tribal authority "address stamp" that confirms their residence in the area. Without this stamp those living in the former homelands are not able to obtain ID books, social grants, driver's licenses or even open bank accounts.

The 2003 White Paper on Traditional Leadership and Governance states[10] that

> The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

This statement appears to recognise the significant role that back-breaking tribal levies and taxes played in the subjugation of black people during colonialism and apartheid and also that exorbitant demands for levies were a key trigger in the anti-chief uprisings of the 1980s. "No more double-taxation" was a rallying cry of the UDF in uprisings in the former Bantustans.

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[10] DPLG p 43.

Yet, section 4(3) of the Framework Act provides that a traditional council must 'meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council'.

The Limpopo Traditional Leadership and Institutions Act of 2005 specifically provides that a traditional council may levy "a traditional council rate upon every taxpayer of the traditional area concerned"[11] and that:

> 25(3) any taxpayer who fails to pay the traditional council levy may be dealt with in accordance with the customary laws of the traditional community concerned.

6 Are the new laws constitutional? Implications of the CLRA judgment

Lawyers and legal bodies have repeatedly warned that various provisions of the new laws are in conflict with the rights protected by the Constitution. Moreover, that they are conflict with the democratic nature of living customary law as it exists on the ground. By reinforcing the autocratic version of custom inherited from colonialism and apartheid the new laws undermine the vibrant and progressive processes of change and mutual accommodation that are being negotiated in rural areas.

The first challenge to the new laws to be finally decided by the Constitutional Court is the challenge to the Communal Land Rights Act. The Act was struck down because the correct parliamentary process was not followed, thereby jeopardizing proper consultation processes. In its judgment the court drew attention to the fact that living customary law as it exists in practice must be respected and taken into account:

> the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend.[12]

The recent *Shilubana* judgment stresses the importance of respecting and facilitating the development of customary law by rural communities:

> As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development *by communities of their own laws* to meet the needs of a rapidly changing society must be respected and facilitated.[13] (emphasis added)

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[11] Section 25(1).
[12] *Tongoane* at para 79 (See also para 89).
[13] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45.

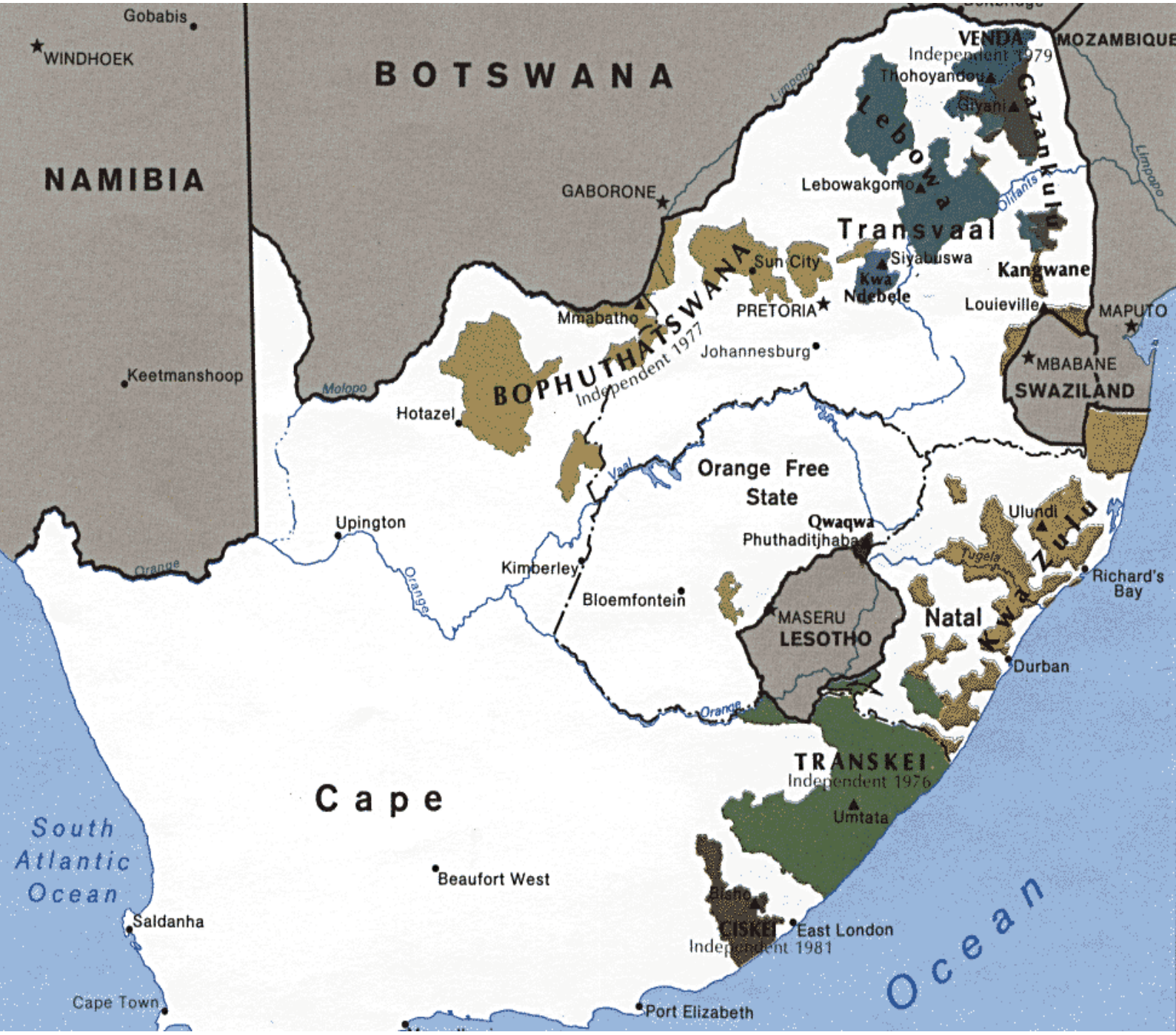
These judgments indicate that the package of new laws, and the Traditional Courts Bill in particular, are extremely unlikely to withstand constitutional scrutiny. Not only because they undermine people's rights, but because they entrench autocratic versions of customary law that are out of sync with the changes resulting from rural people's ongoing innovative attempts to reconcile custom and rights. The content of the laws is closely linked to the interests of the traditional leader lobby who dominated the drafting processes to the exclusion of ordinary rural people. The Constitutional Court has stressed the importance of adequate consultation in legislative processes time and again. The one-sided consultation process, together with the seemingly intentional ambiguity of the new laws is likely to count strongly against them.

Court victories will be cold comfort however, for rural people's sense of betrayal that the government they voted into power has chosen to relegate them, once again, to second-class citizenship within Bantustan boundaries. Yet, as Nelson Mandela wrote in 1958, the struggle against apartheid was the struggle to be part of a united South Africa and the "acceptance of the Bantu Authorities Act represented the abandonment of [this] principle". [14]

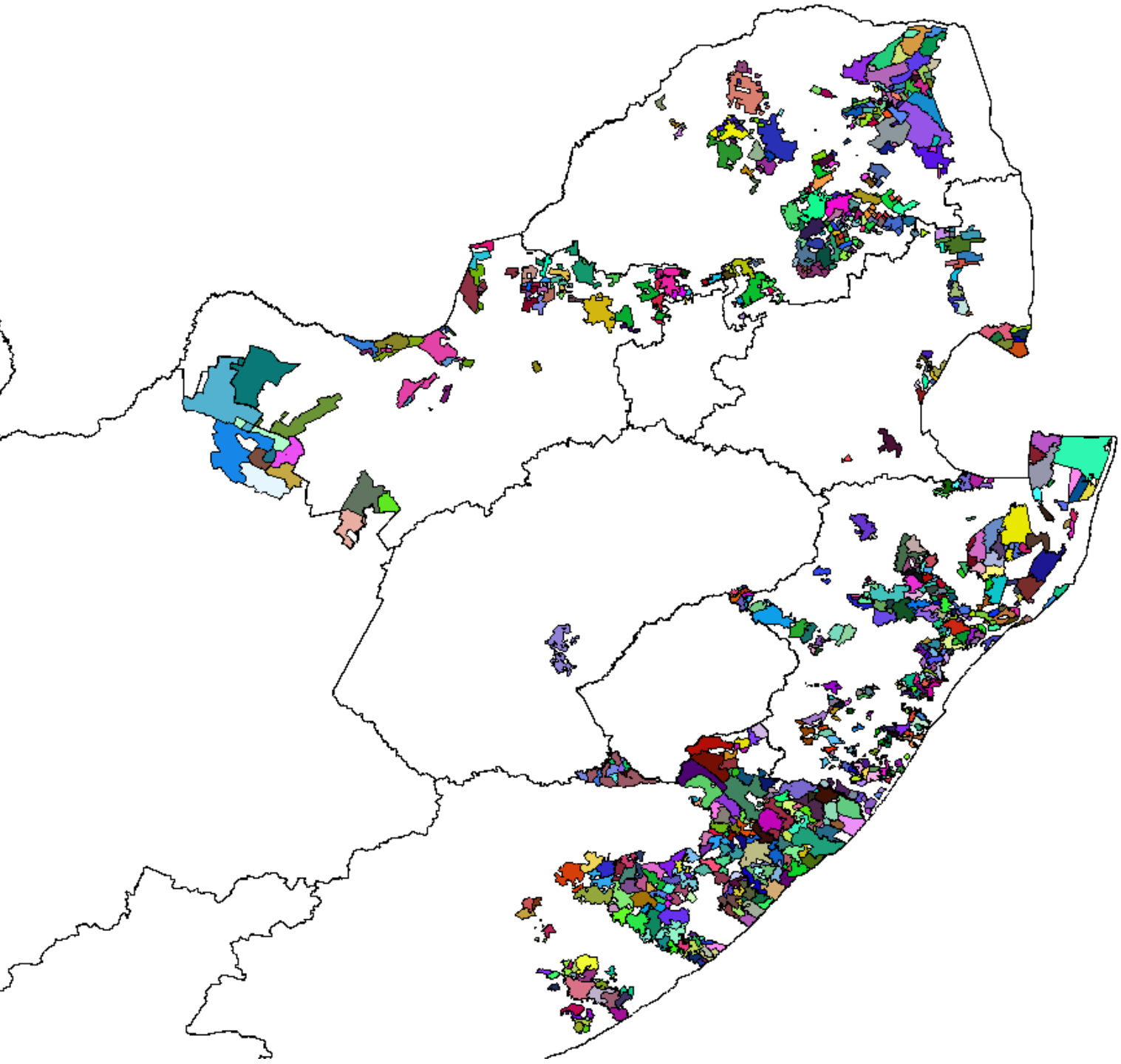
He anticipated that "[i]n the course of time the wrath of the people will be directed… not at the oppressor but at the Bantu Authorities, who will be burdened with the dirty work of manipulating the detestable rehabilitation scheme, the collection of taxes, and the other measures which are designed to keep down the people".[15] It seems inconceivable that the ANC government is once again outsourcing governance of the rural poor to traditional leaders and providing them with even more autocratic statutory power than they had under apartheid. This is a sure-fire way of undermining the legitimacy of the institution of traditional leadership all over again.

[14] A New Menace in Africa. No.30, March 1958.
[15] Transkei Revisited, No.16, February 1956.

Map of South Africa at present, showing provincial distribution of community and civil society submissions

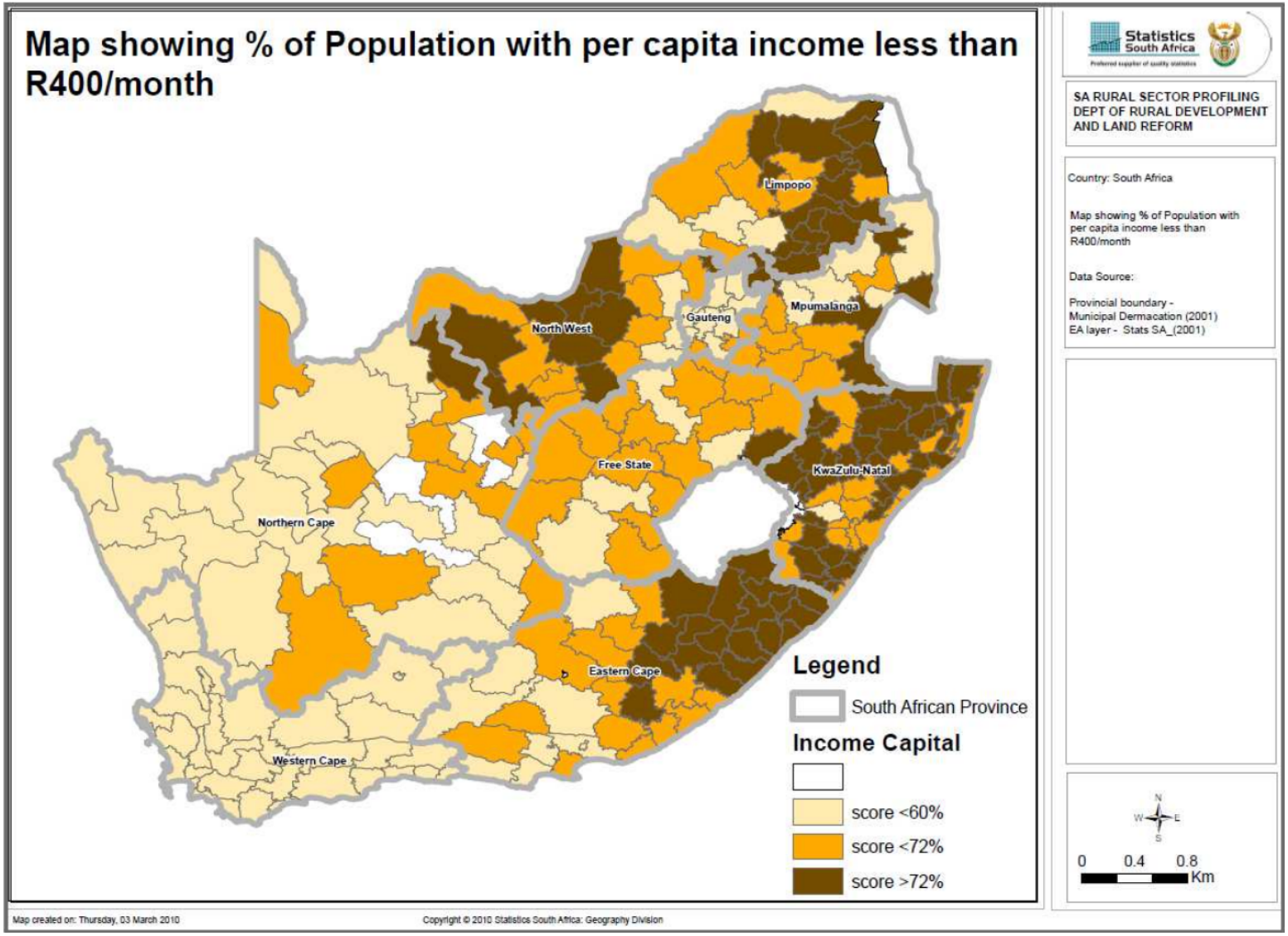


Pre-1994 map of South Africa showing the former homelands



Geographic mapping of traditional councils - 2010

Map showing the distribution of poverty in South Africa



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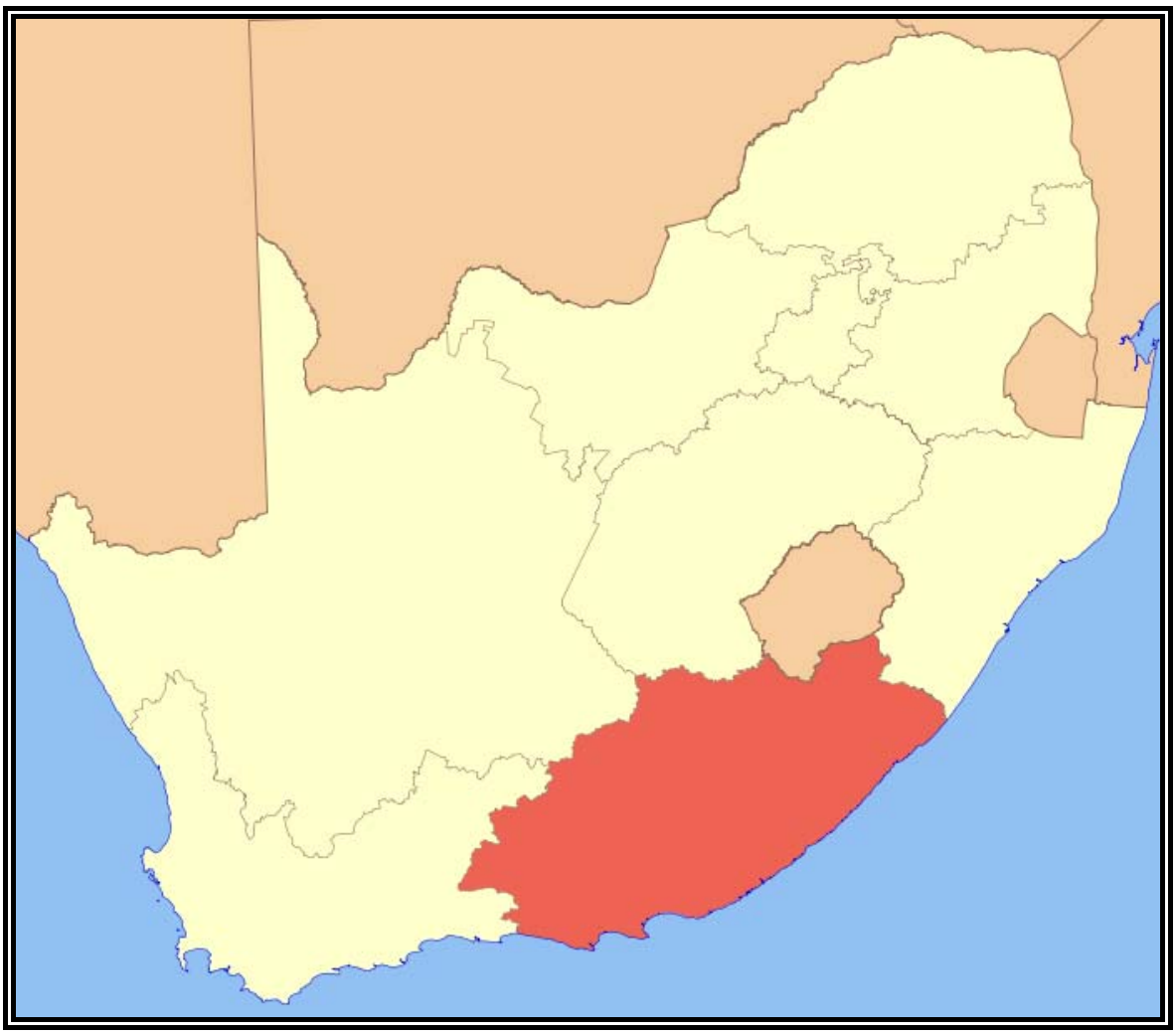

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SUBMISSION
ON THE REPEAL OF THE BLACK AUTHORITIES ACT

BY THE CALA UNIVERSITY STUDENTS ASSOCIATION (CALUSA)
AND
THE SIYAZAKHA LAND AND DEVELOPMENT FORUM

IIMBONO ZE-CALUSA NE-SIYAZAKHA LAND AND DEVELOPMENT FORUM NGOKUGUZULWA KWE-BLACK AUTHORITIES ACT

DATE **:** 21 July 2010

TO **:** The Portfolio Committee on Rural Development Forum
Parliament, Cape Town

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Presentation to Parliament by Mr. Douglas Ntamo (in isiXhosa)
ON THE REPEAL OF THE BLACK AUTHORITIES ACT

FOR THE CALA UNIVERSITY STUDENTS ASSOCIATION (CALUSA) AND THE SIYAZAKHA LAND AND DEVELOPMENT FORUM[1]

1. Umntu endinguye nombutho endisuka kuwo

Mna ndinguDouglas Ntamo. Ndingomnye weenkokheli zeSiyazakha Forum Land and Development Forum eCala. U-Siyazakha ngumbutho osebenza kunye ne-CALUSA (Cala University Students Association, i-NGO esebenza nabantu basemaphandleni eCala).

Intetho yam ndizakuyenza ngolwimi lweenkobe. Izimvo zethu ezipheleleyo zikwumanye amaxwebhu amabini angala:

i. Uxwebhu olubalisa ngokuphelelelyo ngale nyewe size ngayo apha; kwakunye
ii. ne-Siyazakha report on the visit to Tsengiwe by King Zwelibanzi Dalindyebo.

2. Koyiswa noMathanzima ukumilisela oonomgogwana be-tribal authorities eCala

I-Cala yindawo eyaziwayo ngokuba ilandela inkqubo yokonyula izibonda zayo kwakude kudala phaya kungakhange kubekho nto yakuphathwa ziinkosi. I-Cala le yayikade iphantsi konomgogwana waseTranskei, uMongameli wayo owayengazange ayeke ukuyinunusa ngeenkosi. UMongameli Mathanzima wayekhonya am' entla esithi uxhaswa ngumthetho kwinto yokuba asinyanzele ngeenkosi. Ethubeni safumanisa ukuba lo mthetho wayethetha ngawo uMathanzima yayile-Black Authorities Act sithetha ngayo apha.

Thina ke siyiSiyazakha Forum siyavuya xa ususwa lo mthetho. Ekuvuyeni kwethu sicinga ukuba sakude sikhululeke kwinto yokunyanzelwa ngento esingayifuniyo. Sithe ke masize apha ukuza kucacisela ipalamente ukuba sisashiyeka sinengxaki ezizalwe ngulo mthetho mbi kangaka. Isilonda esishiyekayo sesi ke sokuba sinyanzelwe ngosibonda kusophulwa isithethe sethu.

Besenditshilo ke ngaphambili, ndisithi thina eCala sinembali ende eqala kude phaya kunyaka ka-1883. Thina okokoko sazonyulela isibonda sethu endaweni yesibonda esizalwayo. Wayengayifuni ke le nto uMatanzima. Wazama ukusebenzisa le-Black Authorities Act ukusicinezela esinyanzela ngabantu esingabafuniyo. Sisithethe sethu eCala ukonyula oosibonda. I-Black Authorities Act yayinyathela izithethe zethu ngokungafuni ukuba sonyule usibonda esimfunayo. Kodwa ke le nto siyibona ikhona ngoku kumthetho omtsha olawula ubukhosi e-Eastern Cape.

Siqhubekile sizonyulela usibonda de kwafika unyaka ka-2007. Mandibalise ke ukuba kwenzeke ntoni ukusukela kulo nyaka. Ndizakuphinda nditsho ukuba le nto yenzekileyo idibana njani na nokuguzulwa kwe-Black Authorities Act. Ekugqibeleni ndakuveza izicelo zethu kuni njengepalamente kwakunye nezimvo zethu ngoko makwenziwe xa kususwa i-Black Authorities Act.

3. Ukunyanzelwa kosibonda kuthi ngokungathi yinkosi

1 This document is part of the CALUSA-SIYAZAKHA Submission to the Rural Development and Land Reform Portfolio Committee in Parliament, 21 July 2010, on its hearings on the Repeal of the Black Authorities Act.

Kwinyanga ka-March kunyaka ka-2007 kuye kwasweleka isibonda selali yakwaTsengiwe, uMnumzana Msengane. Ngosuku angcwatywa ngalo unobhala wenqila uMr. Mkefa wazisa ukuba sele bemonyulile umntu ozakungena endaweni kasibonda uMsengana ozakuthi ke abengusibonda omtsha. Abahlali bakwaTsengiwe abazange bayamkele lo nto. Yabothusa kakhulu abantu kuba bengazange bayibona ngaphambili bebesazi ukuba banelungelo lokuzonyulela umntu ozakubaphatha xa kuthwe kwasweleka isibonda. Lo nto ke yabangela idabi kuba babengaboni ngasonye bonke abahlali. Abantu ababehambisana nalo mba ngabo babesondele kusibonda. Eyona nto yothusa abantu kakhulu kukuva igama elithi "nkosana" lisetyenziswa koosibonda bona besazi ukuba elo gama libhekiswa kunyana wenkosi abayazi iyazalwa ingabekwa. Kwahanjwa ezinkundleni kuphikiswana. Kwelalo icala usapho lona lwahlala iintlanganiso neqaqobana labantu apho kwavunyelwana khona ukubana mabonyule unyana wesibonda esi siswelekileyo.

Uninzi lwabahlali baseTsengiwe bahlanganisana bavumelana ekubeni bonyule ikomiti yexeshana ebizwa ngokuba yi-Committee of 13. Bayonyula ngeenjongo zokuba iququzelele iingxaki abanazo eziquka le ngxaki yokonyulwa kwesibonda ngendlela abangathandi ngayo bengabahlali. Ekuqaleni bacinga ngokuthi bangafumana uncedo ezinkosini kodwa ke batsho phantsi kwaqhum' uthuli Inyathelo labo lokuqala yaba kukubhala incwadi bayisa enqileni apho izibonda zonganyelwa khona emaphandleni Umntu owayethunywe incwadi wabuya esithi kuthiwe ayivakali ileta kuba ibhalwe ngesingesi Umntu obeyibhala makaze kuyicacisa yaphindwa yabhalwa ngesixhosa zange kubuye mpendulo.

4. Sinkqonkqoze kwiminyango ngeminyango

Bathe bakubona ukuba abafumani ncedo bathatha amanyathelo okuya e Bisho badibana no Mr Giyose bawubeka umcimbi beva ukuba bafanele ukuya eQamata bathe bakungafumani mpendulo nakhona bacinga ukuba mabaye e Qamata apho bafumana uninzi lweNkosi luhlangene babeka isikhalazo sabo bamanyelwa kwathiwa mabagoduke bazakulandelwa ngempendulo. Bathe bakuhlala ixesha elide bengalandelwa kungekho mpendulo bagqiba ekubeni bakhumbuze balinikwa usuku u Nkosi Ngangomhlaba awathumela ngalo u Nkosi Zanzolo salungisa samisa intente sithe sisalinde njalo kanti u Nkosi Ngangomhlaba usijikele ngasemva uSibonda noo bhodi bakhe baququzela kwelabo icala bayifaka iNkosi ecaweni thina sishiywa silinde ngaphandle. Into eyafika yathethwa yila Nkosi yeyokuba iNkosana yi Nkosana akukho mntu uzakuyijika lonto.

Kubekho intlanganiso phaya ekuhlaleni ebizwe ngu-Ward Councillor baze abantu baya entlanganisweni njengoko beqhele ukwenza njalo. Yaqala apho ke ingxwaba-ngxwaba phakathi kukasibonda ne-Committee of 13. U-sibonda wagxotha u-Ward Councillor kule ntlanganiso. Umbuzo ke uthi: ngubani na onamandla olawulo emaphandleni phakathi kuka-ceba kunye nosibonda? Nantso eyona ngxaki iphambili yabahlali.

Lo nto yakhokelela ekubeni kusiwane ezinkundleni. Umnumzana Msengane wayokufuna isithintelo senkundla esithintela u-ward councilor nale komiti of 13 ukuba bangaphinde bangenise zintlanganiso phaya kwaTsengiwe. I-Committee of 13 yabizelwa kwaMantyi ixelelwa ukuba intlanganiso mazibanjwe kwa Sibonda abavumelekanga ukuba bangene ntlanganiso ngaphandle kokuba kukwa sibonda.

Abantu base-Tsengiwe kuba babengayithandanga indlela onyulwe ngayo usibonda baqhubekeka nokubhala iincwadi eziya komkhulu befuna ukuqonda ngale nto iqhubekileyo bangayaziyo kuba bona besazi isibonda sisonyulwa ngabahlali. Baye bagqithelo kumbutho wasekuhlaleni oyi CALUSA befuna amacebo kulapho kukhe kwavulwa ingxoxo khona phakathi kwabo nozibonda abathile apho oosibonda bathi ukhona umthetho othi babizwa ngokuba ziNkosana ngoku yabe obo bukhosi abuphumi kulo family xa buqalile buhlala kubantwana balapho. Abantu abawazi lo

mthetho zange baxelelwa ngawo ufika sele usenziwa. Kungoko abantu besithi bona bayazi I Nkosi izalwa abayazi ukuba iyabekwa.

I-Committee of 13 yabhenela ku-Public Protector bemangalela lo mcimbi. U-Public Protector uphendule ngelithi zange bayibone le nto iqhubekileyo. U-Public Protector naye uyibonile ukuba indlela eyenzeke ngayo ukuba ayilunganga yaze yaphakamisa ukuba lo mthetho mawulungiswe ngurhulumente wephondo kumiliselwe ikomiti yethutyana. Kuyo yonke lo nto yayithethhwe yi public protector zange isiwe so kuba i Nkosana ngokwendlela entsha ebizwa ngayo isaqhubeka nokufumana umvuzo wayo kuba lo mthetho unyanzeliswa ngozibonda nee Nkosi. Kuye kwathunyelwa u Mr Mathetha oyi chief advisor ukuba aze kucacisela abantu ngalo mthetho, Uye wabonisa ukuba u Mr Msengana wabekwa ngokusemthethweni yabe kwi file yakhe asikho isikhalazo sabantu esasifakiwe phambi kokuba kuphele I 90 days njengoko kufanele kubenjalo basifaka nge 16 April 2007 kungoko eli dabi lingapheli kuba abantu abahlala kulandawo abazange kwimbali yabo bazi ukuba I Family yakwa Msengana iyi Royal family.

5. Ukufika kuka-Kumkani Dalindyebo

Ndicela ke malungu epalamente nifunde ingxelo epheleleyo echaza ngokufika kukaKumkani Dalindyebo eCala eze ngale nyewe. Mna apha ndizakwenza nje amagqaba-ntshintshi.

I-Committee of 13 iphindile yabiza uKumkani uBuyelekhaya Dalindyebo. Nalapho abazanga bancedeke kuba uKumkani Dalindyebo wasuka wathuka ubukhosi bakwaMathanzima ekhala ngamaqiqisholo amagiyo-giyo ezama ukumilisela obakhe ubukhosi waza wathuma uJam-Jam ukuba ayokuxelela uMsengane ukuba akasesiso isibonda, yaye isibonda siza konyulwa ngabantu kodwa bonyule umntu wasemaQwathini hayi Umntu oyiMfengu kuba ubukhosi bobasemaQwathini. Kwacaca mhlophe ukuba uKumkani uBuyelekhaya wayengezanga kusombulula ngaphandle kokuba ezokumilisela obakhe ubukhosi. Abantu ke baqaphela ukuba uzokwenza impixwano endaweni yokuba asombulule ingxaki abanayo. Ziinkosi ezinjena ke lo mthetho uguzulwayo usishiya nazo.

Abantu baphawula ukuba lo mthetho wokungonyulwa kwezibonda uyaphikisana nelungelo labantu boMzantsi Afrika othi abantu mabazonyulele Umntu abathanda ukukhokelwa nguye. Ngokwesithethe abantu abanezinto abakholelwa kuzo xa besonyula banezinto abazijongayo. Yabe lo mthetho awuhambisani nomgaqo siseko okhuthaza abantu ukuba banelungelo lokuvota. Thina singabantu sithi kubantu esabavotelayo e Palamente le mithetho mayiphele asiyifuni I-Black Authorities Act nazo zonke izinto ezalana nazo. U Rhulumente makayeke ukufaka umlenze wesine wolawulo makacacise unxibelelwano kulawulo lwasemaphandleni phakathi ko Masipala neZibonda. Asifuni zibonda eziguqulwa zibe zinkosana lo nto ayihambisani nesithethe sethu esithi iNkosi iyazalwa ayibekwa .

6. Sithi mayenzeni ke ipalamente ngebali lethu?

Ibali lethu lithi kuni mayisuswe ngokwenene le-Black Authorities Act kwiincwadi zomthetho. Isuswe yona kuqala kwakunye nako konke eyathi yakuzala. Ukuba yayingekho le-Black Authorities Act ngesisakwazi ukuzonyulela usibonda wethu. Ukuba lo mthetho wephondo ubungathathanga kule-Black Authorities Act ngesikwazi ukuqhuba ngokwesithethe sethu. Mayiphume ihagu namantshontsho ayo egadini, azokukwazi ukukhula amakhaphetshu am. Kodwa ke ukuze yenzeke kakuhle le nto Ingathi makubekho nethuba lokuba le nto yenziwa apha kuzwelonke yenziwe nakumaphondo. Ngoko ke sicela ii-provincial hearings phambi kokuba niwugqibe umsebenzi wenu wokuguzula le-Black Authorities Act.

Siyanicela ke njenge-komiti ukuba nize kwindawo esihlala kuzo nizokuzivela ubungqina bezinto esithetha ngazo apha.

Sikwanawo nombuzo. Ukuba iiNkosi ezilawulayo zenza okulungileyo kutheni zifuna ukuncediswa ngumthetho nje? Ingakumbi nangakumbi umthetho ozalwa ngumthetho oxutha ilungelo lethu lokuzonyulela isibonda? Ukuba kunjalo ke sicela ukuba ikomiti iguzule namanye amasolotya avumela oku asenokuba akweminye imithetho.

Enkosi!

Douglas Ntamo – Siyazakha Land and Development Forum, Cala

Proposals to parliament by CALUSA and Siyazakha[2]

The Tsengiwe case study shows that the Black Authorities Act must be repealed forthwith. It must go and be repealed together with what it gave birth to. It gave birth to tribal authorities that differ from people's local customs. Our custom in Cala is to elect our headman. It is not our custom to have the headman turned into an *inkosana*. If there were no remaining effects of the Black Authorities Act then we would still be able to elect our headman as we have always done. If the Eastern Cape's Provincial Leadership and Governance Act (of 2005) did not learn from the Black Authorities Act then we would still be able to elect our headman as per our custom. We see the Black Authorities Act as a dirty pig with its litter of piglets invading our cabbage patch. We want this pig to go back to its dirty sty. It must leave our garden so that we can continue growing our cabbages as we choose. We want to be able to choose as we have done for more than 100 years. Therefore we ask that you ask the Eastern Cape Provincial Parliament to change the Eastern Cape to allow for our situation to be legal.

But for the repeal of the Black Authorities Act to be effective to people in places like ours, we ask that there must be another chance for the hearings held here in Cape Town to also be held in all provinces. We ask for the committee to hold these hearings before you finish off with your work to repeal the Black Authorities Act.

We also invite the committee to visit our place in Tsengiwe so that you can come and hear evidence of our case right from the people themselves.

We also have a question: if good chiefs are acting properly, why do they need to rely on bad laws such as the Eastern Cape one? This is even worse for us when we know that this Eastern Cape law is born of the law that stops us from practicing our custom. If that is the case indeed, we therefore ask the committee to also remove other laws that have similar impacts as the Black Authorities Act.

2 This document is part of the CALUSA-SIYAZAKHA Submission to the Rural Development and Land Reform Portfolio Committee in Parliament, 21 July 2010, on its hearings on the Repeal of the Black Authorities Act.

ANNEXURE 1
CONTESTATION FOR POWER AND ISSUES OF GOVERNANCE IN COMMUNAL AREAS OF SOUTH AFRICA
The case of Tsengiwe Administrative Area in the Sakhisizwe Local Municipality[3]

Background and introduction

This document gives an overview of how a headman in Tsengiwe seems bent on denying rights of the local citizens from participating in issues of concern in their area. Tsengiwe is an administrative area about 10km from Cala, under eHlathini Tribal Authority. The Hlathini Tribal Authority does not have a chief.[4] The document reflects the contradictions caused by the passing of the Traditional Leadership and Governance Framework Act (TLGFA) and the promulgation of the Communal Land Rights Act (CLRA) into laws in 2003 and 2004 respectively. Both pieces of legislation give traditional leaders powers over land administration and governance in communal areas. On the other hand, the Constitution of South Africa seeks to entrench democracy by encouraging direct community participation in matters that affect them. The two institutions are contradictory in their nature.

Municipalities in democratic South Africa are charged with responsibility of facilitating economic development and delivery of basic services to all citizens of the country, including communal areas. On the other hand, communal areas are deemed areas under traditional leaders with legislative powers to control and manage development processes within them. This situation of two institutions with powers over the same area clearly creates a tension. This document reflects on how this tension of two institutions with legislative powers over the same area, reflect themselves in Tsengiwe - a particular village in the Sakhisizwe local municipal, in the Eastern Cape Province.

A group of people in this particular administrative area have been interdicted and barred by the acting headman of the area from holding meetings, even if to discuss their development needs in the community. The interdict also seeks to stop the ward councillor from holding meetings in the village for allegedly dividing the community.

This is a case of two bulls in the same kraal. The document shows how the effects of this contradictory situation caused by the two legislative regimes affect people in communal areas. The document also shows the steps taken by those affected in challenging the actions of the headman. Lastly, the document highlights the implications of the developments taking place in Tsengiwe to broader issues of governance in communal areas. A central question the document asks is who has authority over communal areas between traditional leaders and municipal councillors.

A case of two bulls in one kraal

Although South Africa has moved from an undemocratic era into a democracy in 1994 that ushered in a new period that allowed South African citizens rights to assemble; discuss and express themselves on issues that concern the, the situation for citizens living in communal areas has not changed much. Unlike their counterparts in urban areas who are governed by means of elected municipalities and ward councillors, communal areas of South Africa have a complicated

3 This document is part of the CALUSA-SIYAZAKHA Submission to the Rural Development and Land Reform Portfolio Committee in Parliament, 21 July 2010, on its hearings on the Repeal of the Black Authorities Act.

4 Although the new Traditional Leadership and Governance Framework Act allows for transformation of Tribal Authorities into Traditional Councils, Tsengiwe eHlathini Tribal Authority has not transformed because the authority has no chief.

arrangement in that both municipal structures and traditional institutions have a say in rural areas. This has unintended consequences for conditions in rural areas, as the document will show later on.

What has made the situation in communal areas more intriguing is the promulgation of the Traditional Leadership and Governance Framework Act, which gives traditional leaders powers over land administration and development processes in communal areas. On the other hand, the legislative framework on local government provides that municipalities should render services also in rural areas, including communal areas. These two legislative provisions create a situation where two separate institutions have competing legislative powers over the same area. With two bulls in the same kraal, there is bound to be friction.

Indeed, tensions and friction have developed in Tsengiwe Administrative Area. On the 23rd October delegates of the Committee of 13, from Tsengiwe Administrative Area, visited CALUSA offices to ask for assistance in responding to an Interim Court Interdict that was trying to stop them from engaging in any community activities in the area. The Committee was established after the headman of the area died in March 2007. It was established in a community meeting held in April 2007, to take care of day-to-day activities in the community, and to deal with development issues of livestock, etc.

There is a confusion on whether an acting headman was installed or not, but Mr Zantyintyi Maqubela claims to have been installed as the acting headman. As the acting headman he has applied for an interdict against the Committee of 13. In his affidavit, which is filed as part of the interdict, he seeks to stop the committee from holding meetings in Tsengiwe, as he argues that the meetings "disrupt" his plans about the community. He further interdicted the Ward Councillor of the area – Councillor Sondlo - not to hold meetings in his area.

It will be remembered that, municipalities, in terms of the local government legislation, are supposed to render services to the whole of South Africa, including communal areas. A question is what should happen in a situation where a traditional leader chases away a Ward Councillor, one of the elements of a municipality? Who has more authority over a communal area between the councillor and the headman?

In response to an Interim Court Interdict, members of the Committee of 13 from Tsengiwe wrote:

> *We oppose the "Interim Court Interdict" because it undermines a number of our constitutional rights. Firstly, the order for the cited individuals "not to conduct any kind of meetings at any time and venue" without his consent is a direct violation of our right to freedom of association (Chapter 2 Section 17). As a people, we have a constitutional right to assemble and discuss issues of our concern. We are not about to allow a situation where that constitutional right in a democratic society gets denied to us.*
> *Secondly, we feel that the affidavit defeats what is contained in Chapter 7 section 152 of the Constitution of the Republic. The section states that local government must "encourage the involvement of communities and their organisations in the matters of local government". The Committee of 13 finds it strange that members a*
> *re barred to hold meetings that aim at discussing developmental issues. How can we communicate developmental messages without holding meetings?*[5]

The letter was written by a Committee that was established by the community of Tsengiwe on the 25th May 2007, and tasked to facilitate development in the community. As can be seen from the response, the Committee that is interdicted by the acting headman challenges the headman. The

5 A letter to "The Clerk of the Court" in Cala, dated 22 October 2007.

Committee seems to be putting on the table the right of the citizens to meet and discuss issues affecting them. The group claims its right to be one of the bulls in the kraal that has to be able to meet and discuss issues of interest. The point raised by the Committee in its opposing letter to the Interim Court Interdict brings up another angle to the issue of Tsengiwe, the issue of the implication of the interdict to democracy for local citizens. As the letter points out, what the acting headmen seeks is to deny the group its democratic right to meet and discuss issues of their concern. Could the actions of this headman be a reflection or confirmation of the argument that traditional authorities are not a democratic institution, which Ntsebeza makes in his book titled "Democracy compromised"?

If the actions of the acting headman of Tsengiwe are an indication of what lies ahead in the implementation of the Traditional Leadership and Governance Framework Act, it means that there is a more difficult road that lies ahead of communities in communal areas.

There is a groundswell because the community of the area could no longer stomach the undemocratic practices taking place. On the 13th November 2007 a memorandum/petition was drafted and was submitted to Qamata Great place. This memorandum was further was orally presented in a meeting held on the 14th November 2007 in Qamata great place. Among the demands put forward are:

- The Headman in question must suspend his activities until the matter is resolved.
- That Headman must be democratically elected by the community

What this case illustrates?

The list of issues highlighted below may not be exhaustive, but indicates to some of the pertinent issues of democracy and governance in communal areas.

Firstly, the example of Tsengiwe is an illustration of the tensions that exist between the Traditional Leadership and Governance Framework Act (TLGFA) and the legislation on local government. The two pieces of legislation create two centres of power for people in communal areas – one centre being the institution of traditional leaders and the other centre is municipalities. That the headman of Tsengiwe decided to interdict the Ward Councillor was a direct challenge to the municipality about the jurisdiction. The headman is staking is claim to the area as his own. What powers do municipalities have in such a situation?

Secondly, the case raises the issue of role clarification. Municipalities are charged with facilitation of local economic development in communities. Similarly, traditional leaders are expected, among others, to: promote socio-economic development; promote service delivery; etc. Clearly, there is an overlap in the roles of these two institutions.

Lastly, this tug of war between the acting headman of Tsengiwe and the Ward Councillor has a potential of stalling development processes in the area. For instance, the fact that the headman banned bars the presence of a councillor in his area could mean that the community can not be serviced by the municipality. A question is what this means for democracy, which is also about the meeting of needs of communities.

ANNEXURE 2
King Zwelibanzi Dalindyebo's visit to Tsengiwe[6]

Date: 12th August 2009
Venue: Phakamisani Junior Secondary – Tsengiwe Administrative (Ward 4)

This meeting is part of Zwelibanzi's visits to communities that he claims are under Abathembu Kingdom. This meeting was supposed to have taken place in July 2009 but was postponed due to the heavy schedule of the King.

The meeting was scheduled to take place on the 12th August 2009 at Tsengiwe administrative area from 11:00am but due to the late arrival of Zwelibanzi and other logistics problems it started at 2:30pm. As per arrangement the meeting was planned to have taken place at Tsengiwe clinic but the tent that was erected there was blown away by the wind. The committee of thirteen then hastily arranged the meeting to take place in the shearing shed just near the clinic. When people arrived in the shearing shed it became clear that the venue neither suitable for the meeting as the corrugated iron was slowly being blown out by the wind. Ultimately the meeting was held at Phakamisani Junior Secondary School which has a better facility such as the hall.

Arrival of Zwelibanzi and his entourage

The king and his entourage arrived just after 2:00pm. Immediately after their arrival the meeting started. The introduction of guest was done by Mr P. Matshotyana who is also serving in the committee of thirteen. The King entourage were also introduced which composed of Umtata West Committee, Chiefs from Bumbane. Among those present were people form Lady Frere, Cofimvaba, Engcobo.

Welcoming address by Councillor Madiyandile Sondlo

Councillor Sondlo welcomes the King and his entourage in Ward 4. He noted the absence of local Chiefs and headmen and posed that as the challenge that needs to be addressed. He made mention of the fact that the community has been experiencing serious problems which also affected service delivery. He apologised for the absence of the Mayor that the she has attended a serious meeting in East London which deals with issues of service delivery in particular the housing development in Sakhisizwe. He then hoped that the King would give direction of where the community would go from here with regard the issue of service delivery and the problems confronting that community.

In his welcoming speech the councillor reported that the municipality is in the verge of unleashing various development initiatives in that ward. Among those initiatives is construction of access road that link Tsengiwe to Lafuta and that project has already been approved by the Roads department. They are now in the verge of appointing a company that will construct that road. He reported that over the past year they have installed water to the Tsengiwe Clinic and have constructed toilets in the area. As the municipality with the department of Agriculture they are encouraging communities to embark in agriculture through the massive food production. He reported that Ward 4 has acquired a Tractor that will used to plough fields jointly in order to realise that goal.

He admitted that he was banned by one Mr Magqubela to hold meetings in that community with reasons that he was dividing the community. As the municipality they resolved to entertain the two parties by ensuring that they consult with both but that proved that they are further dividing them.

6 This document is part of the CALUSA-SIYAZAKHA Submission to the Rural Development and Land Reform Portfolio Committee in Parliament, 21 July 2010, on its hearings on the Repeal of the Black Authorities Act.

Ultimately they (Municipality) resolved not to hold any further meetings in that community until the matter is resolved.

Committee of 13 presented their grievances – Mr Ncoko

Mr Ncoko is the chairperson of this committee which was established by the community when the caretaker headman failed to work with the community. The caretaker was elected by the community because he was knowledgably about community. The mandate of this committee was and still is about ensuring that development in that community takes place. One of the challenges that faced them was that Mr Magqubela didn't co-operate with the committee of thirteen. When the committee of thirteen requested him to bring back the burning stamp he lodged a case against them that they were intimidating him. He further together with Mr Ndimphiwe Msengana interdicted them for holding meetings in that community. They fought that court interdict until it was withdrawn by the magistrate.

They challenged the Act promulgating the installation of Inkosana within the stipulated sixty days. They made numerous representations to various institutions such as a the House of Traditional Affairs in Bisho, Local government and Traditional Affairs, Qamata Great Place and to the Public Protector with no favourable response.

He recalled a meeting where a delegation from Tsengiwe visited Qamata great place where they were presenting their case. This meeting was chaired by Chief Ngangomhlaba Matanzima. In this meeting Chief Ngangomhlaba asked the Secretary of Inqila how she interpreted the Royal family. Her response was that is the person who is from a Royal blood. Pressed further she was asked where she got that from. She responded by saying they were workshopped in Queenstown. In concluding this meeting Chief Ngangomhlaba asked the community and Mr Ndimphiwe to go back as he was going to report to King Lwandile and the matter will be looked at with immediate effect. The community was assured that a delegation will be sent to Tsengiwe with responses from King Lwandile Matanzima.

After months of waiting for a response the committee of thirteen wrote a letter of complaint to Chief Ngangomhlaba Matanzima citing dissatisfaction about the delay in resolving the Tsengiwe matter. In this letter they reminded the Chief about his promise of sending a delegation to the committee of thirteen with a response to this matter. Ultimately the committee was informed telephonically that a delegation of Chiefs from Qamata will be sent to Tsengiwe to address them about the issue. When this delegation finally landed in Tsengiwe they were high jacked by the headman to another venue organised by him. This happens when the committee of thirteen had already organised a neutral venue for the meeting. This was so because the delegation of Chiefs were organised by them to visit the area. The police were requested to call the community from their venue to join the meeting held in the venue organised by the headman. The community refused the call by categorically stating that the Chiefs were called by them not by the headman. The meeting with the Chiefs continued despite the refusal by the community. He reported that in this meeting by the Chiefs that there is nothing new they will discuss because Mr Ndimphiwe is the Inkosana of that area and he must rule. These meetings happened simultaneously. In the community people resolved to take up their struggle. They linked up with the Public Protector in order argue their case. The public Protector came in to take their statements and interviewed the headman and the Secretary of Inqila. Up until now there is nothing tangible that has come out of that process.

The committee of thirteen made other strides by contacting the Abathembu Kingdom. King Zwelibanzi responded by calling them to visit Bumbane great place where they presented their case.

He promised to visit the area of which he did. This meeting is the testimony of his commitment to resolve the matter.

Community grievances platform

The chairperson of the meeting afforded the community a platform to raise their issues with regard the issues presented by the speakers. The following are what transpired from the floor as complaints and comments:-

- It is a lie that the Municipality has installed water taps and built toilets for the community. Bubuxoki etywaleni ukuba uMasipala wasifakela amanzi kulelali.
- Old as I am one has to walk a distance to fetch a bucket of water.
- How many times has the Councillor visited us? Khawukhumbule ukuba wagqibela nini ukuza kusibona. Xa usithi iintlanganiso nizibambela embindini we Ward bangaphi abantu abafikelelayo eCala Reserve sibadala kangaka.
- Zingaphi izinto nokuba zintathu onokuzolatha osenzele zona.
- Nezo toilets ulilisela ngazo azikho mgangathweni kwaye azikho kumzi nomzi ezinye ziyabhodloka.
- Minyaka le soloko nithembisa ningezi nanto.
- Oluncedo lolimo uthetha ngalo lolu nifuna ukunceda uSibonda namahlakani akhe.
- Kumkani sinethemba ukuba uzakusinceda usonyule kule ngxuba ka xaka.
- Siphila okwamantshontsho Kumkani.
- Singathanda ukuba usicacisele umahluko phakathi komtwana wegazi nosibonda.
- Nathi phaya kuSifonondile sinengxaki ekumila kunje sizibone sinesibonda esijike sayi Nkosi. Kona ulutsha aluhoyekanga, akukho mabala okudlala ibhola.

Response by Zwelibanzi Dalindyebo

In his address King Zwelibanzi pointed the Bantu Authorities Act of 1953 was an attempt by the white apartheid government to have an authority of the rule of legitimate chiefs. The white government installed headmen as their lackeys so that they could have supreme rule over the black population. Some Chiefs collaborated with this system and those who did not were persecuted by the government.

He pointed out that one of the many reasons he is consulting with Abathembu is to report and put the record straight that the Nhlapo commission has completed its investigation that the Matanzima are not legitimate Kings. Kingdom of Abathebu is located at Bumbane Great place. The Matanzima collaborated with the white apartheid government (Babe ngoqongqothwane babelungu, namaqaqa babelungu. Ohlohlezabo). *"Kufana nokwakha indlu ze uyifulele ngamazinki amadala, londlu izakuwa. Ngoku ndiyajikeleza ndithetha nendlu yabathembu ndisithi kuzakungena uZwelibanzi"* .

He encourage communities to reject the izibonda (as creation of apartheid and Inkosana as the creation of those who want to cling onto power forever in favour of their stomachs) *Phantsi ngezibonda phantsi*.

He made mention of the fact that this year he set an appointment with Matanzima's in Qamata to report discuss the outcomes of the Ntlapo commission. *"Lo maqaqa andivalela umnyango. Ndiyafuna ukuthetha neBhele masele sithuma wena mfo kaJam-Jam umxelele ukuba ndiyamfuna, nokuba intlanganiso ibekwakhe akukho ngxaki"*. Mr Jam-Jam is one community resident who stood up in the meeting and declared himself as the supporter of the Matanzima's.

In response to the community concerns, he said it is evident that the councillors are not responding to community needs but community must be patient but engage the municipality. "*Uyaziva izikhalo zabantu Mr Councillor bayakhala ngawe nomasipala"*.

In conclusion he promised to come back very soon in order to close the chapter of Tsengiwe community. He did not specify which route he is going to take.

Conclusion and Reflections

It is clear from this meeting that people are not happy about the level of service delivery. People did not hide their anger to the councillor's attitude of not consulting them. The biggest challenge therefore is how that anger can be channeled to pressurise the municipality for service delivery.

It is clear from Zwelibanzi's address that he is not buying on the issue of people electing their leader. He prefers that the Kingdom to pick up somebody and him/her to the people for approval.

BLACK AUTHORITIES ACT REPEAL BILL HEARINGS

20 JULY 2010

MIRIAM MATEZA'S ORAL PRESENTATION:

My name is Funeka Miriam Mateza. I was born in Cala in the year 1932. When we had the Transkei government in the 1980's, there was the Transkei Development Company (TDC). The project entailed that suitably-skilled people would be given an opportunity to purchase land for the purpose of farming. One such initiative of the TDC was launched outside the area of Nyalasa. At that time, Nyalasa was under traditional authority but our particular area was outside of the traditional authority's rule as it had previously belonged to white farmers. As one who was thoroughly trained in farming, I became interested in this project until I finally decided to become part of it. I was one of the original participants of the project. I purchased a vast portion of land that was allocated to me. It was transferred to me in 1983. Therefore, I became a title-holder of the land that I was farming. I took over the land and farmed in what was a very prosperous farm where I even had a distribution point in a complex that rendered many other different services. This complex was named Bessenger's Trading Station where I had various businesses. This was a very successful enterprise.

In 1986, the chief Gecelo of the Gcina Tribal Authority expanded his rule and claimed the land that I was occupying as an owner. I was summoned to the traditional court and they asked me how it was that I owned land when I was a woman. My response was that I had bought the land and therefore that I was a title-holding owner of it. They asked to see the title deed. I showed them the documentation as requested and the response that I received was that the title deed had no bearing on the matter as all land in the area belonged to the chief. Moreover, the traditional court told me that as a woman, I couldn't hold any land in my name. They said that even if the land had been my husband's and he had died, it would have been given to my husband's younger brother or my older brother. Therefore, I was told that I had to vacate the land, as it belonged to the chief, and leave the community. They said that they feared that I would influence their wives into doing bad things such as wanting to take over their lands after their deaths. I couldn't understand how it could happen that even though I had worked so hard to buy the land and held a title as a testimony of my ownership, this had no significance. I was also confused as to why I couldn't have land as a woman as this area did not belong to the chief to begin with.

The next thing that happened was that a number of young men under the instruction of the chief, had gone and looted massive amounts of my

belongings, vandalised my property and burned it down. This was so serious that I had to flee for my life - as the situation was very dangerous when it seemed that the chief did not want me there at all. The chief took the land and divided it amongst its male subjects.

THE ACTIONS I TOOK TO REMEDY MY PROBLEM:

- In 1986, I approached the Cala municipality which is now known as the Sakhisizwe Municipality. The response of the municipality was that they couldn't intervene in the matter.
- I then went to enlist the services of a lawyer and the matter still failed even though we never went to court.
- When I first heard of restitution in 1996, I approached the Department of Land Affairs. At the Land Affairs Department, I was told that the government only took claims of people who were dispossessed by whites. Therefore as my land had been taken by a black chief, they couldn't get involved.
- Over the years, I tried going to many government offices but I could still not get any help.
- After going to them on multiple occasions in the 1990's, the Department of Land Affairs said that maybe they could compensate me only for the money I had bought the property with. I found this to be unsatisfactory

as I am a farmer and want to restore the livelihood that I know which was brutally taken away from me. Now I live in a shack, which is a life that is very much unlike the life I knew. All these crimes have been perpetrated against me by a ruthless chief all because I am a woman. I would like to still believe that there is a principle of justice that still prevails in our country. Therefore, I plead with you to listen to our cries and take note of our anguish as this platform is our last hope.

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20 July 2010

Subject: **Submission by Ilizwi Lamafama Farmers Union**
On the Repeal of the Black Authorities Act of 1951

TO: Portfolio Committee on Rural Development and Land Reform, Parliament, Cape Town

Background

As Ilizwi Lamafama Farmers Union, we have more than 3,000 members in 44 villages in the Buffalo City, Ngqushwa, Amahlathi and Nkonkobe municipalities. As Ilizwi Lamafama, we work with a variety of communities who share their experiences with us about their dreams and visions for development. They also tell us about their sufferings from the rule of chiefs.

We therefore appreciate this move of repealing the Black Authorities Act. As we welcome it, we also inform this committee that there are many problems that continue even though the BAA is being removed. In particular, ever since the promulgation of the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act, we have seen the rural communities in Tshabho, Berlin, Nxarhuni, Nkqonqweni, AmaNtinde, AmaHleke villages being divided. Chiefs in these areas claim that these laws gave them strong powers. They also say that they are now the new government in rural areas. As Ilizwi Lamafama, we are not happy with this situation. This continuation of the divide and rule system of colonialism and apartheid as it was in the classical and in the contemporary is not acceptable and cannot be countenanced. The society has engaged in bitter struggles to redress this situation. Therefore, participatory democracy needs to be implemented.

Traditional council elections

The March Traditional Council election was fraudulent in the sense that communities were not consulted and we tried to pursue the MEC concerned about our dissatisfaction but were disappointed to hear from him that he will be judged as a "stupid MEC" by the President if he can put the election on hold.

Before the March 6 elections we held a series of meetings with MEC Gqobana in trying to pursue him to put the elections on hold because there were lots of grey areas and poor participation by communities in the build-up to the elections. But all those attempts were in vain as his response was a very bad one.

The AmaNdlambe Tribe in Berlin was of the view that before implementation of the Framework Act they were going to apply to the premier as the act stipulates. They did not look at that notorious section 28 of the Framework Act which takes us back to the apartheid era. They were thinking that they would reject anybody who applies on their behalf.

For instance, there at AmaNdlambe Tribal Authority the 40% was elected from the same 60% that was appointed by Chief Makinana. The so-called traditional council took SANCO stamps because they said there is no authentic structure other than them as tribal council. To show that the AmaNdlambe tribe did not want this to happen, only 88 people were there during the nomination, and some of those 88 did not belong to Ndlambe they were from Ndevana formerly known as Khambashe and Msintsini. Chief Makinana and his cronies hired taxis to collect people from Ndevana and Msintsini villages whilst these areas were not falling under his jurisdiction to cast the vote.

Therefore traditional councils in our villages in the mentioned areas are seen as illegitimate. People still see them as the old tribal authorities where they used to be beaten up by Sebe's chiefs. How is the repeal of the BAA going to give us structures that are genuine and democratic? Not these tribal authorities dressed up as traditional councils. We want parliament to answer this question.

Service delivery, land allocation and meetings

In terms of service delivery we are encountering a lot of problems: development is driven by traditional leaders. For example, the CASP budget is utilised by the Department to buy tractors for the chiefs whilst they are not farmers. We also do not know about the money generated by the tractors. And if we request financial reports from them they fight with us as small farmers. If you want to open a bank account the bank requires tribal authority stamps and not community stamps. At Tshabho villages there are sand deposits that are controlled and managed by the tribal authority where they sell sand and the money generated from it is not known by the community. If a person wants land, you have to go to the chief and request it from the chief. If he wishes he will give you land and if he does not wish so, he will not give you land.

This means that rural people are subjects and not full citizens. This is the exact same thing that the BAA did by giving power to these unelected individuals. So, we ask parliament not just to repeal the BAA on paper but to also ensure that rural people become citizens. For this to happen, parliament must look at the other laws that continue with what the BAA intended.

The human rights for men, women and children were, and are deprived and violated by the chieftaincy. In the AmaNtinde villages in King William's Town, if you are summoned by the chief and you fail to appear before him, then the chief can take away your residential rights or force you to work in his mielie fields for a certain period. Also, women have no rights to present their issues in the gatherings of the traditional councils. They have to be represented by a male relative. The traditional council took away the SANCO stamp from the Nxamnkwana village. The community then took the matter to court, where the court instructed the council to return the stamp to SANCO.

During the era of Sebe and Gqozo, the communities waged a battle against the notorious headman system and won that battle. We then developed our community structures which dealt with our issues properly, openly and by listening to the people. Chief Makinana had stopped being our chief. But he now feels strong and bold to come back. We expected the new democracy to support people's structures. But the new laws take us back to the era of Sebe. They bring back what we fought against. Why? In our ANC branches we never had a chance to discuss this and say yes he must come back. But he is supported by the law, and not the people. He stops even meetings of this ANC that we vote for.

In Tshabho, meetings of other structures are not allowed unless we request permission from the chief. We were holding a meeting to educate the community about the Traditional Courts Bill. But we could not proceed because the representatives of the chief told us that since the meeting

mentioned the word “traditional” it must then be held by the chief. What about our rights to meet freely as we choose? This is just not democracy!

The new laws

The chiefs are implementing the Traditional Leadership and Governance Framework Act. Section 28 of this Act is problematic to us. It states if one has been under the traditional authority before 2003 you are liable to be a traditional community today. To demonstrate that there is a legal loophole with respect to the traditional leadership legislation, CLARA is now currently declared null and void. Community participation is key in all law-making processes if the government wants to enjoy the support of people in a democratic dispensation. But our community does not know where this Framework Act and CLARA come from. As we are happy about the repeal of the BAA, we are also not happy about this CLARA and Framework Act.

We are also concerned about the Tribal Courts Bill that is currently before the Parliament. We are for one government for all the people of South Africa. As rural people, why are we left with the government structures of the BAA? We therefore say repeal the BAA and its structures. The tribal authorities must go. We therefore say all laws related to Traditional Authorities must be scrapped.

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20 July 2010

BLACK AUTHORITIES ACT REPEAL BILL: SANCO EASTERN CAPE SUBMISSION

The Chairperson

Let us first and foremost thank you for affording us an opportunity of venting about this notorious Act called the Black Authorities Act (Act 68 of 1951). The Act that managed to segregate and discriminate against our people. The Act that managed to handpick and dictate who our chiefs would be. The Act that continues to perpetuate the legacy of apartheid. The Act that brings back the evils of the past. The Act that intensifies and strengthens the Acts that were promulgated before it was enacted, e.g. Act No. 23 of 1920 and Act No. 12 of 1936, the latter destroying the image of black people. The Tribal Authorities make our people in Rural Communities suffer the most. This makes our people second citizens in their country of birth. We have cruel and unscrupulous laws or pieces of legislation that emanate from you (BAA), formulated by our government in our new democratic dispensation.

We as SANCO Eastern Cape don't know why our progressive government is doing this. The pieces of legislation we are talking about are the following:-

a) The Traditional Leadership and Governance Framework Act 41 of 2003.
b) Provincial Traditional Leadership Act No 4 of 2005 (EC)
c) The Communal Land Rights Act 11 of 2004
d) The Traditional Courts Bill B15-2008

As SANCO Eastern Cape we don't regard the above pieces of legislation as authentic as all of them are based on the old defunct and notorious apartheid laws. Also, we become so mesmerized by why our progressive cadres/parliamentarians used the old apartheid legislation to formulate our new laws, - what informs them to do such a thing? That is the question from SANCO Eastern Cape. The communities are suffering because of that. Therefore, as SANCO Eastern Cape we agreed that this Act must be abolished by no later than today. We must also do away with the pieces of legislations that emanate from the BAA.

Background

As civic organisations, under the UDF, we launched an anti-Ciskei campaign against the headmen system. And we 100% succeeded in doing that. Now our government, the government of National Unity led by the ANC, has failed to consolidate and defend such gains of our beautiful revolution. They promulgated laws like the TLGFA, CLARA and Traditional Courts Bill that are tantamount to killing our rural people. These pieces of legislation are very reactionary - as if they were not done by our comrades. Communities were never consulted. We don't know whether they started as a bill or a white paper - we really don't know. *Xa kunje komanzi kobeka phi kowomileyo* (the layman in the street), the way our government is making the laws is very clandestine - as if they are hiding something. If our government is claiming to be progressive enough they must reverse these pieces of legislation that were formulated based on the Black Authorities Act. Away with TLGFA and CLARA, away!!

Impact of these Laws on Our Communities

Ever since legislation like the Traditional Leadership and Governance Framework Act (Framework Act/TLGFA) embedded the BAA, our rural communities, *Inkosi* and *Izibonda* (called *Inkosana*) don't see eye to eye with our people. They are about to kill each other. They - both the people and Inkosi/nkosana - cannot properly articulate what is contained in this legislation. Even most officials from the department they are not well equipped with the contents of this legislation. Some of them cannot interpret the meaning of 40% and 60% who are supposed to fall under 60%. Our chiefs, instead of waiting for the provincial version to be finished, kept on using the TLGFA, having structures on top of the other. The meaning of the Act, that of transforming our Tribal Authorities is lost. In certain Tribal Authorities you will find out that a clique of notorious and unpopular people are running the day-to-day activities of the office without the consent of the Tribe (e.g. *aMandlambe* as clique of 10 people taking decisions for the whole tribe without the consultation of the tribe). There are only committee meetings - there are no mass meetings for the tribe as the Act stipulates. All these committees are trigger happy because they never know what the meaning of democratic process is. They were not elected by the people.

Case studies

Qawukeni (King Sabata Dalindyebo Municipality, O.R. Tambo District)

At Qawukeni the people were never consulted or educated about all these laws, in particular the one that reinstates the tribal authorities and talks about the election of traditional councils. They only heard about these laws when they were called to a meeting that was to elect 40% of the traditional council and they decided to attend the meeting. Whilst they were there, they were expelled by the wife of the king who said that SANCO has no place in these nominations. This was in front of the MEC, Mr. Sicelo Gqobana. After SANCO was chased away, this 40% was elected from the king's 60%. There was also tampering with the voter's roll and voter registration was done by the king's representatives. Also the IEC was biased

towards the chiefs. The IEC did nothing when SANCO was chased away. The IEC continued as if the conditions for the elections were fair. As SANCO we took the matter to our lawyers in Grahamstown, the Legal Resources Centre. In the same meeting, MEC Gqobana declared that there would be no vote in that tribal authority. On the 6th of March there was indeed no vote in that area, but we are afraid that notorious and unscrupulous names may emerge because in our experience the chiefs undertake fraudulent activities.

Tsholomnqa (Buffalo City Municipality, Amathole District)

There is a chief by the name of Nongenile Pato. Her tribe is AmaGqunukhwebe composed of 23 villages. The problem was created after the promulgation of the Framework Act and its provincial baby where Mr. Mthuthuzeli Makinana wanted to be the chief of this particular area. He wanted to create his own tribe called AmaNdlambe. Small fights started amongst the community. Some wanted to support the Ndlambe side, others wanted to remain AmaGqunukhwebe. That is why, as SANCO Eastern Cape, we are strongly saying that these laws are not good for our people. These laws divide people in the same village along ethnic lines. Therefore, for the repeal of the BAA to give meaning to us, it must not allow this division of the past to continue.

Mooiplaas and Kwelera (Great Kei Municipality, Amathole District)

During the UDF era, both of these areas fought under the Border Civic Congress (BORCO) to resist incorporation into the Ciskei. They fought to be citizens in a united and democratic South Africa. They fought bitter struggles to challenge Chief Jongilanga and they won. To compensate Jongilanga, Sebe moved him and his supporters to another area called Ncera and this left the people of Mooiplaas and Kwelera free from tribal authorities. They were then under the old Cape Provincial Administration. Now there are people who want to smuggle chiefs into these areas for their own benefit. For an example, at Mzwini village in Mooiplaas there is a particular Mkhuseli Makinana staying there, who wants to impose himself as a chief of the village. Statistics show us that most people in Mooiplaas still maintain that they do not want chiefs.

Also in Kwelera there is a certain clique that wants to smuggle in a Ndlambe chief to Kwelera. They were claiming that during the olden days there was a bus stop named after Ndlambe that symbolises that they belong to the Ndlambe clan. But most people are against this.

Kolomane village (Nkonkobe Municipality, Amathole District)

A certain Mr. Hebe is imposing himself as an *inkosana* or headman in the Kolomane village. He is not a *bona fide* person of that village. He is from far away in Zweledinga village in the old Hewu district near Queenstown. The people of Kolomane were never under a chief even during Sebe's time. Their land, on which they stay, belongs to the state. The people of that village want that land transferred to them and not to that chief. This Mr. Hebe is not even of royal blood. Ever since Hebe arrived in this village, life is unbearable. There is not even a chief under which he is appointed as a headman. He claims that because he may have been a chief in Zweledinga, he must therefore now also be a traditional leader of some status in Kolomane.

SANCO in that village have said that they do not want him in any position. Out of 400 households, there are only 10 households that support this man. During the March 6 elections, there were no more than 20 people who took part in the election in the village. People are fighting foot and nail saying that they won't accept that particular person.

Gwatyu (Chris Hani District)

A township by nature, a headman is being imported for them. Their case is with the Legal Resources Centre in Grahamstown.

Betterment schemes

During the era of Pyger between 1959 and 1960, communities were forced from where they lived peacefully to congested areas. Those areas were called villages and their sites were reduced to 50x50 and there was no compensation for the damage caused during that period. Some of the chiefs of the time helped the apartheid government to enforce these betterment schemes. They were doing this because the BAA gave them powers for development in black rural areas. We approached the Border Rural Committee to assist us in lodging claims for the victims of betterment. In 1998, the government opened the doors for claims, but unfortunately people who were victims were not granted that opportunity and the deadline of 31 December 1998 passed.

We engaged the relevant government departments but we received no response. In 2003, we decided to embark on a march of more than 10,000 people. But it seems that government's ears are so deaf that they still did not hear us. In 2004, we met Minister Thoko Didiza. She promised to take this matter to the cabinet but she was replaced by Minister Lulu Xingwana. We also met Minister Xingwana in 2005. And we were forced to start the negotiations from scratch, as Minister Xingwana said she was not aware of what had happened before. We did that. We met with her again in 2007 where we agreed to take this matter to court. But that process was delayed by the Director-General of the department, Mr. Thozi Gwanya. Unfortunately for him, there was a written letter by Minister Xingwana that said that she was willing to hire lawyers on our behalf in order to fast-track the process. After the 2009 national elections, Minister Nkwinti replaced her and we had to start afresh again. When we met with him, there was disagreement and we were left without any choice but to take the matter to court. The case will now be held next week.

This is not the only problem. In some of the communities who were affected by betterment, the chiefs want to claim any possible restitution money. In the case of Chatha village, the community was able to ensure that a democratic Communal Property Association was able to drive development, and not the chief who collaborated with the apartheid betterment schemes.

Service delivery

Now that these chiefs are promised that they will receive lump sums of money by our government, they do not want councilors in their areas of jurisdiction. In their workshop at

Mpekweni Resort in February 2010, they resolved that they would tell government that they will lead rural development in their areas of operation. In last year's Department of Agriculture budget, we found out that monies for a programme called Comprehensive Agricultural Support Programme (CASP) were allocated to the chiefs for the buying of tractors and equipment for each Great Place. Why? Why back to the homelands? What about people-driven development? Are people in rural dwellings not supposed to drive development themselves? Why take them back to tribal authorities that they resisted and defeated? Even worse, these tractors and *amakhuba* are not properly managed because our chiefs do not want to work with the people. Government must monitor everything it is doing. The fact that the chiefs have new powers and that they are going to be represented in our municipalities makes them think that they are now the government of the rural areas. Do we not have one government in this country? Do we now have government for rural people and then government for townships and suburbs? These chiefs took all the roles that are supposed to be performed by SANCO - they even took the stamps of SANCO from vulnerable communities.

Traditional council elections

SANCO Amathole Region, the region formerly known as Border Region during the struggle, is the strongest in our province. They decided to engage the department and MEC responsible for these pieces of legislation to defend their members. The department agreed to convene a workshop where both SANCO and chiefs would take part, under the same roof. The venue was proposed to be in Umtata. SANCO allocated comrade Chris Majikazana to serve in the facilitation committee together with Mr. Giyose from the department. That workshop never materialized because of failures from the side of the department. After the failure of this workshop, the department decided to engage us in the politics of involvement instead of in active participation. They came up with an election date which SANCO refused *in toto*. SANCO decided to protest against those elections and that culminated in a march on 9 September 2009 to the MEC'S office. There is no response from the MEC Gqobana's office. No acknowledgement of the receipt of the memorandum - nothing. The only thing he did was put another date of election, which was 6 March 2010. Rural People's Movement, Ilizwi Lamafama and SANCO picketed on 5 March during the opening of the house of traditional leaders, trying to show our anger. Regarding the 6 March 2010 election, SANCO regarded these elections as fraudulent, concurring fully with Nkosi Patekile Holomisa. To show that this was fraudulent, in six areas, including Patekile Holomisa's area, there was no vote. Few people attended voting stations. We heard that out of 95000 voters registered only 3000 voted on that day. Most of the similar discrepancies that happened on that day were not Gazetted. SANCO met with the MEC about these discrepancies. He said that he was waiting for submissions, but again he never responded to those submissions,

If the elections were so bad, how can the rural people be expected to respect these traditional councils? They are the same as the tribal authorities of the BAA, and we say *phantsi ngazo*!

Recommendations

SANCO Eastern Cape is recommending that if we are repealing the Black Authorities Act, we must also do the same with the TLGFA, CLARA and the Traditional Courts Bill. All these Acts are perpetrating the atrocities of the BAA. Also, before continuing to establish traditional councils, we must see who the real chiefs and kings are. We know that President Zuma is still reading the report of the Nhlapho commission. But we cannot wait. If you look just at the background of the Nhlapho commission report, you will end up saying that all those who are claiming to be chiefs and kings are not. All Tshawe's belong to *Iqadi* not *indlu enkulu*. Therefore, we appeal to let us wait until the findings are finalized.

Courts Bill and levies:

As SANCO, we also appeal to our government not to promulgate the Traditional Courts Bill. If you look at Bumbane (King Dalindyebo's Great Place) presently, people there are no longer subjects of the king - they are slaves. This Bill will give more powers to an unelected few and marginalize the majority and relegate them to slavery. At this point in time none of the levies have been reported in the province.

The resolution taken in our last Provincial General Council on 28 March 2010 was that communities must stay away from these notorious laws. We will mobilise to ensure that this resolution is implemented in full.

We ask the committee to take action to help us address the restitution of the victims of betterment. Specifically, we want the committee to ask Minister Nkwinti for reasons for his opposition to restituting the rights of those who were forcibly removed by betterment. We also ask the committee to ensure that those who benefit from land reform and restitution are able to form their own land structures without being forced to have their land under chiefs.

Conclusion

Let us once more thank the house for rendering this opportunity to come to parliament and talk about the laws of our country. We are hoping that our participation will help parliament.

Away with politics of false involvement, away! Away with marriage of convenience, away! *Phantsi nokugotyelwa phantsi*!
Forward with people's government, forward! *Amandla*!

Thank you

Presented by: Mqondisi A. Ngojo
SANCO ORGANISING SECRETARY, Eastern Cape

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SUBMISSION OF THE RURAL PEOPLE'S MOVEMENT TO PARLIAMENT
REPEAL OF THE BLACK AUTHORITIES ACT
July 2010

I am Nomonde Mbelekane. I am the President of the Rural People's Movement (RPM). I stay at the Ndlambe village, not far from the Great Fish River, under the Ngqushwa Municipality in the Eastern Cape. As I come to speak I am a bit relieved. I say so because between March and June this year, I had received death threats from those who did not like the work we do as RPM. At the time, we were busy raising the awareness of communities in Ngqushwa about the traditional council elections. I am now relieved because finally the Independent Complaints Directorate was able to investigate and address the failures of the police in properly investigating the death threats against me. I now feel I can come to parliament safely without any such problems.

In the last 2 weeks, we as the RPM went village by village to seek the opinions of our members, supporters and the broad community about the repeal of the Black Authorities Act (BAA). We went to the villages of Nobumba, Ndlambe, Pikoli, Ndwayana, Prudhoe and Mgababa. People were shocked that this law still exists. They thought that we lived in a new South Africa. When we told them that this Act introduced tribal authorities they remembered all the pains they suffered under tribal authorities. They then asked us whether the repeal of this law will also mean the removal of the chiefs who are now coming back to rule them. We said that, yes, the BAA will go, but the chiefs will remain. They were unhappy about this. They gave us one clear and loud voice: *Mayihambe i-Black Authorities Act kwakunye namantshontsho ayo*. After the village meetings, we also spoke to community leaders at a separate meeting. The message to us was the same: *mayimke i-Black Authorities Act, maziphele tu ii-tribal authorities, singabemi boMzantsi Afrika omnye*.

The BAA has undermined the dignity of black people in South Africa. It caused so much suffering. This law damaged the authority of chiefs. It changed them from being representatives of the people to collaborators with apartheid. They served the apartheid boss and not the people.

Our views on the BAA

As the RPM, we see the Black Authorities Act as the mother of tribal authorities in rural areas. We also see it as something that gave powers to chiefs and put us under boundaries that made things difficult for us. This law led to the following:

a) The putting together of people under one chief even if that was not the case before;
b) Payments of levies and dues to chiefs by those under their rule;
c) The establishment of apartheid homelands – *oonomgogwana aba sasingabafuni*;
d) Division and disunity amongst people - even those who were related to each other.

We do not see the BAA as different from the new laws that do the same. These new laws are tripling the negative effects of controlling human lives in many different ways. Tribal leaders have been given more powers than they had under the BAA.

In particular, we are very angry about the Traditional Leadership and Governance Framework Act. *Ngendlela esibona ngayo*, this new Act gives tribal authority a new life. This is not what we fought

for. We thought that we were free when Cyril Ramaphosa came to Peddie in 1991 to dissolve all headmen. We are now very surprised that our struggle has come to nothing, thanks to the Framework Act. We did not even get a chance to hear about this Framework Act. Why was it passed? Our views were not asked for. We see it as having many problems and disadvantages for us. We see it as giving chiefs the same advantages that the BAA did.

Chiefs believe that the land is theirs to own and control. Anyone who wants a site or a field has to go to the chief for an allocation.

We are now faced with traditional councils who also handle cases in Peddie. The Magistrate's Court in Peddie no longer takes cases from rural areas. The Magistrate tells people to go back to have their cases discussed by their local chief. The Magistrate wants a letter from the chief first before taking a case from people of rural Peddie. But this is not done for those who stay in the Peddie town or people from Peddie who stay in Grahamstown and King William's Town. Some of the chiefs in Peddie have said that women are impure, dirty and involved in witchcraft. In Prudhoe village, an 8-months-pregnant woman was called to the Dabi tribal court. She had tried to claim damages from the man who made her pregnant. The tribal court asked her to say who the man was. The court decided that she was just accusing the man and dirtying his name. The court said that the man's father was rich and important, and that he could not just have his family name pulled through the mud. She was then sentenced to corporal punishment. *Ngenene wakatswa ezimpundwini* in front of everyone. This makes many women feel as if they do not have rights. In Pikoli village, no one can apply for a child support grant without a letter from the chief. We see this as wrong. These things make chiefs not wanted by the people. We do not understand why government has given them these powers.

We have also seen cases where chiefs demand money from small farmers who want to use the land. Our villages also had to pay for *imali yezixhobo* to be sent to King Sandile in Mngqesha. But we do not know what this *imali yezixhobo* was for. The local chiefs also tried to collect R100 from each household for King Sandile to challenge the decision of the Nhlapho commission. Only a few people paid this money. Some of the chiefs demand "money for napkins" when they will have children.

These are the remaining problems of the BAA that must also go. Parliament, please help us to remove these problems in the Ngqushwa villages.

Traditional council elections

The people of Ndlambe village wrote to the Ngqushwa municipality asking for someone to come and explain what these elections were about. The councilor brought someone but this person did not answer our questions. This person then promised to send Mr. Mayekiso who is his senior to come to us. But Mr. Mayekiso never came. We are told that this Mr. Mayekiso works in the office of the MEC.

We then saw the IEC coming to run elections. In the Ndlambe village, we refused to participate. We told the IEC that we are waiting for an explanation from Mr. Mayekiso. The IEC then said we must write a letter. We did that. Mr. Poro, the chairperson of the community, signed the letter and gave it to the IEC. This was in front of everyone at the Ndlambe community meeting. On 6 March, the elections went ahead in the Ndlambe village. 31 people voted. Our village has 400 households.

In the Pikoli village, Mr. Mayekiso arrived and addressed the community. But there were still many questions that were not answered by him. People asked him about the role of ward councilors against the roles of traditional councils. He did not know what to say. 172 people voted in Pikoli.

Pikoli has 658 registered voters. Mr. Ramie Xonxa, *othe uyinkosana yakwaPikoli*, told the ward councilor, Mr. Myozolo, not to come to the villages again without informing him of his visit and the agenda of what he has come to do.

In the Nobumba village, there was no resident who voted in the traditional council elections. We have now found out that Chief Matomela sent a delegation to Nobumba last week. This delegation told the people of Nobumba that he will send them an *inkosana*. The people told the delegation that they will make time to discuss this. After this, the people of Nobumba have said that they do not want the *inkosana* and that they do not see themselves as under Chief Matomela. There are a few people in Nobumba who want the *inkosana*.

There was also no voting in the Ndwayana village. The people of this village are told that they are under Chief Sizwe Msutu of the Tyefu Tribal Authority.

So, these traditional councils in Ngqushwa will face the same problems as the old tribal authorities. People do not want them. People will not work with them. We fear that if the chiefs insist on these traditional councils then there will be more problems. We therefore ask parliament to help keep peace in the Ngqushwa villages. Please come and do what Cyril Ramaphosa did: remove these unpopular tribal authorities.

The unpopular Chief Mxolisi Makinana

The Makinana royal family in Tshabho some 90km away from Ndlambe village appointed one of their sons to be chief of Ndlambe village in 1982. This was after a small group did not like the rule of Chief Nkebeza Msutu who belonged to another tribe. But the coming of the new chief was never accepted by most people. This saw many tensions and fights in the community. There were even deaths, violence and court cases.

Chief Makinana has created a Mhala Heritage Trust which he runs with a small informal committee. He also opposes community initiatives for development. There is now a new dispute about the revival of the Tyhefu Irrigation Scheme (350 ha) which was led by the community. Now the chief wants to claim all this to the exclusion of the community.

The chairperson of the community committee, Mr. Porho, is being taken to court by one of the community members for having signed documents to the Premier challenging traditional council elections. It is said that Mr. Porho “cannot take the chief to court, he cannot act in a demeaning manner against the chief”.

Another problem is that this Chief fails to solve community problems. He is just there to cause conflict. The community is able to handle its own affairs. But when he appears there is a problem. The chief does not even stay in the area. He only comes to meet his few supporters and to cause problems.

Even Chief Zolile Burns-Ncamashe of the Provincial House of Traditional Leaders came to address problems with Chief Makinana when the community was unhappy about members of the tribal authority that Chief Makinana imposed. Chief Ncamashe left saying that it is clear that he cannot solve this deep problem. *Wathi ngamev’ etolofiya le nyewe*.

Prudhoe community

The people who now stay at the Prudhoe village were labour tenants on farms long before the Ciskei was independent. The commercial farmers were bought out of these farms by the South

African Development Trust. These communities were left on these farms to produce and farm for themselves. This was for more than ten years. They did very well because they were taught farming activities when they were young. They opened bank accounts and even sent their children to universities and colleges.

The Ciskeian government removed these communities from the farms and allocated them to Prudhoe farm. This farm was not under the jurisdiction of any tribal authority. The Dabi Tribal Authority, under Chief H.Z. Njokweni, hijacked these communities to be under his jurisdiction. The Dabi Tribal Authority is largely for people of Mfengu origin. The people of Prudhoe are not of Mfengu origin. Unknowingly, the communities obeyed the instructions issued by the chief, paying the dues demanded by the chief, such as: levies, donations, *lobola*, "nappies" for the chief's children, household rents and the costs of functions held at the chief's place.

As time went by, the children of these ex-tenants became suspicious of being under the Dabi Tribal Authority, to which they knew they had no background connection. They did research and claimed for labour tenants' rights and beneficial occupation from the Land Restitution Commission in 1998. At this time the community was aware of their human rights and their entitlements. The chief's authority was discarded by the community because they knew that geographically they were not under his jurisdiction. The chief, Mr. H.Z. Njokweni, sent a delegation to explain about the traditional council elections to the community of Prudhoe. They could not even answer a single question. The main question that people asked was what the duty of those people to be elected as traditional councilors was to be. The community told them to send whoever could answer all their questions. The chief never did, even to today. Come the election period, the IEC did not educate the people. The people did not know who they were voting for or who elected those candidates. As a result, only 22 people cast their votes out of 522 voters.

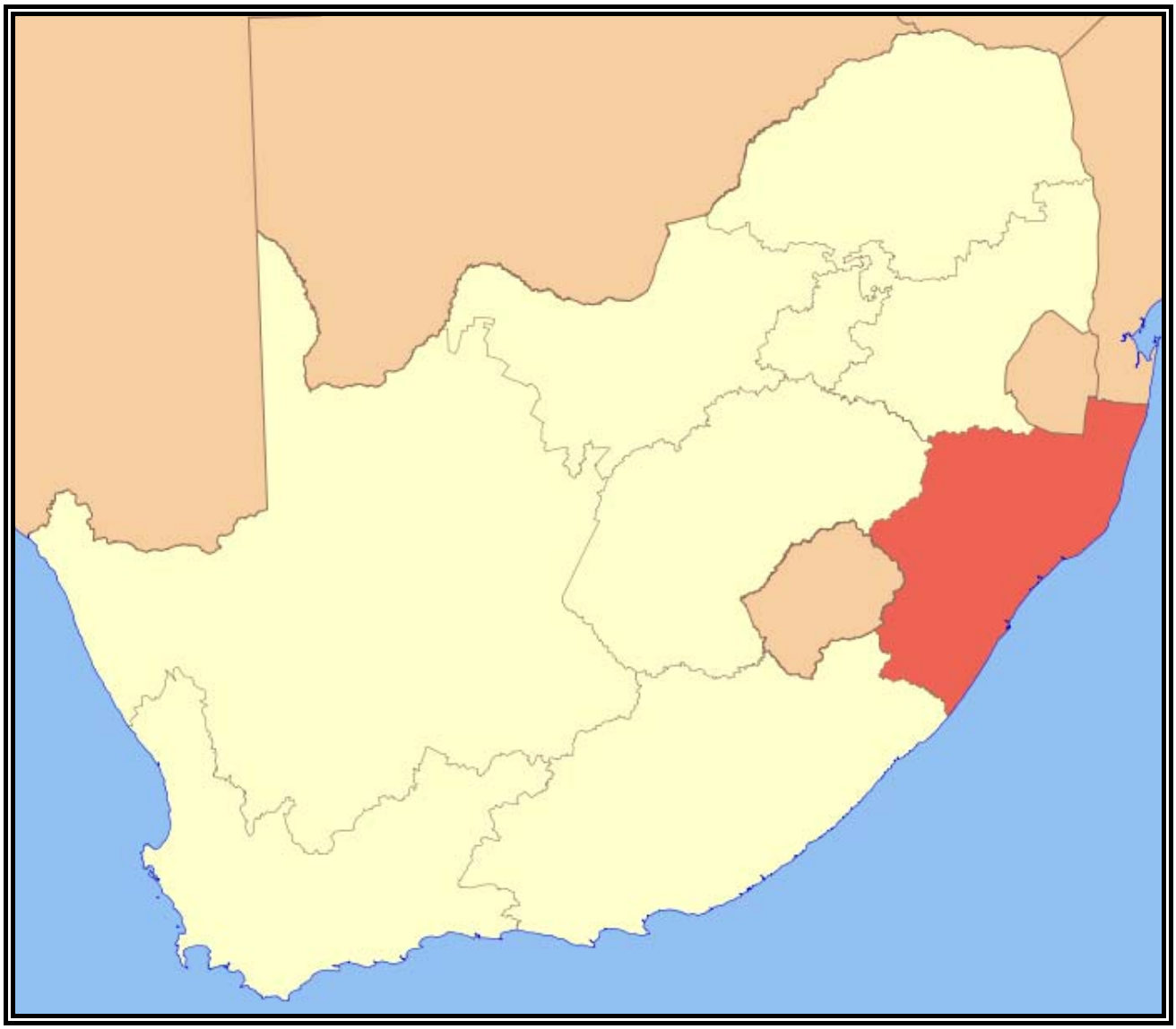
After the election, the chief came to the community to introduce a traditional councilor for the Prudhoe community - his child out of wedlock. The community rejected that traditional councilor in front of the chief, citing all the evils of traditional leaders that they had suffered and endured. They decided to write a petition rejecting the traditional leadership to the Dabi Tribal Authority, the Ngqushwa municipality, the House of Traditional Leaders in the Eastern Cape, the MEC for Local Government and Traditional Leadership, and the Premier of the Eastern Cape. More than 430 people in the community have signed the petition. The traditional leader has not come back to the people of Prudhoe.

Recommendations

a) We ask parliament and government to assess whether the Framework Act and Traditional Courts Bill are not children of the BAA. What does the constitution say about these new laws?
b) We ask government to ensure that the rights of rural people do not suffer.
c) As women, we do not really like chiefs that much. We voted for a democracy of the people by the people. We did not vote for individuals. We did not vote for apartheid.
d) We ask Minister Noluthando Mayende-Sibiya to be clear about her role. We suffer as rural women. We suffer under the chiefs. We ask for her to hear our voices.

e) We see chiefs as filling their own stomachs.
f) We prefer municipalities. We see abuse only from chiefs. We do not want the government of the chiefs in rural areas.
g) What will now be the role of municipalities and ward councilors? Is government giving with the one hand and taking with the other? Is government removing the BAA while also keeping its tribal authorities in place?
h) We ask for a chance for our views to be heard. If not, it is going to be difficult for us to vote again in the future.

KWAZULU-NATAL SUBMISSIONS



Maria Mabaso (Farm Evictions and Development Committee)
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Prisca Shabalala (Rural Women's Movement)
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Submission by Maria Mabaso to the Rural Development and Land Reform Committee on Wednesday 21 July 2010 in respect of the Black Authorities Act Repeal Bill [B9-2010]

Introduction

My name is Maria Mabaso, I am the Chairperson of Farm Evictions and Development Committee (FEDCO) in Zululand District in KwaZulu-Natal. I am the subject of Nkosi Mbatha, under the jurisdiction of Mbatha Tribal Authority. There are other traditional leaders who are our surrounding neighbours. These include Nkosi Ntombela, Nkosi Mdlalose and Nkosi Shabalala. Those people, who are our neighbours under the above-mentioned authorities, have the same problems as we have under the Nkosi Mbatha - which are problems of high taxation or too much taxation and levies placed on the subjects. I support the repeal of the Black Authorities Act, but I want to make you aware of these problems that will still exist in our community.

Background of the community

The KwaQwashi community is made up of about 90 000 people, of which about 60% are women. There is a high rate of death amongst the men because of a chest disease contracted by many men while employed as migrant workers in the mines. The community consists of about 70% unemployed persons, the remaining 30% of which are working in shops and supermarkets. Some of the people have survived by selling fruits and vegetables on the streets. Most of the employed persons are men. Those who are working in the textile industry earn about R70 a week, while those working in shops earn between R300 and R500 per month. The community is therefore heavily reliant on social grants. Without these social grants, the community would not have survived to today.

People in the community have to travel about 120km to Ulundi to do their shopping, and it costs about R65 for a return trip. There is only one clinic to serve the population, so people are forced to go to the townships. These clinics are located far away from the community – about 15km. We also have access to mobile clinics, but they only come once a month. You have to ferry the sick yourself, or wait for an ambulance, which takes a very long time to come. We have access to two hospitals in the surrounding area. We have about 10 high schools and 6 primary schools. There is a high rate of people who have passed matric, but who are loitering because they cannot go to tertiary schools or get jobs. There are no recreational facilities in the community. There is no police station in the entire community. Each household has a standpipe and the community built their own toilets. There are no RDP houses and no electricity – people use candles for lighting and there has been a lot of fire. The Chief plays no role in the development of the area, or improving these services.

Taxes and levies in the past

Since the time of apartheid, the community has paid various levies and taxes to the traditional leaders. Some of the taxes we have paid are: dog tax, administered differently according to the

gender of the dog; poll tax, paid by a man above 18 years to the apartheid government; and a tax known as rand-for rand, which we were told was for building schools.

These taxes were a heavy burden to families, especially women, because their husbands were migrant workers. The women, who were left behind to head households, had to use their family money to pay these taxes. The money that was allocated for bringing up and taking care of the family then had to be re-allocated to pay the taxes.

Life at present in the community

When the new democratic government came in, we were so excited and ululated about the possibility that now the burden of heavy tax, that we have carried since the time of the apartheid government, would now be lifted, and that we would be able to use the money that we had been using to pay the tax for the bringing up our families and building the community instead. Instead of a lifting of the tax burden, what we are experiencing is that we are now being forced to pay more tax than we did in apartheid.

Right now we are paying many different high taxes to the traditional leader. These are some of the taxes we are paying in the community:

1. If your child gets pregnant, you have to pay a certain amount of money to the Chief. Only the pregnant girl-child's parents must pay, the boy-child's parents do not pay. The amount differs from area to area, and ranges between R200 and R1000.

2. When a widow has to remove her mourning dress, before she can partake in the cultural ritual, she has to pay a tax to the Chief. This amount varies, ranging from R300 to R1000, depending on the traditional leader.

3. Development tax. This development is brought in by government departments, but the Chief claims that he brought the development and then charges taxes for it. For example, for use of the tractor, each family pays R100, for the construction of roads, each family pays about R500. In some other cases, Chiefs withhold use of the tractor completely from their subjects.

4. When the government buys land through land reform, the beneficiaries of the land reform who are subjects of the Chief are forced to pay levies to the Chief to access the land.

5. If the Chief has a private legal matter pending against him, the community has to pay for the legal costs. In most instances, the tax will be about R150 **per person**. The fees are paid no matter what the costs award is in the matter.

6. If you go to do the unveiling of a tombstone, you have to pay an amount ranging between R300 – R1000 to the traditional leader.

7. If there is a wedding, someone has to officiate the ceremony, and a fee must be paid between R200 to R500, depending on the traditional leader, for that person to officiate.

8. In Emakhuzeni, each household has to pay R50 towards the expenses of sending the Chief's child to university.
9. There is also a 'horse tax', which is for the Chief's use of a car, when he needs one. The amount is R50 per household.
10. A tax must be paid for the traditional skirts of the Chief's wife. Money is paid for her upkeep.
11. If the Chief wants to extend his palace, people have to pay a tax towards the building of the extension. The tax is called 'izintungwa'.
12. If you want a letter to prove your residence in the community, you have to pay for the letter.
13. In Amahlubi, there is also a tax to be paid to have an end-of year celebration. The amount is R20 per household.

No receipts are received for the taxes and levies paid. Payment is not recorded, and we do not sign that we have paid any fees. There is no accountability to the community about how much money was collected, how much money was spent and how much money is left. If the amounts for the taxes and levies are not paid, the traditional leader will not give any support to you, and if you ask the Chief for anything, he will not help you. If you have not paid, you will not be allowed to bury your relatives in the community and you cannot receive your verification as a member of that community, for example.

Conclusion: The way forward

We want the Committees in Parliament to work together to stop all of these taxes, because people in the community are already very poor and heavily burdened. Most households are dependent on social grants already and most people are unemployed. We do not have the services that we need and must still pay taxes. Therefore, we want all these taxes and levies to be abolished.

We also request to see the KwaZulu-Natal Bill on the Code of Local Government Law that is mentioned in the Black Authorities Act Repeal Bill, because it has not yet come to our attention.

Submission by Prisca Shabalala to the Rural Development and Land Reform Committee on Wednesday 21 July 2010 in respect of the Black Authorities Act Repeal Bill [B9-2010]

Introduction

My name is Prisca Shabalala. I am from Matiwaneskop in the Uthukele District in KwaZulu-Natal, near Ladysmith. I am under the Nkosi NB Shabalala. I am representing the Rural Women's Movement from KwaZulu-Natal. I am also the Chairperson of the Rural Women's Movement in KwaZulu-Natal. I support the repeal of the Black Authorities Act, but in this submission I want to bring to your attention some important problems that are still faced by our community and that will continue to face us after the Act is abolished.

Background of the community

The community land was bought in the early 1900s by a group of 120 men, who organised themselves into a syndicate, called the Matiwaneskop Management and Syndicate Committee. The syndicate then elected a Mr Mbekwa to be the leader of the whole Committee. The Title Deed for this land was only received by the Committee in 2007. After the death of Mr Mbekwa, his son Nhlanganiso started imposing himself as a Chief over the community, even though this was private land. The current traditional leader of the community belongs to the fourth generation of leadership flowing from this original imposition. The Chief is also a member of the KwaZulu-Natal provincial legislature, and before that he was a school principal.

Since the 1970s, the community has been living under the dread of forced removals. In the late 1970s we were officially dispossessed of the land and our title was taken away. Our land was registered under the name of the Republic of South Africa. In 1986, through the South African Council of Churches initiative, a German church outreach group of four people visited with the community and lived in the community for one month. During the visit, the Germans realised that they needed to assist the community to get back the title deed that had been taken away by the Republic of South Africa. The Germans invited three men and one woman, who were representatives from the community, to spend three weeks with them in Germany, to understand the community's problem with dispossession and to assist the community.

After many battles with the government and the Department of Land Affairs, the community finally received its Title Deed in 2007, with the help of the Rural Women's Movement. During all the time that we struggled to get our Title Deed back, the so-called Chief did not play any part and did not assist the community with the struggle.

The community at present

Matiwaneskop is located 35km away from Ladysmith, which is where the people go to do their business. The cost of travelling to Ladysmith from the community and back is about R40 a day. The population of the area/ community is about 72 000. The population was not always so big; it has exploded because the Chief has brought in people who are not part of the community, to pay for the use of sites. 60 percent of the community consists of women. The community is made up of 11 wards ('izigodi'). Most of the wards are administered by the headmen and the Chief's police. We have four primary schools in the area and three secondary schools. We only have one clinic for the entire community. The hospital is about 50km away from the community and most people have to access their medicines from the hospital because they are not available at the clinic. Most of the people are employed in Ladysmith in the textile factories - about 70 percent of the community, of which about 40 percent are women. The wages that people earn there in the textile industry are about R110 per week.

Life under the current Chief

The Chief unilaterally controls community resources and access to land. In most instances, where there are projects that the community has initiated without him, for example the sewing machines project, the Chief tries to frustrate the projects and threatens to take away the resources that are needed for the project. This is because he feels like he has no control over the project and the money involved. Some of the project resources that the Chief wanted to confiscate, initiated by the rural women of the community, were donated by the self-help programmes of the American Consulate.

Service delivery and community facilities

There is no tarred road in the community. Access to water is limited to only 11 boreholes in the entire community of 72 000 people, and there is a problem when these boreholes collapse or need repair. The boreholes were implemented by a private company, upon the initiative of the development community, not the Chief. Sanitation services do not exist at all in the community. There are no recreational facilities for the young people – no proper soccer fields or community parks. As a result, young people spend their time at the taverns. There is no youth development in the community. Instead of helping the community, the Chief is blocking development and doing nothing to improve the lives of people in the community. Access to general community facilities, like the hall, is wholly controlled by the headmen, who allow access depending on the political affiliation of the community members. If the headmen are Party A and a family wanting to use the facilities is Party B, the family is not allowed to do so, or their use is frustrated.

Traditional Courts

In 2001, the Chief appointed 19 people as the traditional authority to run the Traditional Court, on the basis that he had dreamt about that particular composition. Of the 19 people appointed, only 6 of them are women. The Chief has continued with the procedure of appointing such a traditional authority, and has not appointed a Traditional Council in terms of the new law. The conduct at the Court is that if you are a woman, you may not represent yourself in the Court or

witness box - a man must represent you. As a community, we feel that this is against our human rights and the Constitution, that have fought so hard for and for which our ancestors died. In the case of a widow, she is not even allowed to enter the premises of the Court, because it is believed she will bring bad spirits to the Court. Justice in the Traditional Court is dependent on you who are, your resources and your status in the community. If you have a lot of resources and are known, you can buy the people in charge a bottle of expensive alcohol or pay them money and your case can be thrown out.

Some of the penalties that are meted out in the Court:

- Where there is a dispute between a woman and a man about who the father of a child is, the Court will order a blood test to be done and the father's family must pay a fine of one cow or R1000. The fine is not paid to the Syndicate who owns the land or the woman's family - it is paid to the Chief.
- Where there is a case of trespassing animals, there will be a fine of one cow or bull, to be paid to the Chief. In other instances, the trespassing animals may be pounded by the owner of the field where the animals trespassed. Then the owner will charge a fee for the release of the animals. Sometimes the Chief will come to Court and say the fee is too high and decide that a total fine must be paid, of say R1000. The problem is that the Chief does not know what damage is done by the animals to the field – he is not an expert of this.

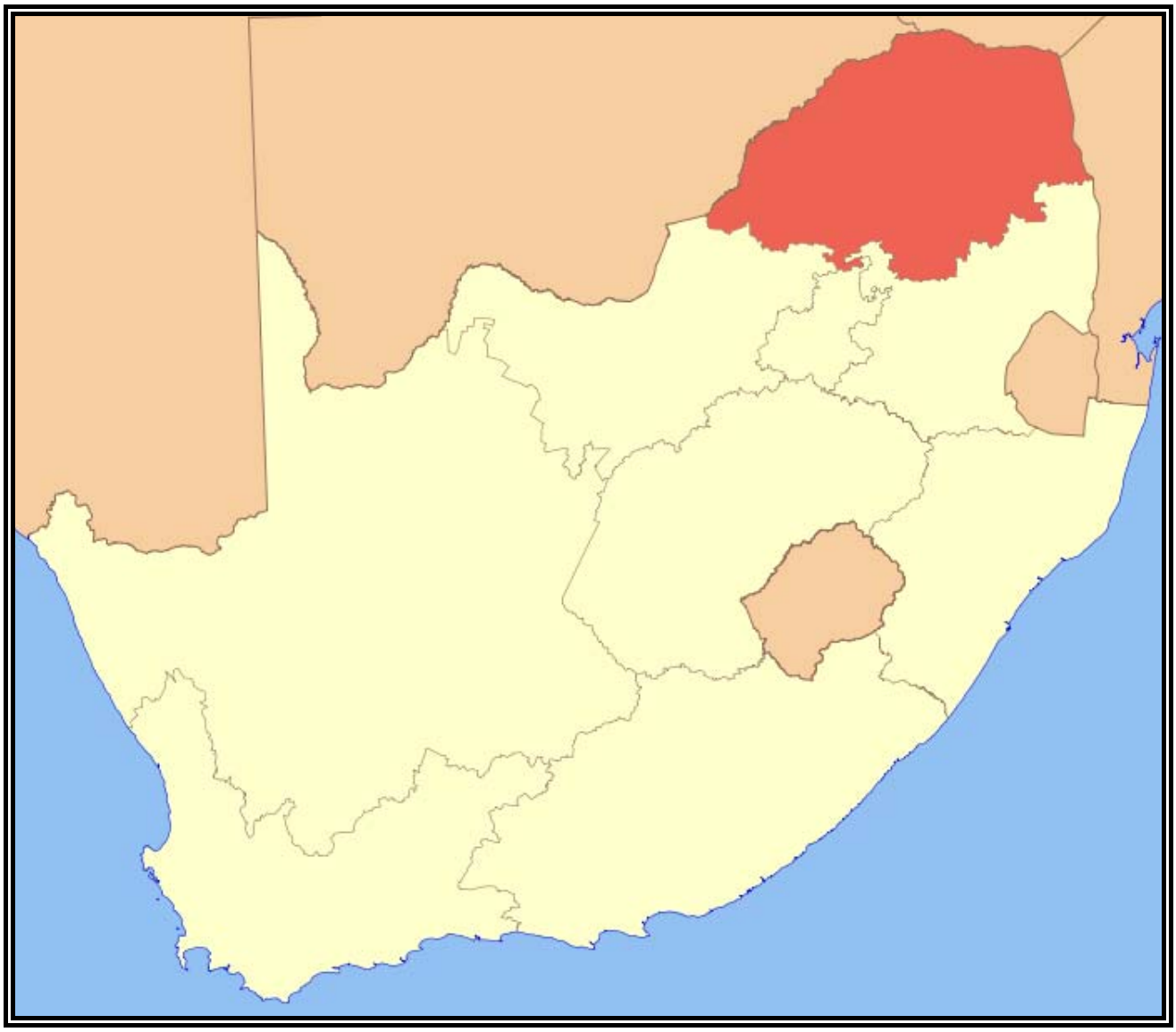
Conclusion: The way forward

As a community, we ask the Committees in Parliament to work together to:

1. Disband the current traditional authority and Court, because it was not legally formed and not appointed according to custom. The people in the traditional authority were not democratically elected, they were just dreamt up as members by the Chief.
2. Have the position of the so-called Chief Shabalala and his authenticity as the Chief of this community investigated by the government.
3. See a situation in Matiwaneskop whereby the rights of women are respected and recognised by all in the community, including the Chief.
4. Create a structure that gives government support to caregivers in the community, improves access to water and sanitation, provides recreational facilities and creates job opportunities.

Finally, we ask to see the KwaZulu-Natal Bill on the Code of Local Government Law that is mentioned in the Black Authorities Act Repeal Bill, because we have not seen it yet and do not understand what it aims to do.

LIMPOPO SUBMISSIONS



Johannes Ramutangwa and Tshavhungwe Nemarude (Ramunangi clan)
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Monoko Thomas Moshitoa and Patrick Mashego (Sekhukhune Land Ad Hoc Committee)
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Submission of the Ramunangi Clan to the Portfolio Committee on Land Reform and Rural Development

Presented on behalf of the Ramunangi Clan by

Mr Johannes Ramutangwa and Mrs Tshavhungwe Nemarude at the Parliamentary Hearings into the Repeal of the Black Authorities Act held on 20 and 21 July 2010.

The Ramunangi have been custodians of the Ramunangi Guvhukuvhu and Nwadzongolo sacred sites in Limpopo since the time when the first people came to that place. We were given custody of the sacred sites by God. This was before the time of the division between South Africa and Zimbabwe. We are Vhadau Vhangona, part of the Mapongupwe. The Tshivhase chiefs found us there and conquered us. We accepted their authority, and for all this time they have respected the Ramunangi's custody of the sacred sites. When the Venda nation needed rain they would ask the Ramunangi to talk to the ancestors at the sacred site. This happened even with the predecessor of the current Headman. The Nwadzongolo site was destroyed in 2006, when a road was built. Now the Guvhukuvhu site is under threat. Let us explain.

The site is comprised of the natural place, the river and waterfall where our ancestors are residing. It is also important for animals, birds and snakes, which are not supposed to be killed. Firewood is not supposed to be collected. At this site you will find big stone pots, which were made by the ancestors, in which water from the waterfall is collected. Every year, in September, the Ramunangi perform rituals at the sacred site. At the end of the rituals the place makes a sound – *guvhukuvhu* – to tell the Venda that the rain is coming.

People respected the site in the past. The chiefs and headmen respected the site. All were afraid and they were respectful of the site. There was no road, only a small path used by the Ramunangi who were going to do rituals. Now there is a road and the forest is being destroyed.

In 2001, Headman Jerry Tshivhase turned the sacred site into a picnic place from which he receives the entrance fees as income. The Ramunangi were not consulted. When we came to the gate the security guards demanded payment from us before we could enter. We

refused to pay and continued onto the site to perform our rituals. At the site we found used condoms and empty bottles of alcohol. Also, other people who visit the site to picnic had access to the place where we were performing our rituals. This is taboo.

After we performed the rituals in 2001 we went to the Headman, Jerry Tshivhase, to complain that the site was being desecrated. Headman Jerry Tshivhase told us that the site belongs to the Tshivhase, not the Ramunangi. He wrote a letter that we were to take to the Chief, but when we read the letter it said only that the civic people and the Ramunangi should be brought to a meeting. The Ramunangi feel that this is a matter between them, as custodians, and the Headman, as traditional authority, and that they have no business with the civic.

The Ramunangi went to see Headman Jerry Tshivhase many times without resolution. Because the Tshivhase's are chiefs we didn't know what to do. We continued to do the rituals in September every year. Finally, in 2005 we decided to go to Chief Kennedy Tshivhase. We found the traditional councillors there and we gave them a letter for the Chief. They said they would give it to the chief. We didn't receive a response for a long time, so we gave more letters to the councillors. They said they would call us. Finally, a councillor told us that the site doesn't belong to the Ramunangi – it belongs to Tshivhase. We also went to various different government departments, including land and traditional affairs, but we received no help from them.

In June 2010 we discovered that bulldozers were digging up our sacred site. There, they were making new roads and building 6 chalets for which the foundations are already in. This was the first time that we knew anything about tourism development at the sacred site. Nobody consulted the Ramunangi at any time. It seems that the Tshivhase were given permission to build without any consultation or investigations being conducted into the site.

Since they started to destroy the site many members of the Ramunangi Clan are sick and some have even died. We believe that this is because we are no longer protecting the sacred site as we should be. Our ancestors are angry with us for this reason.

We have now decided to go to court. On 9 July 2010 we obtained a court order to stop the desecration of the site for 20 days. The Ramunangi do not want authority over the site. We respect the leadership of the Tshivhase. But we are the custodians, since the beginning of time. Our responsibility for the land and our duty to the ancestors must be recognised. We have to make sure that the place is respected. This means that it must be restored to its natural status, the trees replanted, and the road and the foundations removed.

The Black Authorities Act created tribal authorities that gave all powers to the chiefs. It disregarded individuals, families and clans living in the same area and having particular rights over the same land, like the Ramunangi Clan. We support the repeal of the Act. But Parliament must ensure that traditional authorities are not again given absolute power over our land. They must have control over land for *specific* purposes, just as the Ramunangi's rights for a specific purpose needs to be recognised and respected. This means that when the government is required to consult with people whose rights are affected, it must go beyond the tribal office to fulfil its obligation. Chiefs are not chiefs by themselves. They are chiefs because of the presence of their subjects. *Khosi, ndi Khosi nga vhalanda.*

BLACK AUTHORITIES REPEAL BILL

Submission to the Portfolio Committee of Rural Development and Land Reform

21 July 2010

Submission by Monoko Thomas Moshitoa and Patrick Mashego

We represent a Land Forum in Sekhukhune District Municipality. We live in a district where the devastating effects of the Black Authorities Act are still vivid, where the people remain second class citizens who do not know clean water, sanitation or land ownership.

Prior to the 1950's, there were a number of tribal leaders congesting our district. Following the promulgation of the Black Authorities Act, the apartheid government spotted one particular 'kgoshi' in the area as a young and learned leader who was both able and willing to work with the apartheid government in their efforts to establish Bantustans. The government wanted him to become visible as the leader of a greater area. As compensation, he was offered land to buy. He was unable to pay for all the land, so a large portion of the land was declared trust land while he was appointed as the supervisor of the land.

At the time we were moved to the trust land. Before being moved, we never paid anything for our right to work and live on our land. Starting from 1958, this suddenly changed as we were expected to pay trust money (rent).

Governance in the area also changed as a result of these new arrangements. Before 1957, the villages were not scattered; we constituted a single community. As from 1957 the Chief appointed headmen for the villages. People were participating freely within the villages. We worked according to the resolutions taken at 'kopanong' – and these were reached democratically.

Since about 1997, the Chief has started to abuse his power, however. The headmen appointed now are invariably people loyal to the Chief – and always men. This remains the case today and has in some regards become even worse: the Chief now appoints elderly people as headmen who know nothing about the Constitution. They have become nothing more than watchdogs or spies for the Chief on the one hand, and his messenger on the other. It is unclear to us whether the repeal of the BAA will mean the end of this abuse of power.

We continued to pay the trust monies until one day in 1995, when the Chief – who was once a cabinet minister of Lebowa - came to address our community and announced that we did not need to pay trust monies any longer, as the land had been transferred to the tribe and the title deed was now in his name as the Chief.

In 1999, after submitting a memorandum to the Chief demanding an explanation as to the status of the land and the title deeds, we were summoned to the tribal court where we were made to stand in the sun for an entire day before being rebuked for demanding our title deeds.

One of the worst legacies of the Black Authorities Act impacting upon our communities remains the Chief's right to impose levies upon his subjects. The significance of this power must be understood in the context of the socio-economic conditions of our community: the overwhelming majority of people are unemployed, surviving on government grants only. Most of those employed work as farm labourers or small-scale farmers who earn hardly enough to care for their families.

Against this background, we can hardly do better than merely mention some of the levies recently imposed by the Chief:

> The residents were informed without explanation that every person who has finished school needed to pay R50 towards a new car for the Chief. This, despite the fact that the Chief has received a car from the government.
> Tribal levies are charged yearly, but we don't know what the basis for that is.
> There is what is called the 'ancestors levy': if the Chief performs a cultural ritual at the community level, then every member of the community must pay an amount that is arbitrarily fixed. These levies are imposed regardless of one's religion.
> There is also a levy for the traditional healer that was recently instituted. In one of our villages, children started mysteriously falling down and the people suspected witchcraft. As the Chief must know everything that happens in his district, the people went to update him. Soon after, they were told that the Chief had consulted with a traditional healer on the matter, and as a result everyone in the village had to pay R 17 as levy. In one of our villages, a murder recently occurred. Members of the community were forced to contribute R 20 each towards the traditional healer who was consulted in solving the murder. After the police found a suspect, the healer demanded more money as he claimed to have helped in getting the suspect. The community is still debating this issue.

The headmen take the lists of people who have paid their levies to the Chief every Wednesday when they meet with him. They return to their communities with news of any new levies that may have been imposed.

If a person does not comply with paying levies, it is regarded as an offence and he or she will be brought before the Chief. There, people are threatened and refused any services until the levy is paid. If a person dies before paying, his family would not be able to bury him unless they pay.

This power of the Chief is not only limited to the imposition of levies. The traditional leader can impose fines on people in his court and does so even if they are found not guilty. It is in fact impossible to appear before the Chief's court and not pay a fine. This practice is abused by the people on the ground to take revenge on those that they differ with.

But the most blatant example of their abuse of power is probably the fact that the traditional council in our area regard themselves as the local government. They stamp receipts with a stamp declaring them the 'Matlala Local Government'. They have, in fact, become a fourth tier of government – but one not accountable to anyone.

This goes unchallenged: the real local government in our area has no power as they are in fact subjects of the Chief. For any developmental project proposed by the Local Government, the Chief's permission must be requested in the form of a tribal resolution. The same applies to individuals applying for business sites. Applicants of business sites are not treated equally. There was a case where an application was turned down and immediately after the refusal the daughter of *kgosi* introduced a second applicant who was granted permission to use the same site. The daughter works together with this second applicant in NAFCOC.

The Chief is not accountable by law – as state organs are – and therefore can frustrate the process to the point of denying access to sites.

There is further no proper planning for land use. Functions are just mixed. Residential sites are set out very close to oxidation ponds, under high voltage electricity lines and close to the main road.

That is because these traditional leaders are only interested in money, and not in the health and safety of their people.

In addition, even though the Chief is not the owner of the land, he 'sells' these sites. This is a practice of various chiefs in our area. A neighbouring community of ours is currently challenging their acting Chief as he is now selling their land at R 1000 a site.

So why are these chiefs allowed to continue to operate in this way, abusing the powers which were awarded to them by the Black Authorities Act even though the terrible aims of the BAA are a thing of the past?

Firstly, the Chief successfully oppresses the educated people in our area by accusing them of disobeying him whenever they question him. For the same reason, he is opposed to the issuing of title deeds as he believes that it will lessen his control over his subjects if they have their own title deeds.

Secondly, even though the people on the ground are often unhappy, they are also scared. In the area where the Chief stays, no meeting may be held if it was not sanctioned by him. In the other areas, developmental meetings do take place, but he ensures that he has spies present. This scares people into keeping quiet.

Thirdly, it is the case that, according to our culture, the Chief must be respected above all. The combination of this culture with the huge powers afforded to traditional leaders in terms of the BAA – which is not based on custom - has created a terrible abuse of power.

Fourthly, we submit that our government is promoting the abuses of traditional leaders as we never see any sanctions imposed upon them.

We would like to state that we are not opposed to the notion of traditional leaders or to custom. In fact, we want to treasure these institutions. What we do want is for parliament to enact laws that would enable us to hold these traditional leaders accountable and protect ourselves.

What we ask is the following:

Parliament must revise the TLGFA to take out all the aspects that promote the legacy of the BAA. We ask that the notion of levies should be scrapped completely from all national and provincial legislation. We acknowledge that it is our custom to give to the Chief, but that custom originated in a time when the Chief received no salary or government support. What we now suggest is that there should be a yearly meeting where the working class members of the community decide amongst themselves how much they can pay yearly into the community's account and for developmental purposes. Then the Chief needs to account to these people regularly as to how this money was spent. In the same way, the government should provide the resources for the traditional councils to perform their functions so that they cannot use this need as an excuse to impose more levies.

- We ask that traditional leaders and councils be capacitated to be able to perform their functions properly.
- We want traditional leaders to understand the legislation that governs their powers and to be held accountable to that.
- The role of the traditional leaders should also be limited to customary issues and not extend to governance issues.
- Despite this suggestion, we would still like to see traditional councils as more democratic than the suggestion of a 40% elected representation.

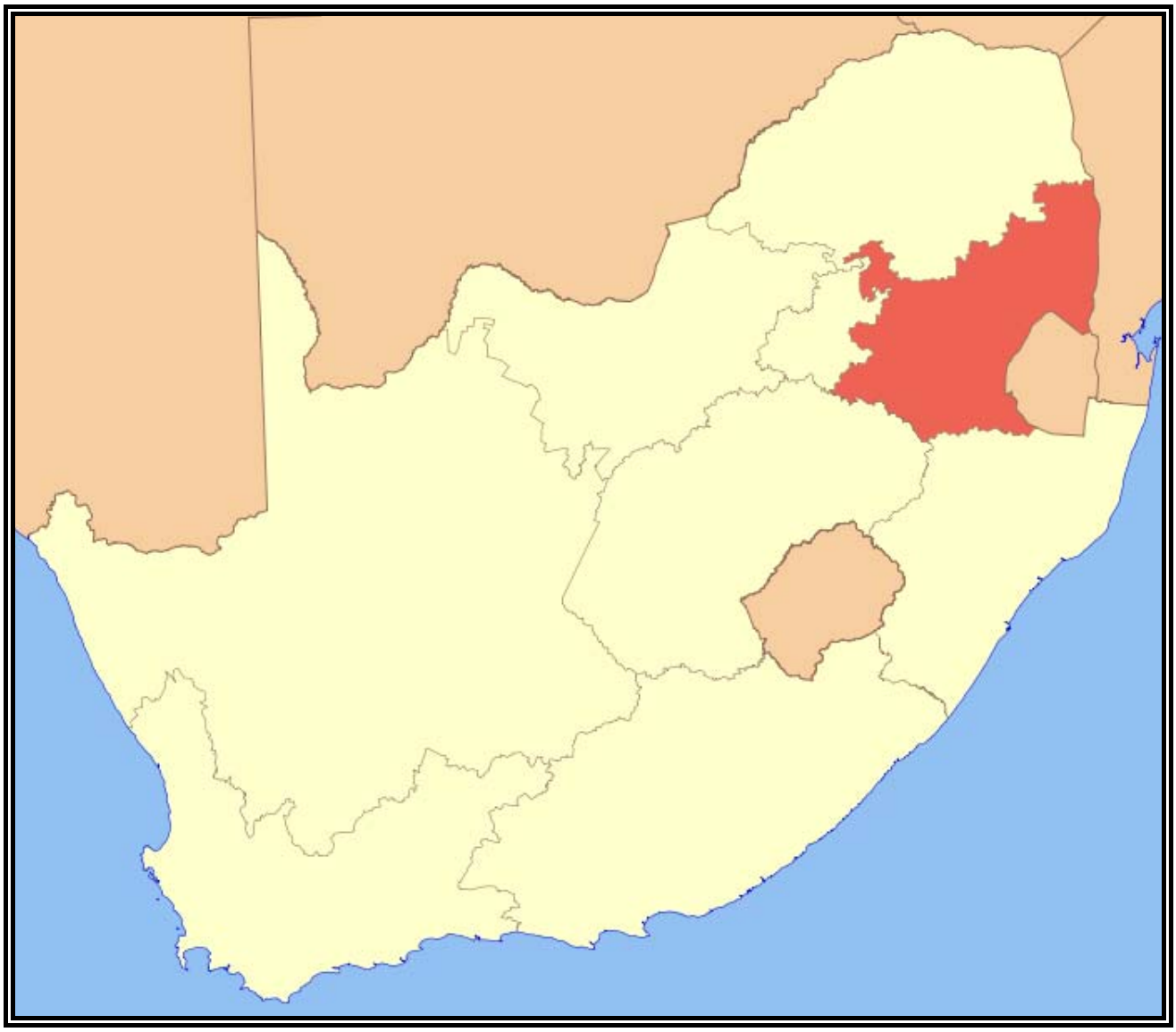
- We are further inviting the portfolio committee to come to our area to make some of their own observations.

In conclusion, we support traditional councils, but only insofar as the law is strong enough to curb the power of these leaders. Just like a municipal councillor can be taken to court if he does not comply with applicable legislation, so too must traditional leaders be open to scrutiny.

Our poor community members know nothing about the Acts that protect them. There are no newspapers in our villages. We urge parliament to go and see and engage with people on the ground if they want to understand the impact of their laws on the people.

The fact that we came here and spoke out in parliament will probably mean that we will be summoned in front of the Chief and possibly be evicted. We ask parliament here today to protect us from this potential suppression of our rights by enacting legislation that keep traditional leaders accountable and that destroy the legacy of abusive power created by the BAA.

MPUMALANGA SUBMISSIONS



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Daggakraal - Submissions to Portfolio Committee on Rural Development

By Eric W Twala – Secretary and Media Officer, Twelve Committee, **Daggakraal**

Introduction

The farms that I am going to talk about are portion 90hs Daggakraal and portion 87hs Vlakplaats, which together constitute one out of three farms that were purchased by Pixley Isaka ka Seme – namely, Daggakraal, Driefontein and Driepan, situated in the east of Mpumalanga Province. Portion 90hs Daggakraal and portion 87hs Vlakplaats were consolidated, rezoned, subdivided, proclaimed and became three farms – namely, zone 1, 2 and 3. These farms were purchased by black farmers who were issued title deeds. This area consists of 343 land owners and has about 40 000 people.

Ntshebe Ngwenya embarked on a search for land; that was when he met Pixely ka Seme, who was a founding member and the first treasurer of the South African Native Congress, and also founded the African Native Farmers Association* (ANFAA) which was registered as a company in 1912. The ANFAA bought these three farms at 3 pounds per Morgen. In 1912, the three farms were bought by Pixley Isaka ka Seme after consulting with Mr Gouws' Agents, known as Slazenger Trust, who was the owner of the farms. Through a committee that he set up, he was able to collect an amount of 100 pounds from each of the people who intended to buy and they were able to collect 6000 pounds cash in order to be able to buy these three farms. There were 60 families involved in the purchase of this land.

After the surveyor had sub-divided the farm, Daggakraal, into mostly 10 morgen plots, the founders were allocated a numbered plot each.

This all happened before the 1913 Land Act and these properties were bought through a company before the introduction of the 1913 Act that would take away people's land.

In 1913, the Board, seeing that the Company still needed funds that were owing to Mr Gouws for the sale of the farms, passed a resolution to raise a bond with African Colonial Banking and Trust Company of Africa Ltd. This was approved unanimously. As a result, the company was able to pay its debt to Mr Gouws in full.

In 1916, four years after the settlement of Pixley ka Seme, the Makholokwe tribe, who were a branch of Witsieshoek and led by Chief Maitse Moloi and his son Popo Moloi, heard that land was being sold in the area. They then bought and moved from the Free State into Daggakraal.

Already during that time in 1916 it was made clear that the chief was purchasing property like everybody else, and therefore had no authority over the Daggakraal community who had purchased in the area, as their **properties were regarded as fully paid freehold stands.** They bought at Daggakraal no 2.

There was also the farm called Daggakraal no 3 (which is portion 87hs and is commonly known as Vlakplaas). This area was bought after 1916 by another black group (whose names are on record).

Significance of DAGGAKRAAL

The community continued to reside in the area without problems and not under any traditional authority.

In 1950, there was an attempt by the government to forcibly remove the people of Daggakraal from the area and it emerged that each would be relocated according to their culture. The Swazi's would be relocated to Kangwane homeland, Zulu speakers to Babanango in Kwazulu and Sotho speakers to Qwaqwa. This was done through the introduction of the Black Authorities Act, interlinked with the tribal authority systems that wanted to introduce a chieftaincy in order to have a leader who would override any other authority in the area.

An official from the then Department of Constitutional Development and Planning came to Daggakraal to conduct community elections but was chased away by angry land owners who told him that he had no mandate to conduct elections in Daggakraal. One of the landowners Abner Dlamini, whose father, Alexander Dlamini, was the general-secretary of the ANFAA when its chairman and ANC co-founder, Pixley ka Seme, bought the land in 1912, said, "***We reject both the tribal authority and the Community Act which the government is ramming down our throats*****"**. He went on to say that the community actually favoured the Twelve Committee, consisting of mostly respected elderly land owners from the area. The problem that existed was that the government had continued to ignore the leadership structure that had been set up by the community themselves which was known as the "Twelve Committee".

The Twelve Committee is made up of 12 members who represent these farms in a 4 membership form: which means they appoint 4 members from each zone in order to manage and address community issues. At that time such management of land ownership was unheard of, so they became custodians on behalf of the land owners. From these 12 members they appointed 3 members who would occupy office, one being Chief Popo Moloi who was appointed chief facilitator from Zone 2, the other two would deputize for him (Thambekwayo from Zone 1 and Nkala from Zone 3). They were known as "Abalamuli".

The Twelve Committee was legally registered on the 24th January 1961, with their own Constitution on how the area would be managed. They did not have a chief.

Finally, after a long battle in 1982, Mr Piek, an official from the Transvaal Provincial Administration announced that the government had made a decision that the people would remain in Daggakraal and that this would not change. He stated that a **community authority** would be established which would have direct communication with government; this would apply to all of Daggakraal. Piek said that elections would be conducted and only land owners would be eligible for election. He also said that the **community authority** would not be run by a chief because the landowners could not have a chief ruling over them. The community welcomed the decision. Mr Gweje Twala said, "***We are particularly happy that the government has decided that Daggakraal will not be run by a tribal authority, but by a community authority as we have requested over the years"***.

The State President authorised the establishment of the **Community Authority** for Daggakraal 1,2 and Vlakplaas (Daggakraal 3). This was done under the Proclamation in Government Gazette Notice 744 of 1988.

Thereafter, in 1989, a letter to Chief Moloi was sent by the Department of Constitutional Development Services stating that Moloi was *not* the chief of the Daggakraal area; they even said that he was a chief without land.

Chief Moloi knew at all times that he had no authority over the community of Daggakraal although he held the title of chief; he was just an ordinary land owner like everyone else. An academic article, titled 'The Legacy of Land Struggles in 20th-Century Mpumalanga', written on the area by Christopher Mulaudzi and Stefan Schirmer, states that the Community and Development (CAD) had written several letters to Chief Popo Moloi of Daggakraal promising him land if he agreed to relocate to Qwaqwa with his community. It makes reference to the fact that he refused the initiative and said that, even though he is a chief, he was ***"just one of the plot owners with the same status as the rest of the landowners."*** He then advised the department to approach the elected committee.

Chief Moloi as a land owner subsequently sold his land to Senjaka Samson Mdake (stand no. 130, Government Gazette no. 6663 of 1979) and as a result, according to the constitution, Moloi became just a tenant in Daggakraal. After selling his land he continued to stay in a homestead (stand 24, Daggakraal no.2). On the 20th of December in 1985, through a letter written by the attorneys Mark Yammin and Company who were representing the committee of 12, Moloi was instructed to move back to Qwa qwa as he had lost his status as a landowner. However, Moloi stayed in the homestead until he passed on in about 1992.

The position taken by the community of Daggakraal is that this history shows that they have never had traditional authority and that they do not want to have one.

DAGGAKRAAL after 1994

After 1994, Chief Moloi's son, Edward Lephatsoane Moloi, went and acquired communal land in the area of Daggakraal in order to accommodate his tribe, the Makgolokoe. The government paid R 5.8 million to buy this land. As a concern, this was a piggery farm. (This was one of the 1st land restitution cases done in Mpumalanga; it is located in Somerhoek, under the Lephatsoane Trust.)

The then Premier, Matthews Phosa, and former President, Nelson Mandela, came to Daggakraal to celebrate the inauguration of this farm; this was a very big event.

Unfortunately, the farm was taken back by the Land Bank due to alleged mismanagement of funds at the farm.

Then, suddenly, in about 1995, Edward Moloi started imposing himself on the community of Daggakraal 1, 2 & 3, saying that he was the chief over the area. He was using his home as a form of tribal office; he continued to hold himself up as a tribal authority in the area but the people did not recognise his authority. This has been continuing until now, even though the community continues to reject him as the traditional leader. His position is strengthened by the fact that the government officially appointed him as the traditional leader of Daggakraal.

The Twelve Committee tried various means to engage the government both at the local and provincial levels, without any success. Most recently, the committee took it upon itself to approach the Provincial government of Mpumalanga. On the 14th of May 2010, a letter was sent to the Premier of the province complaining about this imposition of a chief over their land.

Finally, on the 3rd of June 2010, during the Provincial Cabinet outreach in Daggakraal, the Premier, Mr David Mabuza, and Norman Mokoena from the Department of Cooperative Governance and Traditional Affairs welcomed the committee and advised that they would look into the issue of chieftaincy in Daggakraal. He informed the Twelve Committee that he intends to meet with his cabinet and legal department in order to investigate the situation of Chief Moloi as Chief over Daggakraal.

The Daggakraal landowners feel that they have been marginalised and sidelined by both local and provincial government. We do not even appear on their database and, according to the aerial photographs, Daggakraal appears to be a vacant site with no improvement. We have no basic services and no infrastructure and for the past 15 years nothing has happened in our area.

Now we learn that it is probably because of the fact that we were a **community authority** that we are now ignored by government. We also realise that the Traditional Leadership and Governance Framework Act has stripped us of a status (as a **community authority**) that we fought very hard for during apartheid, as I have explained. This Framework Act also gives Moloi the authority to impose himself on us. We are independent landowners who are not under any tribal authority. We refuse to be made subjects of any chief who wants to force himself on us. We are shocked that, after the long battle that we fought against the apartheid government for our freedom, we are now put in the position of having to fight our democratic government also.

Recommendations

Our recommendations are as follows:

- For Chief EJ Moloi to be **legally** removed as traditional leader of Daggakraal.
- That the Black Authorities Act be repealed and the tribal structures that it created be disestablished.
- That new laws being introduced by the ANC government must not put us in a worse position than the position that we were in during apartheid.
- That section 28 of the Traditional Leadership and Governance Framework Act be repealed so that it does not take away our right to be a **community authority**, and so that it does not force a tribal authority upon us.
- We invite the Portfolio Committee on Rural Development and Traditional Affairs to visit Daggakraal and confirm the illegitimacy of this chief who is forcing himself on us as freehold landowners.

We do not want to be under any traditional authority - neither now, nor in the future.

Submissions on the repeal of the Black Authorities Act of 1951
on behalf of the Kalkfontein B & C Community

to the Portfolio Committee on Rural Development and Land Reform

21 July 2010

Thank you chairperson, honourable members of the portfolio committee and members of different organisations.

Let me first introduce myself to the house:

I am Stephen Tongoane, a resident of Kalkfontein 143 JR, in Dr J S Moroka Municipality, Mpumulanga province. I am one of the leaders of Kalkfontein B & C Community Trust. I make this submission in my personal capacity and on behalf of the Kalkfontein B & C community that are equally affected by the provisions contained in the Act. I shall report to my community about the public hearings.

In 2003 I gave evidence before this committee, when it was called Agriculture and Land Affairs, about the Communal Land Rights Bill. I do not think that that committee heard us well. I represented my community in the court case about the constitutionality of the Communal Land Rights Act, a court case that took 6 years before the final judgment.

On 2 March 2010 when we went to the Constitutional Court we heard from the Minister's advocate, Adv Nellie Cassim SC, that he, the Minister of Rural Development, Minister Nkwinti, now agrees with us that the CLRA does not follow the Constitution and does not give security of tenure. The Minister, through his advocate, informed the Court that he intended to repeal the CLRA in its entirety as it was not consistent and reflective of the new policy in respect of security of communal land tenure.

I would like to indicate to you that our community is delighted about the repeal of this Act, because the Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanised.

Background

The Kalkfontein B & C farm was bought by our forefathers, including my grandfather, in 1923 and 1924 respectively, as indicated in the title deeds. The original co-purchasers of this farm were from different ethnic groups, e.g. Tswana, North Sotho and Ndebele. They had no chief (*kgosi* or *inkosi*). After three years they choose five members amongst them to form an executive committee that was responsible for the day to day affairs of the community.

The Kalkfontein B & C farm was bought in terms of an exemption of Natives Land Act, which meant that the Minister of Native Lands, as he was at the time, held the title to the farm on our behalf. The purchasers had to apply to the governor-general for permission to purchase non-scheduled land. The Act allowed the governor-general to approve exemptions.

The Black Authorities Act of 1951 enabled the Minister to appoint and impose a chief upon us. This was in 1980, and this led to violence and destruction of properties by the imposed chief. People who resisted this move were maimed and others imprisoned in makeshift prisons. The police sided with the "chief" and refused to intervene.

These actions ultimately resulted in the appointment of a commission of inquiry by the minister. The commission under Judge Kruger recommended that the chief must be removed from his position.

Traditions and Customs; and the imposition of an Apartheid Chief

The Trust was formed in 1996 to have the land registered in its name. There was repeated litigation in the Transvaal Provincial Division and ultimately in the Land Claims Court. Two years ago the Land Claims Court granted us, Kalkfontein B & C Community Trust, full title to the land in terms of the Restitution of Land Rights Act of 1994.

We exercise our land rights under our own local living customary law. This was emphasised by the Constitutional Court in its judgment in paragraph 31:

> *"In the case of the Kalkfontein community, the farms were managed and administered according to indigenous law through a Kgotla – a customary decision-making body. It recognised the individual rights of co-owners and their families in respect of particular plots of land which they came to occupy for purposes of residence and cultivation. These functions are now performed on a similar basis through the institution of the Kalkfontein B and C Community Trust."*

I quote from the judgment because I want to show that the Constitutional Court recognised our system.

The terms of shared access to grazing and veld products were also regulated by the *kgotla*, whose members were replaced at intervals. Important decisions were referred to public meetings for discussion with the wider community of co-purchasers and their heirs.

This system worked well until the tribal authority began to make unilateral decisions that usurped the authority of the *kgotla* and overrode the land rights of the co-owners. This happened in 1978 when the apartheid government, in creating the KwaNdebele homeland, constructed a tribal authority and imposed it over the three privately owned Kalkfontein farms. The Native Administration Act of 1927 was used to 'establish' the Ndzundza

(Pungutsha) tribe and to appoint as chief Daniel Mahlangu, a descendant of a Kalkfontein A co-purchaser. In 1979, the Bantu Authorities Act was used to define the area of jurisdiction of the Ndzundza (Pungutsha) Bantu Authority as the three portions of the Kalkfontein farm.

Daniel Mahlangu treated the Kalkfontein farms as his private property. He 'sold' residential sites to over 1 000 outside families. Each family paid R250 for the stand allocated to it and a further R50 as *lotsha* (allegiance fee) to Mahlangu for giving his consent to settle on the land. The newcomers, many of them poor people who had been evicted from white farms, were allocated residential sites on the ploughing fields of the original owners. Mahlangu set up a police station at Kalkfontein, opened a stone quarry and authorised the establishment of a variety of businesses. People who refused to pay the various 'tribal levies' demanded by Mahlangu found their state pensions and other welfare benefits cancelled. Several people were assaulted for objecting to his actions. A system of public floggings was instituted and one man was shot.

The Kruger Commission uncovered widespread financial irregularities by the 'chief' and his councillors, including the extortion of a range of compulsory levies. These included levies for the 'chief's protection', 'chief's *lobola*' (brideprice), 'chief's residence', 'celebration fees' and 'chief's petrol'. According to the report of the Kruger Commission, bank accounts were unlawfully opened and moneys paid into the chief's personal accounts.

The commission ultimately recommended that Mahlangu's recognition as chief be withdrawn and that consideration be given to the disestablishment of the Ndzundza (Pungutsha) Tribal Authority. Following the commission's report, Mahlangu was indeed deposed. However, without consent or negotiation, SAP Mahlangu was appointed to replace him as 'acting chief'. Contrary to the recommendations of the commission, the tribal authority continued in office.

We continued with our struggle to get ownership of our land, and when we got our constitutional democracy we established our trust, we sent letters to the premier and we started our court cases. In February 2007, the Ndzundza Pungutsha Tribal Authority summoned me and other Kalkfontein leaders to appear before the tribal council, demanding that we leaders account for their role in the litigation. When we leaders realised that this was the purpose of the meeting, we walked out. One of the royal councillors, a Ms Masango, claimed that I had brought the case only to further my ambitions to become premier of Mpumalanga. I have no such ambitions.

The Constitutional Court and Minister Nkwinti himself have now agreed that our court cases were justified. But in 2007 chairperson Mahlangu of the Pungutsha Traditional Council threatened us in his affidavit. He said that the tribal authority is now a traditional council recognised by the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 and that it exercises powers derived from 'the Constitution, the Framework Act and

customary law'. He said that no independent community exists within the jurisdictional area of the traditional council and that 'Kalkfontein B and C are part of Ndzundza (Punguthsa) traditional community'. He said that 'in terms of the Ndzundza customary law, all land occupied by the community is controlled by a senior traditional leader as political head'. Chairperson Mahlangu got these ideas from the Black Authorities Act and the TLGFA.

The Context of the Repeal Bill and our Concerns

The repeal of the Black Authorities Act is an inadequate step on its own given a set of post 1994 measures and provisions that in effect entrench the legacy of the very Act that is being repealed. The problematic laws are the TLGFA and the Traditional Courts Bill (TCB).

The TLGFA does not undo the tribal authorities established by the Black Authorities Act but provides for their continuation as traditional councils. The TLGFA also makes it difficult for communities to withdraw from traditional authorities that were wrongly assigned authority over them under the Black Authorities Act.

The TLGFA provides for the election of 40% of members of traditional councils and 60% to be nominated by the senior traditional leader. This is not true democracy because those who were democratically elected will always be in minority and overpowered by the 60% nominated by the chief when it comes to decision-making. From past experience their views won't be considered. Rural people who prefer a democratic system of authority continue to resist the fact that traditional leaders are allowed to appoint 60% of members of traditional councils.

The TLGFA also permits traditional councils to impose tribal levies. This is despite the fact that the constitution gives taxation power to national, provincial and local government. Tribal levies are double taxation, something that seems counter to the government's own statements.

The Department of Provincial and Local Government White Paper on Traditional Leadership and Governance (July 2003) said that "Traditional leadership structures should no longer impose statutory taxes and levies on communities".

The TCB repeats the same errors made by the TLGFA and the now repealed CLRA in adopting the same Black Administration Act tribal boundaries and structures. The TCB extends the powers of these undemocratic structures. The TCB centralises all decision-making and law-making power to the "senior traditional leader", thus excluding community councillors and dispute resolution forms that exist at lower levels in the community.

Our participation in law reform

The Kalkfontein Community Trust will participate in the rewriting of a new land tenure law when it is done in terms of the procedure prescribed by the Constitution and with the wording that will give real security of tenure for the occupiers and owners of the land.

On 17 July 2010 our Kalkfontein Trust met in our village with the other community leaders that were applicants in the CLRA court case, leaders of surrounding villages that are also affected and the organisations that supported us over 6 years of the court case such as LAMOSA, Nkuzi and Rural Women's Movement. We agreed that any new land tenure law that replaces the CLRA must follow two principles:

1 It must not be assumed that traditional councils should get extensive new powers of land administration, or that communities must accept traditional councils as default land administration bodies. Communities must choose.

2 The recognition of living local customary law must be a central feature in any new system to comply with the constitutional requirement for tenure law reform. Any new law must do away with unconstitutional statutory powers that were created under apartheid and re-establish the system of customary law that regulates communal land on the ground.

But in the meantime we remain concerned that our land will still be subject to the control of a traditional council which, as we said in the court case before the Constitutional Court, we consider to be incapable of administering our land and our affairs for the benefit of the community.

As a community, we would like to say to our government that there are thousands, if not millions, of voiceless Black land owners out there in the countryside. There is no one who can articulate and present their aspirations and needs. We propose that:

1 a relevant structure should be constituted in order to address issues related to private communal land ownership where the private owners are not affiliated to or wish to be affiliated to traditional councils and traditional leaders;

2 the elections that are provided for by the TLGFA should be on a 50 – 50 basis, ie 50% elected and 50% appointed by the royal family of the community, if the community has a legitimate royal family;

3 we humbly request that the portfolio committees come down to our villages so that they can get firsthand knowledge on the ground.

Attention: Honourable Chairperson Stone Sizani,
Portfolio Committee on Rural Development and Land Reform
Date: Monday, 19 July 2010

Initial Submission on the Repeal of the Black Authorities Act of 1951

By Solomon Mabuza,

Silwanendlala-Ubuntu Farmers Agricultural Co-operative Ltd.

1. Introduction

I am Solomon Jaftha Mabuza. I come from Buffelspruit Village under the Nkomazi Local Municipality in Mpumalanga Province. The Village falls under the Matsamo Tribal Authority. In my community, our real chief (Mr. Matsafeni Norman Shongwe), is not in charge of the tribal authority. He is the son of the late chief (Mr. Amos Tinhlonhla Shongwe) and is supported by the community at large. But, since his father's death in 1981, the tribal authority has been run by regents. Now, the tribal authority is run by people of the same surname who have chased the chief away. This matter was taken to the former Premier, Matthews Phosa, who promised to fix this, but his term ended before he did so. The real chief has committed himself to leading the community democratically. But, the people who are in the tribal authority now are abusing the power given by the government and they refuse to let him back.

I am making this submission because I see that there is no change in governance in the area that I come from. It is not directly government's fault that there is no change, but it is because the tribal authority uses laws that were legislated by the apartheid government: the Black Administration Act 38 of 1927 (which allowed for forced removals) and the Black Authorities Act 68 of 1951 (which gave tribal authorities the power to control the lives of black people in the rural areas).

We were trusting that the present government would bring changes but it has given more powers to the traditional leaders, for example with the Traditional Leadership and Governance Framework Act of 2003 and the Communal Land Rights Act of 2004. Now, this Traditional Courts Bill follows, which will stop us from even complaining about the wrongs of the traditional authorities because we will be forced to take our complaints to the same traditional authority that we are complaining about. But, we were there in the elections of 1994, and we voted for this democratic government. Now, we are surprised as to why we are being left behind and not being accommodated in this democracy, because now the democracy that we voted in is allowing the chiefs to take advantage of us in this way.

Right now, we ask that government does some strong monitoring in the areas where it knows that there are people who have voted it into power. We do not belong to traditional leaders; we belong to the government that we have voted into power. We asked in 1995 that customary law should be evaluated by the Constitutional Assembly to ensure that it be made consistent with the Constitution, but this was not done. Our Constitution states very clearly what the role of traditional leaders is in this democratic country, but they do not do their job of listening to the people and observing the

customary law of the communities. They interfere wherever they wish, in areas of law that are based on the government's agreements with the people themselves. In other words, they defy the customary law and the Constitution.

We rural people were grateful for the ANC dreams expressed in 1955, in the Freedom Charter. On the 27th of April in 1994 those dreams were realised. But the shock is that we are still being left behind in the apartheid regime.

2. Summary of Problems

There are many problems in our area that are caused by the tribal authority. But, here I will focus on three main problems.

One, our tribal authority is standing in the way of development in the community.

Two, the tribal authority is selling land that it does not own.

Three, the tribal authority is charging levies but not providing services for the people.

3. Problems in Detail

I will give examples of each of the problems that I have listed.

3.1. Tribal Authority Disturbing Development

Firstly, the cooperative that I represent, Silwanendlalaubuntu Farmers Agricultural Co-operative Ltd., has been blocked at a number of points from fulfilling its development purposes. As the name suggests, Silwanendlalaubuntu is a cooperative established to fight the problem of hunger in our community. The cooperative was started by a number of us who had been retrenched from work and were desperate for a way to survive. A member of our community was caught in a banana farm (Van Rose farm) stealing bananas because he was starving. He was assaulted until he died.

I said to other community members that this was not good and we should start a cooperative so that we could produce our own food rather than stealing from the farms. I showed them the area but the police were called by the tribal authority, which instructed the police to arrest me because I showed people plots for them to farm (on alternative land that was out in the bush). I was arrested and, when I arrived in court, I explained the problem that was facing the community. The court said that I must go back to the tribal authority to explain this issue. When I explained to the tribal authority, they sent some of the councillors to come and see the area. These councillors said that the area was fine and reported it back to the tribal office. So, the tribal office sent us back to the community to make a community resolution. We did that on 5 May 1995.

This community resolution allows us to use 350 hectares for farming purposes, so that we could create jobs for the community. After some years, the tribal authority took the land back from us. Now, we remain with 83 hectares. The reason why the tribal authority took the land back was that they wanted to sell it. They gave it to the cattle farmers who were going to pay for the land by giving the tribal authority cows.

We are using the 83 hectares that we are left with for farming. We received assistance from the National Department of Public Works (led by the late Minister Stella Sigcawu) assisted by the Ehlanzeni District Municipality (led by the former Executive Mayor, Jerry Ngomane). They gave us R838,000 for fencing our farming field, installation of an irrigation system in 11 hectares,

installation of electricity (three-phase), installation of a water pump to the borehole, and buying of two water tanks of 10,000 litres each. But, our surprise was to see the local tribal authority instructing people to vandalise the wire fence in our farming field. This is because they want to take the remaining area (our farm) back and allocate sites there to make profit.

In 1999, the tribal authority instructed cattle owners to graze their cattle in our maizefield. We tried to explain that this was totally wrong because we were not working and we depended on the maize to make money to send our children to school and to support our families. Then, we started to plough again in the same season. They then brought the cows again, who then ate all the maize. Twenty-eight women in our cooperative marched naked to the tribal authority to raise complaints about it. The police arrested them and put them in cells. I organised a lawyer, Mr. D.J. Bosman, to represent them. I also bailed them out. The cost was going to be R14,000 (at R500 bail per person) then the lawyer negotiated for it to be reduced to R7,000 (at R250 bail per person). I drew up a statement to say to the court that the individuals were not being accused; it was the cooperative and, as the spokesperson of the cooperative, I could explain to the court what had happened. When I explained, the court understood, and we won the case so all the women were released.

Since then, the Department of Agriculture donated R150,000 for building the house in which mushrooms would be produced and for building a storeroom where we could put a fridge for storing our mushrooms after harvest. The Local Economic Development department of the Nkomazi Local Municipality also cooperated in the project and donated money for buying seeds. Then the National Development Agency approved R349,000 for assisting our cooperative to buy farming implements. The Cooperative used that money to buy a tractor, two ploughs, one disc, one ridger and water pump etc. On the 21st of June 2010, the Mpumalanga Agricultural Skill Development Training department donated a new tractor, with a plough, slasher and a mentor to help train us in farming and farm management for 12 months.

But, we are afraid because of the disturbances by the tribal authority who say that they want the mentor to go to them and be directed by them. The tribal authority stopped the Department of Agriculture (led by Mr. Moses Shongwe at KaMasimini Agricultural Extension Office) from providing us with a bulldozer for renovating the dam. The Authority says that it must be the one to control any projects of this kind; they want the money to go through them.

The government has said that it wants to use traditional authorities to implement development. But this is a problem for us because, in our tribal authority, there is corruption. The Authority does not want development for the people; it just wants money for itself. So, when community members and cooperatives like Silwanendlalaubuntu try to make real development happen in the community, the tribal authority interferes to stop that. They are taking us back to poverty; they are not taking us forward to development.

Similar things have happened with other cooperatives like Buhlebuyeza Cooperative and Litsembaletfu Farmers Association in Mzinti.

Buhlebuyeza had been granted 234 hectares of land by the tribal authority for farming purposes but the soil test showed that the soil was frail. The Cooperative then decided to build a shopping complex and industries in order to create jobs for the community. The local *induna* and his secretary, including the councillors, want to sell the land to a white farmer, Mr. Johan Cronjee. They also want to allocate stands on that site so it is confusing because we want to assist the government in creating jobs for the community but the tribal authorities are disturbing our efforts. Litsembaletfu was granted land for sugarcane farming. Without being consulted, part of their land is now being sold and used for residential site allocation.

The tribal authority also prevented Mr. John MacCormick from building a shopping complex which the Buffelspruit community had requested. Mr. MacCormick offered to pay R450,000 as community compensation. This was agreed in a resolution that he made with the community. The tribal authority then demanded that he pay this money to the tribal authority directly, instead of paying it to the Community Trust Fund, as was agreed with the community. When Mr. MacCormick refused to do that, the tribal authority sent people to defy this agreement and build houses on his site. Mr. MacCormick spent more that R1.5 million to compensate these people who were defying the community resolution. In the end, the tribal authority refused to grant him the right to build the shopping complex and they gave this business opportunity to another person. They gave this person a site right next to the site which was going to be used by Mr. MacCormick. This other person built something useless.

3.2. Tribal Authority Selling Land

All of the land that these cooperatives are using for job creation that is taken by the tribal authority is used for site allocation. This is a money-making scheme for the tribal authority. The farms of the original black farmers in Buffelspruit were also taken from them in 1986. At that time, some white people came to the tribal authority to recommend starting a sugarcane project. Instead of developing the existing farmers with this project, the local *induna* and his secretary and councillors took these farms and gave the land to other people who did not have farms. These people paid the tribal authorities money.

When the tribal authority allocates land to local people, they charge them R800. Others, from outside of the community, pay R1,500 or more. This is just for being shown the site. I have a receipt from the tribal authority for an application for land to build a shop; the charge was R1,900 for 29 x 61 meters of land. Other complaints made to the Nkomazi Advisory Centre by residents about the tribal authority say that the charge for a single stand in Jeppes Reef goes from R500 to R3,500.

Because our Village is located between Swaziland and Mozambique, there are a lot of people who come from these other countries and apply for land so that they can get free education, pensions and health services in South Africa. There is a bordergate close by (Jeppes Reef Border) but people do not use this. There is an alternative corridor and transport to get people through illegally. There are people who go through there daily, such as school children and people who have homes on both sides of the border.

A lot of the sites in our village are allocated to people from outside of the country. This is disturbing the allocation of the budget in our area because we are even more overcrowded than during apartheid. The high numbers that are coming from the other side of the border are unknown to the government. And, so, the limited resources that we have for our community are stretched even more. Examples are that we have an even worse shortage of medicines in our health centre, shortage of books in schools, high number of pensioners etc. Also, when local people want to apply for residential sites it is very difficult for them to get them because they are competing with people from the other countries who can pay the tribal authority much more money.

If local people say that they want to be accommodated in the land tenure upgrading, for changing the Permission to Occupy (PTO) and Right to Occupy (RTO) certificate system to title deeds, the tribal authority fights with us. These PTOs and RTOs were used during the apartheid regime. The time for this has passed. Today, people need more secure rights because otherwise they cannot get loans from the bank because they do not have title deeds.

3.3. Tribal Authority Charging Tribal Levies

We are made to pay tribal levies of R50 per household per year. (This is called a tribal tax.) We started paying these levies in 1949 when we were paying 25c per house. That money was used to send the chief to school because chiefs were not paid at that time. This money has now continued to be paid even though the chief completed school (including university) in 1962; it has been gradually increased to R50. Chiefs now earn an income and the tribal authority gets support from the government but we continue to pay levies which are unlawful.

Other annual levies that we pay include payment for the residential site. This is approximately R100 per household but the exact amount is determined by the tribal authority. They look at you to decide: if you do not support them, they will charge you more. You also have to pay a burial fee; this can go up to R400 if you are not supporting the tribal authority. When I left to come here, the tribal authority was going house-to-house to collect R10 each for cleaning the graves of the royal family.

There are tribal courts which convict people and fine them between R1,000 and R3,000 but this money does not help the community at all. It is not accounted for. The fines depend on whether you are a supporter of the tribal authority. If a person steals a cow and another person steals a chicken, the person who stole the chicken can be fined much more than the person who stole the cow just because they are known not to support the tribal authority. To get services from the tribal authority you must be a known supporter. Otherwise you will not be assisted. But, the tribal authority is given resources by the government to help all the people.

4. What Help Government Must Give

With all of these problems, we ask that government stop the tribal authorities from practicing the old laws of the apartheid regime. It must direct them to the Constitution, which requires democracy and says that the people must govern. We want the tribal authorities to respect the customary law of the community, not make their own law.

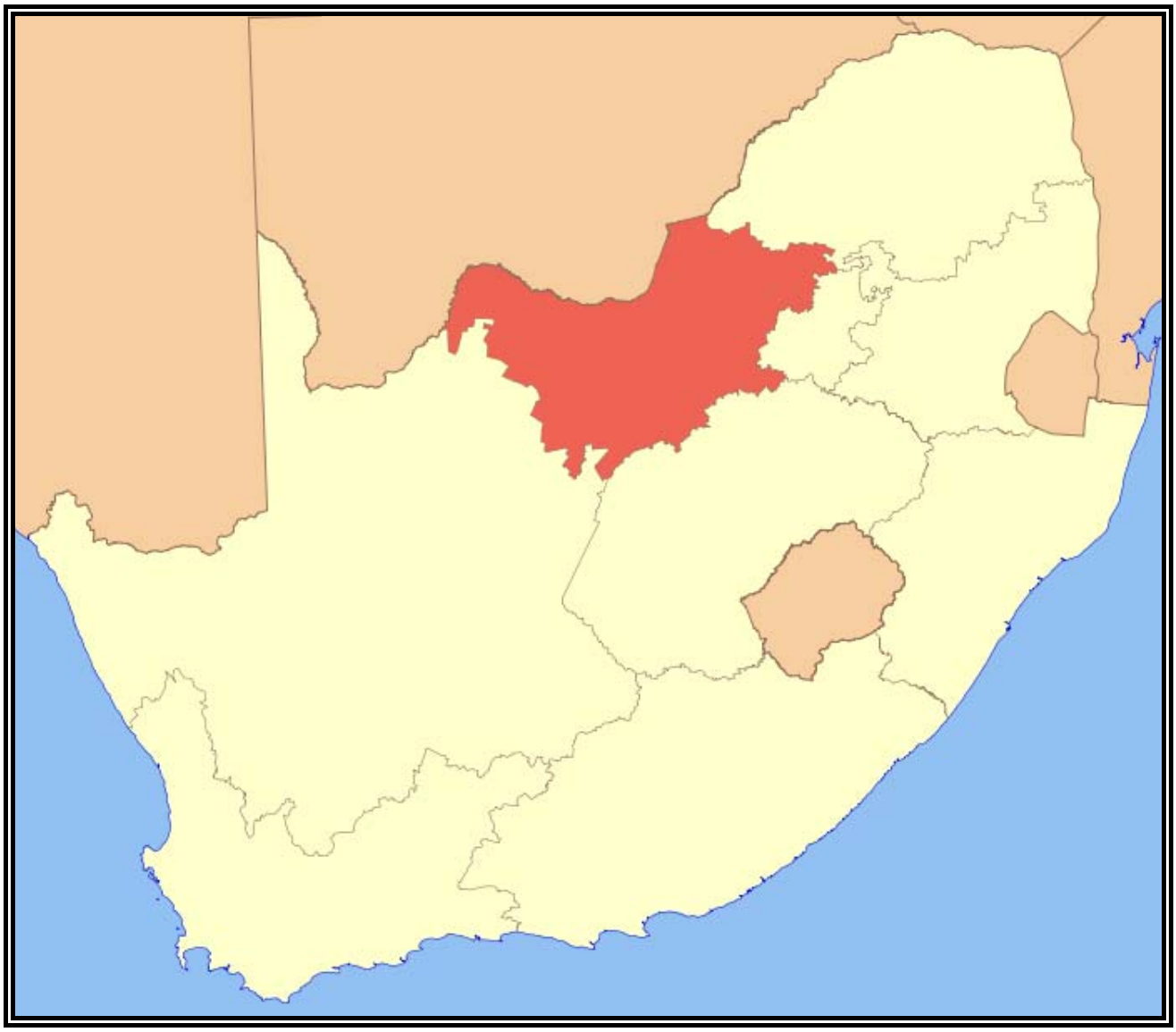
Government must also not make decisions and laws without us. We want to participate in making the laws. We want to be the ones who are making the laws and we want to be the ones who give the tribal authorities the customary laws that we need.

Government should ensure that tribal authorities are not taken over by royal families which then abuse the power. According to our custom, only the chief and a single representative come from the royal house. The rest of the traditional council is supposed to come from the 12 blocks of the Matsamo Tribal Authority area. These traditional councillors are supposed to be elected by the different community blocks. But this is not what is happening now; it is only the family members who are operating as the tribal authority.

Government must stop tribal authorities from interfering with development in the community. Tribal authorities should not have power to control development projects or to allocate land to the community. The authorities should also stop collecting levies from the people because this is double taxation: we pay VAT and then we must also pay the tribal levies. But the government is paying the chiefs and the whole staff in the tribal office, even providing stationery.

The Department of Rural Development and Land Reform and Local Government must release application forms for title deeds and give them to the people. People are ready to apply. Finally, I would like to invite this committee to come to my area and see for itself all of the problems that I have told you about.

NORTH WEST SUBMISSIONS



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SUBMISSION TO THE PORTFOLIO COMMITTEE ON RURAL DEVELOPMENT AND LAND REFORM

20-21 July 2010

Parliament, Cape Town

Submitted by Tsholofelo Zebulon Molwantwa,
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Introduction

Land Access Movement of South Africa (LAMOSA) is a federation of Community based organizations who where forcefully removed and have claimed land through the Restitution Programme. It was formed in 1991 through the Back to Land Campaign, and Barokologadi Communal Property Association is a member community to LAMOSA in the Northwest Province under the Moses Kotane Local Municipality.

Chairperson, Honourable members of the Portfolio Committee on Rural Development and Land Reform, we appreciate and welcome the Repeal of the Black Administration Act (BAA), we like to think that its repeal is long overdue in that its tentacles are already spread in the newly formulated bills. As Barokologadi Communal Property Association (CPA) we would like to bring the following scenarios to the attention of this committee, as it impacts negatively on the envisaged development plan of the restored land.

Barokologadi of Melorane

At the time of the forced removal of the community in 1950, the community was split into 4 groups and settled in 4 villages. Different villages with no real connection with the Barokologadi were incorporated into two tribal authorities under the Bantu Authorities Act of 1951. According to government records this was done for "administrative feasibility purposes".

The Barokologadi of Melorane fought and won the restitution of their ancestral land around the Madikwe Game Reserve and now holds that land under the Barokologadi Communal Property Association. The incorporated communities tried to use the new laws to address this issue, which has been problematic to date and without success.

We used the TLGFA and the Northwest Leadership and Governance Act to complain to the premier about the apartheid and homeland incorporation of the 4 groups under different tribal authorities. The community got this answer:

> *"The Traditional Authority cannot be dismantled, lest floodgates of problems are opened", and "this would create new administrative problems".*

Our community expected better from the new laws under our constitution. The wrongs done under the Bantu Authorities Act must be undone. We could get our land back but we cannot get our community back.

> I, TZ Molwantwa, was born in 1944 at Melorane near Zeerust. I grew up, I was "given" [in Setswana tradition], in my grandmother's household. My grandmother, Baitse Ngwatoe [1880 – 1967] was the first child of the Kgosi Thari [1800s – 1930s]. She would have been the kgosi if we had a democratic constitution at the time. I do not want to be a kgosi but I am telling you this to show that I am rooted in the community.

When I was 6 years old our community was moved by force from Melurane. I remember some of the events and my family still talks about it. The forced removal process included:

- Impounding of cattle... I saw this;
- Fencing across the village and arrests for trespassing for crossing the fence to fetch water;
- Government trucks came to load our people and their possessions;
- We started with nothing in the new villages.

The first Scenario: Barokologadi Tribal Authority

Under the Black Authorities Act (BAA), four communities were clustered under the Barokologadi Tribal Authority, though they themselves did not relate to the Barokologadi. Two of these communities, Ramotlhabe and Silkaatskop, were landowners who bought their own private farm and had their own community authority, which was incorporated under the Barokologadi Tribal Authority.
Two other communities, living on state land in the proximity of the Barokologadi tribe, also had their Community Authority with affinity to the original main tribe e.g. Nkaipaa (Bafurutshe) and Sesobe (Bakwena) commonly known as Nooitgedacht

Second Scenario; Barokologadi Ba-Obakeng Community

This Community is part of the Barokologadi Tribe, which, during forced removals of the Barokologadi Tribe, were moved from their ancestral land Melorane. They went to stay in a private farm called Spitskop (Motlollo). Later during the former Bophutatswana era, they were allocated land at Obakeng (Volgestruisdraai) and because of their proximity to the Batlokwa Tribal Authority, they agreed to be served by the Batlokwa Tribal Office for administration purposes as their tribal Authority was far from them with no proper roads to reach the office. Since our democratic Government they have been trying in vain to regain their place in the Barokologadi Traditional Administration.

The changing of boundaries and clustering of these communities under the abovementioned tribal authorities brought about tensions, which have escalated to date:

1. One of the reasons is that they do not share any traditional values with these tribal authorities and are forced to observe and practice the traditions and value systems of this tribe. They feel they have been made second-class subjects under this authority.
2. Whilst they were made to pay levies to the Tribal Authority there was no service rendered to them, preference with service delivery was always been given to the main tribe.
3. There is nothing to show how the revenue benefited them, no financial reports are provided.

Given the above, these communities are agitating to be released from these Traditional Authorities and have made submissions before the Portfolio Committee in 2003, stating their

intention, and this has been blocked at every corner. A response letter was received from the Premier of the Northwest in 2004 (Ref: 11/2/10//3/14 (183) Subject: Problems at Nkaipaa).

In this letter to the Chief Director of Legal Services the then Chief Director of Traditional Leadership and institutions concluded: "The claim of the Nkaipaa community to secede cannot be entertained; the Traditional Authority cannot be dismantled, "LEST FLOOD GATES OF PROBLEMS ARE OPENED".

Faced with this attitude that denies them their Constitutional rights, these communities are now revolting, the following are few examples:

- Nkaipaa Community has now resorted to legal action and has established their own administration system with their own stamps. Those who still abide by the Barokologadi Tribal Authority have no mandate.
- Sesobe and Obakeng Community are also not cooperating and have since established their own office own stamps and letterheads.
- There is also a rumour that Ramotlhabe and Ramokgolela (Silkatskop) Community also wants to unilaterally withdraw. Submissions have been made to Nhlapo Commission without any help.
- Retaliation by the traditional council influences those who have to offer services not to do so unless he is consulted first. For example, Obakeng MTN Tower project was abandoned as a result. The Municipality Ward Councilors are also in cahoots, instead of focusing on developments and service delivery, they are now indulging in these politics, and therefore the community stands to suffer.

Conclusions

We propose that the BAA Repeal Bill should include clauses that will address the above scenarios otherwise it will be a "repeal" by name only.

The TFLGA and TCB should be reviewed so as to ensure that they are not a repetition of the Black Authorities Act in disguise.

Thank you that CLARA has succumbed to the pressure from the communities and has been scrapped as unconstitutional. Thanks to those communities who never relented since the hearings in 2003 about this Act. We hope this Repeal Bill will bring relief to the communities who are still suffering injustices sixteen years after the dawn of democracy in our country.

Barokologadi Tribal Authority BAA 1951 **Traditional Council TLGFA 2003** [under Kgosi OTS Maotwe]		**Batlokwa TA / TC** [under Kgosi Matlapeng]	
	Barokologadi[1] of Melorane Barokologadi Communal Property Association CPAA		
Nkaipaa village[2] Sesobe[3] Ramuthlabe[4] Silkatskop[5]	1 Pitsedusulejang village (Hartebeestdoorn) 2Debrak 3 Katnagel	4 Obakeng[6] village	Molatedi village[7]
	Restitution farms Madikwe [part of the original Melorane]: 1 Rooderant 2 Mooiplaats 3 Tweedepoort 4 Sebele (Loteringskop) 5 Genadendal 6 Eerstepoort 7 Wolwehoek 8 Doornhoek 9 Leeuwenhoek		

[1] Barokologadi of Melorane: the Barokologadi first settled at Melorane in the 19th century before the Transvaal Boer Republic imposed its rule over the Western Transvaal. The community was removed by force from Melorane in 1950 and its land was distributed to white farmers. These farms were much later incorporated into Bophutatswana and the luxury Madikwe game reserve was established.

In 1950 the community was removed by force from Melorane, split into 4 groups and settled in 4 villages. One village was incorporated under the Batlokwa chief during the Bophutatswana for "administration purposes". Other disparate communities were incorporated under the original Barokologadi. The motive for incorporation had nothing to do with customary law or association of people. The government letters show this.

In the constitutional era part of the original Melorane land was restored to the community, but the settlement agreement by the Land Claims Commission requires that the Madikwe game reserve will continue under co management, and community members may not return to their ancestral land. The problem is that the apartheid and homelands governments incorporated communities under these tribal authorities in terms of the Bantu Authorities Act of 1951.

The imposed system continues under the new TLGFA of 2003 and the Northwest Governance and Leadership Act. The National Commission on Disputes and Claims under the TLGFA and the North West House of Traditional Leaders do not have the statutory powers to resolve the issue. In fact the new laws made the situation worse because they frustrate the rightful claim of the community to govern itself on customary matters in terms of customary law.

[2] Nkaipaa: associated with the Bafurutshe tribe of Witkleigat of Kgosi Lencoe.

[3] Sesobe: associated with the Baphalane tribe of Ramakoka stad.

[4] Ramothlabe: community members purchased the land without assistance from chiefs.

[5] Silkatskop: consists of different people with different affiliations who settled on state land.

[6] Obakeng: is Barokologadi by origin, is now administered by Batlokwa despite no association historically.

[7] Molatedi: this is the main village of the Batlokwa tribe.

Submission by Mrs Mary Mokgaetsi Pilane and Mr Mmothi Pilane of

Bakgatla baKautlwale

To

Rural Development Portfolio Committee

On

The repeal of the Black Authorities Act Bill

21 July 2010

Mrs Mary Mokgaetsi Pilane

I have been an ANC veteran since 1952. I cannot understand how, now that we have freedom, we are in a situation where a chief who has been found guilty of corruption can interdict us from holding community meetings to discuss the problems in our community.

The proverb that I know is Kgosi-ke-kgosi ka-batho. But Nyalala Pilane has no support from the people whom he governs, instead he was imposed by government, on the advice of a chief living in Botswana, as a kind of paramount over us. According to history he is not the right successor, plus we never had paramounts in the past. The work of the famous South African anthropologist Isaac Schapera confirms this.

Nyalala uses the power that he got from the government via a chief in Botswana to control the mineral wealth of great platinum deposits that rightfully belong to the Bakgatla people, and not to him. Despite having been found guilty of corruption in 2008 he somehow still manages to control the mining revenue, of which our community has never seen a penny. His power comes from the fact that when apartheid began to really bite us after 1948 the government re-defined the Bakgatla as the Bakgatla baKgafela. Before that we were all equal as Bakgatla and the name Bakgafela was not used to indicate a separate tribe. At the same time the other royal houses of the Bakgatla were converted into being "headmen" under the Bakgatla baKgafela instead of separate and independent Bakgatla royal houses as they had been previously.

My son will tell you all the steps that he and his father have taken over the years to try to protect our community and its resources from the actions of the present and previous chief, the late Tedimane Pilane. This is a story of people trying to use proper custom and consultation to contain the actions of chiefs puffed up by official power and recognition. The new laws will make it even more difficult to hold corrupt traditional leaders to account.

Mr Mmothi Pilane

My father Mainole Pilane and I have spent the last decades trying to protect our land and resources for our community. We are the descendants of the 11th house of Chief Pilane the First and we call ourselves the Bakgatla ba Kautlwale. According to history and custom we should be equal to the Bakgafela. This is a long story and it would take me a long time to explain it here. I am afraid that you would get lost in the details. All I want to say is that three commissions have heard our story and 2 of these supported our contention. But nothing came of this because the apartheid government defined us to fall under the Bakgatla Bakgafela "paramount" and we have never been able to escape this historical mistake.

In 1999 when my father tried to stop Nyalala from secretly using community funds to buy a private farm for himself by insisting that a community resolution was necessary, Nyalala excluded him from the royal council. He replaced him with a headman whom he appointed. This so-called headman Tlhabane Pilane does not even live in our area, and is not from our royal family. Nobody accepts his authority and Nyalala did not even try to introduce him to the community and hold a celebration because he knew that according to custom only our royal family can appoint our chief in consultation with the community. An outsider had to be appointed because nobody from our family was prepared to go along with Nyalala's secret money deals. (Incidentally, Tlhabane himself admitted to the Restitution Commission that he was forced to take up the position because Nyalala wanted to block my father who was the rightful chief at the time.)

The consequences of the Bakgafela being wrongly elevated above other royal houses and of an outside headman being appointed over us have been very serious. For example:

- We tried to lodge a restitution claim to our original land at Witkleifontein – which is rich in platinum and chrome. However, our restitution claim was lodged under the name of BaKgatla baKgafela and Nyalala is now claiming that the land, which only we as the Ba Kautlwale ever occupied, belongs rightfully to him. He hired a lawyer to follow up the claim and paid him R20,000 a month, collected from the community, until my father managed to stop that.

- The other serious problem for all the Bakgatla is that the revenue from our minerals all goes to Nyalala and we never see any of the proceeds in our communities. This is one of the issues that surfaced in the corruption trial. It has been a thorn in our sides for many years.

- Plus, the proceeds from all the infrastructure that we as the Ba Kautlwale have developed on our own land at Welgewacht (where we have built 3 schools, a post-office, a community hall and a clinic) all go to the coffers of Nyalala at Moruleng in Saulspoort and we never see it again.

We have traveled high and low and approached various structures to try to solve these problems over the years. Most recently (in July 2009) we wrote a letter to Chief Nyalala, the chief magistrate, the station commander, the mayor, the chair of the North West House of Traditional leaders, the MEC for Local Housing and Traditional Affairs as well as the Premier stating that because of ongoing corruption and the historical problems inherited from apartheid the clans of the Ba Kautlwale had decided to establish themselves as a separate traditional community.

The Dept of Traditional Affairs responded by trying to set up a meeting with Nyalala and other neighbouring Bakgatla royal houses at our village on the 18th of December. However Nyalala did not come. The meeting was postponed to the 21st of December and again he did not attend. Instead, officials from Traditional Affairs and the House of Traditional Leaders came and advised us to make an application to the Premier's office. They advised us that we must invite the neighbouring villages and inform them of the process.

We thus set up a meeting of all our clans for the 6th of February to discuss the issue, take a formal resolution and write the application to the Premier. However Nyalala called the police to stop the meeting taking place on the 6th of February. On the 8th of January I was served with a summons indicating that Nyalala and his Traditional Council were interdicting us from holding any meetings because we planned to discuss "seceding from the tribe".

Since then I have had to spend all my time trying to find lawyers to defend us in court. Our matter has been postponed to the 19th of August. We managed to find the Legal Resources Centre to defend us.

We are not the only Bakgatla royal house and community that wants to be recognized as equal to and separate from the Bakgafela. The other royal houses in surrounding villages have similar complaints about the abuse of power by Nyalala, especially his abuse of mining revenue, his control over the local police station and the way he uses the police to interfere with our human rights. The situation is now so tense that various groups have planned marches and strikes over the coming months. He has no option but to rely on force because he is so unpopular. Moreover, there is widespread consensus that he is not even the rightful chief according to his lineage. He is the nephew of the previous chief and not his son. This is only one of the ways in which proper custom has been manipulated and undermined by official law.

We are very worried about these new laws that entrench the legacy of the Bantu Authorities Act. They reinforce Nyalala's disputed status and the boundaries of the Bakgatla ba Kgafela tribe. Even though he was found guilty after a long trial, he somehow seems to enjoy official protection. How else did he manage to go ahead with

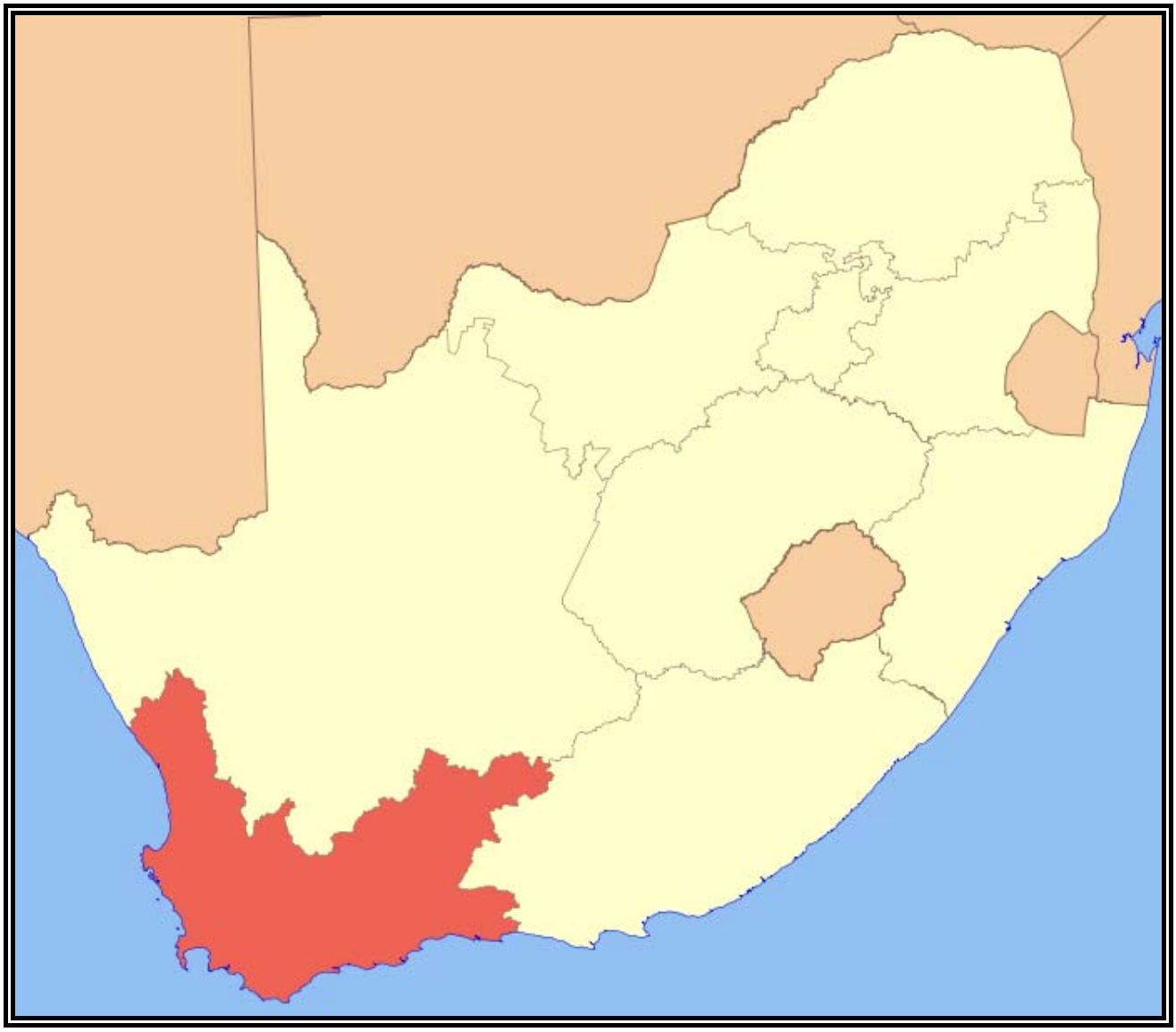
the Moruleng soccer stadium during the time that the court ordered he should no longer deal with “tribal” finances?

These laws make it very difficult for people like us to challenge abuse of power. We believe in our customs - in fact, that is what we are trying to protect. But chiefs like Nyalala are protected by laws that give them top-down state-power so that no matter what mistakes they make, the community can never correct them.

We have gone to commission after commission, only to find that the Traditional Leadership and Governance Framework Act confirms the wrong boundaries created by apartheid. Now chiefs believe they can even ban us from meeting to try to hold them to account and prove our own separate status. That is not only contrary to custom but to the Constitution. Nyalala is putting forward versions of custom that prop up his power to steal our land and mineral resources. We have a duty to our ancestors to fix this problem during our lifetimes.

I only hope that my 82 year old mother is still alive when we ultimately win.

ADDITIONAL SUBMISSIONS FROM CIVIL SOCIETY ORGANISATIONS



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11 June 2010

Initial Submission on the Black Authorities Act Repeal Bill (B9-2010)

Prepared by Dr Sindiso Mnisi, Senior Researcher

Executive Summary

LRG welcomes the repeal of the Black Authorities Act 68 of 1951 (BAA) as an important step in moving away from our apartheid past.

However, LRG submits that it is an inadequate step on its own. The submission draws attention to a set of post-1994 measures and legal provisions that, in effect, entrench and even exacerbate the legacy of the very Act that is the subject of the repeal. It asks the Portfolio Committee on Rural Development and Land Reform to take notice of these, and take decisive steps to ensure that the legacy of the BAA is done away with.

The submission shows section 28 of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA), which is spuriously titled 'transitional arrangements' and hidden in the back of the TLGFA, to accomplish two damaging things. (i) It does not discontinue the traditional authorities established by the BAA but instead provides for their continuation as traditional councils. (ii) It provides for the disestablishment of elected community authorities that exist independently of traditional authorities, forcing them under the authority of traditional authorities that they resisted being subjected to under apartheid . The TLGFA also makes it near-impossible for communities to withdraw from traditional authorities that were wrongly assigned authority over them under the BAA.

Whilst the TLGFA provides for the election of 40% of members of traditional councils, these elections have been a failure in the provinces in which they have been conducted so far: North West, KwaZulu Natal and most recently Eastern Cape. Rural people who prefer a democratic system of authority continue to object to traditional leaders' being allowed to appoint 60% of members of traditional councils.

Finally, the TLGFA permits that traditional councils can continue to impose tribal levies. This is despite the fact that the Constitution restricts this power to national, provincial and local government and requires that it be exercised subject to very strict processes that the TLGFA does

not replicate. This TLGFA permission also runs counter to the government's own statements, previously, that 'double taxation of people must be avoided [and thus] [t]raditional leadership structures should no longer impose statutory taxes and levies on communities.'

With reference to the recent Constitutional Court decision declaring the Communal Land Rights Act 11 of 2004 (CLARA) unconstitutional, CLARA is shown to build upon – and not eliminate – the BAA's boundaries and authorities. CLARA, in fact, extends the powers of the traditional authorities in the BAA to include wide-ranging land administration powers. Furthermore, as the Court found, CLARA did not involve sufficient public participation in its passing because it avoided the more demanding legislative route of section 76 of the Constitution. Section 76 gives the provinces and their constituents a bigger role to play than section 75, which was used instead. Lastly, CLARA does not show adequate respect to the systems of living customary law that it finds on the ground and seeks to 'repeal or amend' by its terms.

The Traditional Courts Bill B15-2008 (TCB) is proven to replicate the same errors made by the TLGFA and CLARA in adopting the boundaries and authority structures created by apartheid legislation – namely, the BAA and the Black Administration Act 28 of 1927. Likewise, the TCB extends the powers of these undemocratic structures, including the power to impose severe sanctions on people on whom the traditional authority is imposed. The TCB centralises all decision-making and law-making power to the 'senior traditional leader' thus excluding community councillors and dispute resolution forums that exist at lower levels in the community. It is also poor in ensuring public participation: it was drafted without consulting the rural public whom it most affects, especially women, and does not provide for their active involvement in the courts.

This submission therefore shows that, though the repeal of the Black Authorities Act is represented as a big victory over apartheid and its oppression of rural people, the *legacy* of the Act is being entrenched by recent legislation, and not repealed. As reflected in its policy speeches, government's aim is to 'institutionalise traditional leadership'. It is submitted that this policy approach actually dates right back to the 19th Century when Frederick Lugard articulated the policy of 'indirect rule'. This policy was embodied by three specific institutional dimensions: (i) the recognition of the traditional leaders (Native Administration), (ii) the establishment of Native Courts, and (iii) Native Treasuries to which the indigenous leaders collected the taxes from their subjects. This dated three-part policy with colonial origins that was later entrenched by apartheid legislation, including the BAA, is largely realised in the TLGFA, CLARA and TCB today.

In sum, what the new legislation does, especially the TCB, is re-create second-class citizenship for people living in the former homelands. They become insulated from the reach of the laws applying to other South Africans and subject to customary law as defined and interpreted by traditional leaders. The consensual nature of customary law is undermined when it is applied within fixed jurisdictional boundaries derived from the BAA as is done in the TLGFA, CLARA and TCB. This result is inconsistent with the government's stated aim of undoing the legacy of the Bantu Authorities Act.

Having demonstrated how important but insufficient the BAA repeal legislation is, we ask this committee, which is responsible for the repeal of the BAA, to engage with other parliamentary committees and structures to *effectively* eliminate the legacy of the Act. In particular, we stress the importance of proper consultation with the rural people directly affected by these laws. The legislative process has thus far been dominated by privileging the voices of the traditional leader lobby – the very sector that stands to gain from the laws – over the voices of the rural public.

1. Introduction: Who We Are

The Law, Race and Gender (LRG) Research Unit was established in 1994 as a research and training unit in UCT's Faculty of Law. The initial goal of LRG was to produce socio-legal research that informed evidence-based training of judicial officers. To this end, LRG's empirical research has included studies of the functioning of the justice system, including the Family Advocate, the Divorce Courts, unrepresented accused, lay assessors, and the family courts.

Presently, the main project of LRG is the Rural Women's Action-Research (RWAR) project. The RWAR project is part of a wider collaborative initiative that seeks to support struggles for change by rural people, particularly women, in South Africa. The project focuses on land rights, but includes related issues of poverty, inheritance, succession, marriage, women's standing and representation in community structures and before traditional courts, rural governance, citizenship and access to human rights in general by rural women. An explicit concern is that of power relations, and the impact of national laws and policy in framing the balance of power within which rural women and men struggle for change at the local level. It seeks to understand the complexities and opportunities in the processes of contestation and change underway in rural areas and aims to provide targeted forms of support to those engaged in struggles that challenge patriarchal and autocratic power relations in former homeland areas.

The project embodies a rights-based approach, focusing on the realisation of socio-economic rights. It is also concerned with citizenship and governance through its focus on women's decision-making status in community forums that allocate and adjudicate land, and on contested interpretations and applications of customary law. A key concern of the project is to support women in their efforts to improve access to, and control over land. The project thus has a livelihoods and development aspect.

2. Main Argument in Summary

LRG welcomes the repeal of the Black Authorities Act 68 of 1951 (BAA). The repeal is an important historical and symbolic step in moving away from our apartheid past. As the Black Authorities Act Repeal Bill (B9-2010) itself states, *'the Black Authorities Act, 1951 (Act No. 68 of 1951)... established statutory ''tribal'', regional and territorial authorities to (amongst other things) generally administer the affairs of Blacks'*. Beyond this symbolic repeal itself, the key issue that remains for today and the future concerns whether the repeal on its own will be sufficient to undo the legacy left by the BAA, or whether additional steps are necessary. In the context of the repeal we consider it important to draw the attention of parliament to a set of post-1994 measures and legal provisions that, in effect, entrench and even exacerbate the legacy of the very Act that is the subject of the repeal. We also draw the attention of parliament to recent policy pronouncements by government that seek to use apartheid-era tribal authorities as institutions with governance powers.

2.1. BAA Legacy Lives On

In particular, we draw attention to section 28 of the Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA). This section of the TLGFA entrenches apartheid-era tribal boundaries and authorities on a wall-to-wall basis in virtually all rural areas in the former apartheid homelands. In effect, section 28 of the TLGFA perpetuates and legitimates these apartheid-era tribal

boundaries and authorities. In other words, section 28 of the TLGFA essentially extends the very Black Authorities Act that is being repealed today, as well as elements of the earlier Black Administration Act 38 of 1927. These laws gave the Union and apartheid governments draconian powers to exercise indirect rule over millions of dispossessed black people dumped in so-called native reserves held in trust by the state. In the March 2010 Constitutional Court hearing on the Communal Land Rights Act 11 of 2004 (CLARA),[1] Deputy Chief Justice Dikgang Moseneke expressed serious concern about using *'the Black Authorities Act of 1951 as a platform for land reform'*. He described CLARA's reliance on the BAA as *'simply incredible'*.

In the context of section 28 of the TLGFA and the equivalent transitional mechanisms in the provincial laws enacted pursuant to it, the repeal of the BAA therefore falls far short of what is required to address the legacy of apartheid in the rural areas of our country. Drawing from extensive textual and empirical research in the former homelands, the LRG presents to parliament arguments and evidence that demonstrates the consequences for rural people of the BAA. We also depict the current state of affairs vis-à-vis recent legislation that ostensibly seeks to remedy apartheid's effects but instead further entrenches them.

We think that, for this repeal to be a genuine act of liberation and democratisation of the former homelands, parliament should not ignore problematic and controversial post-apartheid legislative developments. These developments essentially work together to refashion the old tribal authorities as 'traditional councils' without much transformation of their content, purpose, functions and powers. The new laws give traditional councils the very kinds of unaccountable governance powers they had as traditional authorities under the BAA which contributed to various abuses and ultimately led to their loss of legitimacy in many areas. A close examination of the TLGFA, CLARA, and Traditional Courts Bill B15-2008 (TCB) – as provided below – reveals this.

Of the BAA, the Repeal Bill states that:

> 1.2 The Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanised, and is reminiscent of past division and discrimination. The provisions of the Bill are both obsolete and repugnant to the values and human rights enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution).
>
> 1.3 The proposed repeal is also in line with the investigation and report of the South African Law Reform Commission on obsolete and redundant legislative provisions, which report was adopted by the Department of Justice and Constitutional Development.

Whilst the LRG agrees with the assessment articulated by the drafters in clause 1.2, it is submitted that the transitional mechanisms of the TLGFA (namely, section 28) preserve and entrench the 'obsolete and repugnant' boundaries, authority structures and power relations between traditional leaders and their 'subjects' established by the BAA. It is therefore inconsistent to highlight the repeal of the BAA when the structures it created are now deemed to be new 'traditional councils' under the TLGFA with enhanced powers in terms of CLARA and the TCB, as described in detail below.

This submission therefore sets out the fundamental ways in which the legislation that government has enacted to replace the BAA has in large part reinforced the apartheid architecture. This recent legislation has thus perpetuated the 'dehumanisation and discrimination' experienced by people in the former homelands, instead of broadening constitutional values and human rights to them.

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[1] The judgment in this case is *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT 100-09, judgment delivered on 11 May 2010.

We also draw attention to the fact that, whereas the Repeal Bill states that:

> KwaZulu-Natal supports the proposed repeal of the Act on the basis that the cut-off date in clause 1 (31 December 2010) will afford sufficient time for the passage of its Bill on the Code of Local Government Law. Limpopo has not recorded any objection or identified any consequential legal vacuum.

We are concerned that, despite concerted effort, we have not been able to obtain a copy of the KZN Bill, and it would seem not to exist.

2.2. Recent Policy Pronouncements: Apartheid-Era Tribal Authorities to Gain Governance Powers

In addition to the problematic provisions of the TLGFA outlined above, the committee should also take note of recent policy pronouncements by government:

i. Response by President Jacob Zuma to the debate on his opening address to the National House of Traditional Leaders: 20 April 2010;

ii. Budget Vote by Minister Sicelo Shiceka: 22 April 2010;

iii. Speech by Minister Sicelo Shiceka to the National Council of Provinces (NCOP) on the passing of amendments to Traditional Leaders Bills: 10 November 2009; and

iv. Speech by Deputy Minister Yunus Carrim to the Traditional Councils, Local Government & Rural Local Governance Summit, eThekwini: 05 May 05 2010.

These speeches provided platforms for government to make significant policy pronouncements that build on the problematic provisions of the TLGFA concerning the powers of converted apartheid-era tribal authorities. Through their speeches, the President, the Minister and the Deputy Minister of Traditional Affairs have announced the following:

i. *'The Department of Traditional Affairs is about to release proposed guidelines on the allocation of roles and delegation of functions to traditional leaders and traditional councils by organs of state in terms of the Traditional Leadership and Governance Framework Act. All the affected Departments will have a chance to align their plans with what the guidelines intend to achieve.'* (President Zuma speech).

ii. *'The Department is also reviewing the need for implementing the Communal Property Association Act in traditional communities.'* (President Zuma speech).

iii. *'Traditional councils are meant to contribute to the system of cooperative governance'.* (Deputy Minister Carrim's speech).

iv. *'National and provincial government departments may also allocate to traditional councils roles in land administration; agriculture; administration of justice; safety and security; health; welfare; arts and culture; tourism; registration of births, deaths and customary marriages; and the management of natural resources.'* (Deputy Minister Carrim's speech).

v. *'Consideration needs to be given to making it necessary for traditional councils to be represented in ward committees, through changes in policy or regulation or legislation.'* (Deputy Minister Carrim's speech).

The above speeches allude to significant measures that will expand the powers and functions of apartheid-era tribal authorities, pursuant to the TLGFA's adaptation of the BAA model of authority. Whilst these are not yet law or official policy, should they become official, they will create a 4th tier of government that is not provided for in the Constitution.

2.3. What We Ask Parliament to Do

In light of the new laws that entrench what the BAA created and the pending government policy processes, we ask parliament to note the irony of repealing the BAA whilst its key provisions live on in new legislation as highlighted in this submission. We also ask parliament to take official notice of the concerns of the Constitutional Court regarding the reliance on the BAA's tribal authorities and boundaries as a basis for post-apartheid land reform. We urge the Portfolio Committee on Rural Development and Land Reform to draw the attention of the Portfolio Committee on Justice and Constitutional Development to the concerns raised in this submission regarding the perpetuation of the BAA in current territorial boundaries, traditional institutions and local practices in the former homelands. We also encourage this committee to take notice of the concerns tabled here as it proceeds to consider what will replace CLARA as the legislation required by section 25(6) of the Constitution.

We now turn to the relationship between the BAA, and the TLGFA, CLARA and TCB.

3. The Black Authorities Act 68 of 1951 and the Traditional Leadership and Governance Framework Act 41 of 2003

As the legislation founding the framework of the government's recognition of the institution of traditional leadership, the Traditional Leadership and Governance Framework Act establishes the primary traditional structures and their boundaries of territorial and subject-matter jurisdiction. It therefore brings these structures into being, and describes their powers and functions. This submission focuses on three areas of greatest controversy. First, it looks at the boundaries that the TLGFA establishes as marking the jurisdictions of the traditional structures founded by it (namely, the old boundaries established by the BAA for the traditional authorities instituted by same). Second, it sets out the power of taxation that the TLGFA permits the traditional authorities. And, third, it discusses the means by which the TLGFA prescribes that the traditional structures should be constituted.

3.1. Boundaries and Authority

The Repeal Bill notes:

> 1.9 The Act also affects the concurrent functional areas of "indigenous law and customary law" and "traditional leadership" listed in Schedule 4 to the Constitution. In view of the enactment of the

> Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), legislative alternatives for the provisions of the Act affecting those areas are no longer required. The cut-off periods for the continued existence of the old community, regional and other authorities mentioned in section 28(5) and (6)(a) of the Traditional Leadership and Governance Framework Act, 2003, have expired.

However, it must be noted that this is an incomplete – and, consequently, deceptive – telling of what has taken place with regard to community, regional and other authorities in the TLGFA. It could be understood to suggest that traditional authorities have been discontinued when, in fact, the TLGFA reasserts old boundaries that were established by the BAA. It does this by deeming the former traditional authorities to be traditional councils in terms of the innocuous section 3, on condition that they comply with the requirements in section 3(2) within a year of the Act's commencement, therefore before 24 September 2005.[2]

Section 28(1) of the TLGFA states the following:

> Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.

Section 28(3) goes on to deem any *'"tribe" that, immediately before the commencement of this Act, had been established and was still recognised as such is deemed to be a traditional community contemplated in section 2 ... .'* Section 28(4) continues in this same vein, stating that any *'tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council ... .'*

Finally, Section 28(5) states that

> [a]ny community authority that had been established in terms of applicable legislation and still existed as such immediately before the commencement of this Act, continues to exist until it is disestablished in accordance with provincial legislation … .

The Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (TLGFA Amendment) has extended the transitional period for traditional authorities to comply with section 3(2) of the TLGFA and thus be converted into traditional councils until 24 September 2011. This means that today the former traditional authorities have effectively become traditional councils (whether transformed or not) under the TLGFA and *'must perform the functions referred to in section 4'* of the TLGFA.[3]

As a matter of contrast with the case of traditional authorities, the TLGFA Amendment extended the existence of elected community authorities only until 24 September 2009. This means that they had ceased to exist even by the time the TLGFA Amendment was promulgated in December 2009. Moreover, an important disadvantage that elected community authorities suffer in contrast to traditional authorities is that the TLGFA only provides for their disestablishment and integration into a (sometimes Commission-approved) traditional council.[4] The TLGFA makes no provision for the continuation of community authorities. Despite the use of apparently enabling language in

[2] Traditional Leadership and Governance Framework Amendment Act 41 of 2003, Section 28(4).
[3] Section 28(4).
[4] Section 28(5).

sections 2 and 3 which suggests that it would be possible for a community authority to continue (or a 'traditional community' that is not subject to the authority of a traditional leader), this suggestion is categorically undermined by section 28(5).

That the traditional councils established by the TLGFA are the very same traditional authorities brought into being by the BAA is an uncontroversial claim. In *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*,[5] the Chief Justice notes that:

> The Black Authorities Act gave the State President the authority to *establish* "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of CLARA apply. … *It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act*, 2003 (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land. (emphasis added)

The Court finally declares that '[u]nder apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands.'[6] It is difficult to see how such an undemocratic process can acquire different (that is, democratic) significance in the present but this is what the government has tried to persuade people is the case with its adoption of the same model, in the TLGFA, used by the apartheid state in the BAA.

In summary, what the above shows is that (i) the traditional authorities established by the BAA do not in fact cease to exist but are converted into traditional councils through what is spuriously titled 'transitional arrangements' hidden in the back of the TLGFA. It also shows that (ii) elected community authorities cease to exist and are rendered a non-option henceforth.

This latter point is of great significance in light of the long history of community authorities that, under apartheid, resisted being included under traditional authorities to which they were not genuinely affiliated and whose authority they did not recognise. In the context of violent and resisted forced removals by the apartheid government and imposed traditional identities, boundaries and authorities,[7] those communities that managed to gain recognition as community authorities secured themselves some refuge from a deleterious process under an unjust regime. Now, such communities will automatically be included under a traditional council that they (still) do not recognise; yet, it will take place under a democratic dispensation that purportedly protects their rights.

Whilst it exists, the mechanism for withdrawal from a traditional council's boundaries in the TLGFA is inadequate and makes it virtually impossible for sub-groups put within disputed boundaries to withdraw. Section 7 requires that the whole community apply to the Premier for the withdrawal of its recognition as a community. It also necessitates consultation with the provincial house of traditional leaders and the king/queen having official jurisdiction over the community; this is despite that these bodies might be less than keen on supporting a sub-group's application to be recognised as independent from the traditional council and community. This therefore creates a bias in favour of traditional councils and places an unfair burden on community sub-groups (especially unfair on those that were already recognised as community authorities) to show why they ought to be permitted to be independent.

[5] CCT 100-09, judgment delivered on 11 May 2010, at para 24.
[6] *Tongoane*, para 25.
[7] See para 25 in *Tongoane.*

It is worth recalling that government has acknowledged many times the need to investigate and weed out the illegitimate traditional leaders and boundaries created by apartheid but has, as yet, failed to do so despite attempts such as the Ralushai and Nhlapo commissions. Furthermore, last we heard (23 February 2010), the President is still studying the recommendations of the Nhlapo commission. These results have yet to be released to the public.

3.2. Tribal Levies

The White Paper on Traditional Leadership and Governance[8] states that

> The authority to impose statutory taxes and levies lies with municipalities. Duplication of this responsibility and double taxation of people must be avoided. Traditional leadership structures should no longer impose statutory taxes and levies on communities.

This recognised the significant role that back-breaking tribal levies and taxes played in the subjection of black people during colonialism and apartheid.

Yet, in the TLGFA, a different approach to that articulated in the White Paper was taken. There is therefore no similar provision outlawing levies or taxes. Instead, there is a detailed description of the reporting and auditing requirements of traditional councils and their relationship, financially and otherwise, with provinces. Section 4(2) of the TLGFA prescribes that:

> Applicable provincial legislation must regulate the performance of functions by a traditional council by at least requiring a traditional council to –
>
> (a) keep proper records;
>
> (b) have its financial statements audited;
>
> (c) disclose the receipt of gifts; …

Section 4(3) then says that:

> A traditional council must – …
>
> (b) meet at least once a year with its traditional community to give account of the activities and finances of the traditional council and levies received by the traditional council.

The TLGFA therefore provides for the possibility that traditional councils will impose levies. This reverts to the long and documented history of colonial and apartheid government approaches which shored up traditional authorities' progressively oppressive powers over their people using taxation. The TLGFA permits this despite the fact that the Constitution (in sections 43 and 104) vests powers of this kind in national and provincial government only, and permits provinces to delegate only to their municipalities, as per section 104(1)(c). Chapter 13 of the Constitution, which (in sections 226 through 230A) deals specifically with 'Provincial and Local Financial Matters', anticipates that revenue will be raised only by national, provincial and local government. Strict procedures are put in place by the Constitution for Money Bills in section 228(2)(b) to check the provincial power of taxation:

[8] (July 2003) GG25438, published on 10 September 2003. Issued by Minister for Provincial and Local Government.

> The power of a provincial legislature to impose taxes, levies, duties and surcharges – …
>
> (b) must be regulated in terms of an Act of Parliament, which may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.

The TLGFA does not replicate this accountability procedure for traditional councils; their levying powers must therefore be unconstitutional. It is also submitted that this is the case despite Chapter 12 because section 211(1) subjects '[t]he institution, status and role of traditional leadership' to the Constitution.

Amongst the provinces, Limpopo has enacted legislation that explicitly creates a process for traditional council levies. Section 25 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 provides that:

> (1) A traditional council may, with the approval of the Premier, levy a traditional council rate upon every taxpayer of the traditional area concerned.
>
> (2) The levy of a traditional council rate under subsection 1 should be made known by the Premier by notice in the Gazette and shall be of force from the date mentioned in such notice.
>
> (3) Any taxpayer who fails to pay the traditional council levy may be dealt with in accordance with the customary laws of the traditional community concerned.

On the other hand, North West, Northern Cape and Eastern Cape all ban levies:

> A Traditional Council may not impose any levy to be paid by any member of the traditional community or by any section of members of the traditional community.[9]

However, their legislation permits gifts and voluntary contributions. Free State, KwaZulu Natal and Mpumalanga say nothing explicit in their legislation about levies, but do contain sections on voluntary contributions and gifts. Within the regulations for each of these provincial acts, there is no further discussion of levies or taxes.

Concerning voluntary contributions, in the words adopted by the Eastern Cape:

> (1) A traditional council may request members of a traditional community or any section of a traditional community, to make a voluntary contribution.
>
> (2) No such contribution must be collected unless the majority of the members of such traditional community have, at a meeting convened for the purpose, consented to the payment of such voluntary contribution.
>
> (3) Such voluntary contributions must only be made for purposes of financing a specific project.[10]

Most of the provinces use similar wording and, yet, while a few of the provinces mention this process (a meeting) by which such 'voluntary' contributions are decided upon, some do not. Even where a meeting is mandated, the wording of this section suggests that to call the contributions 'voluntary' is somewhat misleading as they might become binding as long as they are pursuant to a meeting and a vote.

[9] Section 30 of Eastern Cape Traditional Leadership and Governance Act 4 of 2005
[10] Section 31 of Eastern Cape Traditional Leadership and Governance Act 4 of 2005

Recent studies have shown that levying practices continue and are widespread despite the legislation above.[11] They include annual taxes, as well as ad hoc levies. Such ad hoc levies might be for the maintenance of the chief – for instance, to purchase a car for the chief, or a traditional skirt for his wife, or even to send his children to (sometimes private) school. The latter category of taxes is difficult to dissociate from the 'special rates' levied during colonialism and apartheid.[12] Other 'special' rates include fines for cohabiting while unmarried, and for falling pregnant out of wedlock; levies for the removal of mourning clothes, and for hosting a traditional feast; and charges for obtaining proof of residence, and for having an RDP house built by government for you. When people object and/or cannot pay these various taxes they are severely punished by being denied the proof of residence stamp that they need to obtain an identity document, open a bank account and function in the formal economy. They might also be brought to the traditional court where a number of traditional court fines are also charged, often at similarly exorbitant rates.

Members of rural communities complain about this being double taxation (they pay VAT and then have to pay tribal levies). They speak of finding ever-increasing and inflated tribal levies particularly burdensome in light of rural poverty and the desperate need for development rather than further extortion. Women making up the large majority of rural people, and many of them being unemployed, they complain of having to pay the expensive levies out of the minimal child, disability or pension grants that they receive from government, which worsens their poverty.

3.3. Failure to Effect Electoral Procedures

As mentioned, section 28(4) of the TLGFA provides that tribal authorities created in terms of the BAA are deemed to become traditional councils but permits them a period of seven years to adhere to section 3(2). This section requires that they change their composition to incorporate 40% elected members and ensure that 30% of the council are women (except where exemption is sought from the Premier on the basis that *'an insufficient number of women are available to participate in [the] traditional council'*).[13] This means that the senior traditional leader may select 60% of the members of the traditional council.

The elections held so far in the Eastern Cape, KwaZulu Natal and North West provinces for the 40% elected quota have been fundamentally flawed and have not complied with the provincial regulations governing them. For instance, the elections were meant to have been held throughout the Eastern Cape in early March of this year. However many traditional leaders objected to having to include elected members and many community based organisations and civics objected to the electoral process on the basis that it reinforced contested apartheid boundaries and subjected the people to largely unelected structures.

Evidence collected by LRG and concerned rural organisations shows how the traditional elections were held under conditions that fall far below acceptable standards for elections. The experiences in Peddie (Ndlambe, Nobumba and Prudhoe), Ndlambe (Mncotsho and Tshabho), King William's Town (most villages under the jurisdictions of the AmaNtinde, ImiDange, ImiDushane, ImiQayi, Khambashe and Rharhabe traditional councils) and Keiskammahoek (Keiskammahoek North) all point to the following problems:

[11] See (July 2009) Draft Report on the Consultative Process on Communal Contributions Paid in Traditional Communities Within KwaZulu-Natal, Maurice Webb Race Relations Unit, UKZN.
[12] See Native Affairs Act 23 of 1920, Native Taxation and Development Act 41 of 1925, Bantu Authorities Act 68 of 1951 and Bantu Taxation Act 92 of 1969.
[13] Section 3(2)(d).

i. The communities did not know of the proclamations by the Premier of their community's traditional community status or the purpose of their traditional council. They also were not aware of the Premier's announcement that traditional elections would be held, and his call for the nomination of candidates as required by the provincial regulations governing traditional council elections.

ii. In all these areas, there is no evidence that community meetings were held on traditional council elections that meet the 50%+1 quorum/threshold required in terms of the provincial regulations.

iii. A large number of King William's Town villages rejected the traditional elections through objection letters sent to the MEC. The same was done by several organisations (SANCO, Ilizwi Lamafama Small Farmers' Union and the Rural People's Movement). These organisations also actively met and corresponded with the MEC's office which failed to reply to the concerns they raised. Four meetings were held with the MEC who informed them that the elections will go ahead so as to show President Zuma that he is an MEC with integrity. The MEC admitted in these meetings that the traditional council elections process was not properly done. The MEC also publicly admitted that government *'failed to properly inform communities about the provincial traditional council elections'*. He did this through a press conference held a week after the traditional council elections were held.[14]

In KwaZulu-Natal we understand that there were insufficient funds to hire the IEC to monitor and support the traditional council elections. Yet, the IEC ballot boxes and other equipment were used, creating the impression that the elections were properly monitored and run by the IEC, whereas this was not the case. In North West we have been informed that the election process was supervised by the Provincial House of Traditional Leaders. We have also received complaints from ordinary people in various areas who attempted to nominate their own candidates but were ignored by the person in charge who accepted only those nominations consistent with a pre-agreed list of names.

The 60% assigned to the senior traditional leader to appoint was objected to in the process of drafting the TLGFA. Many rural people objected to this on the basis that they wanted to ensure democratic processes for the leadership structures that would prevail in the former homelands subsequent to the end of apartheid. They objected to the perpetuation of the divide between homeland areas and the cities, wherein those who live in the former would continue to be 'subjects' while those who inhabit the latter would be 'citizens'. The fact that people continue to object to it is therefore no surprise. This concern also relates back to that about the apartheid boundaries and jurisdictions of authority established by the BAA that the TLGFA preserves as shown above.

4. The Black Authorities Act 68 of 1951 and the Communal Land Rights Act 11 of 2004

The Communal Land Rights Act is the legislation that was enacted to provide for the exercise of the land administration function assigned in section 20(1)(b) of the TLGFA. This submission details some of the objections raised to CLARA, focusing specifically on concerns that relate most profoundly to the legacy of the BAA as it is expressed in the TLGFA. Namely, those concerns pertaining to traditional council boundaries, authorities and their extended powers; and the degree

[14] 18 March 2010. 'Traditional council voting fiasco'. Front page article in EC Today Newspaper. Article written by Mandlenkosi Mxengi.

of public participation in the process of CLARA's enactment and the determination of customary law.

The Constitutional Court's decision to declare CLARA unconstitutional in the challenge[15] by four rural communities against CLARA is significant here as it took these communities challenging the legislation over years for it to be realised that it was not in keeping with the Constitution. The Constitutional Court decision itself was reached on procedural grounds, as the Act had been passed by an incorrect and less cumbersome procedure in parliament (that of section 76 instead of that of section 75 of the Constitution).[16] However, some statements made by the Court in its judgment, such as those already quoted as drawing the link between the TLGFA traditional councils and the BAA traditional authorities, render the decision of substantive importance also.

4.1. Boundaries, Authority and Extended Power

Depending upon the TLGFA's boundaries, CLARA permits that the traditional council (formerly, traditional authority) might be the land administration committee[17] that will operate in terms of community rules.[18] As pointed out previously, Chief Justice Ngcobo, writing on behalf of the unanimous Court, explicitly acknowledges the continuous relationship between CLARA and the old apartheid structures imposed by the BAA.[19] Namely, the traditional councils that the TLGFA establishes are in fact the very same old traditional authorities that existed under the Bantustan system which was formed on the back of forced removals, and imposed boundaries and authorities. The Court is alarmed by this troubling continuity. Yet, in fact, people have repeatedly spoken out against the TLGFA, CLARA and TCB (which is presently before the Portfolio Committee on Justice and Constitutional Development) in attempts to draw the government's attention to this fault, to no avail. Now, in this judgment the Court not only recognises the adoption of the BAA model of black administration but identifies that the unconstitutional CLARA even *extends* powers[20] held by the apartheid-established bodies of authority.[21] In the Court's words,

> traditional leaders, through traditional councils, will now have wide-ranging powers in relation to the administration of communal land. [22]

[15] *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT 100-09, judgment delivered on 11 May 2010.
[16] *Tongoane* at paras 110-12.
[17] Section 21(2).
[18] Section 19.
[19] *Tongoane* at para 24-5.
[20] *Tongoane* at para 80.
[21] *Ibid* at para 22:

> "The Black Land Act and the Development Trust and Land Act, together with the regulations made under these statutes, must be read together with the Black Administration Act, 1937, and the Bantu Authorities Act, 1951 (now the Black Authorities Act). The latter statute formed part of the colonial and apartheid legislative scheme for the control of African people. … As will appear below, the Black Authorities Act established a tribal structure for the administration of African people in African areas."

[22] *Ibid* at para 80.

4.2. Lack of Public Participation in Making of Act and Development of Customary Law

The Court found the process by which CLARA was passed wanting on the basis that the provinces had been excluded from playing the weighty role that the Constitution assigns them in the passing of legislation that affects their constituents.[23] Therefore, in its statements, the Court emphasised that 'our Constitution manifestly contemplated public participation in the legislative and other processes of the National Council of Provinces, including those of its committees'.[24]

In the Court's retelling of the history of the formation of the former homelands, the counter-democratic (and thus unconstitutional) nature of the process of CLARA's promulgation is situated within the important context of the undemocratic policy move of basing the TLGFA on the BAA, as set out above. And, the Court goes to great lengths to show the significance of this.[25] Democracy, freedom and public participation are the cornerstones of our constitutional order. They are values that ought not to be deviated from in the manner in which the government has done in these pieces of legislation.[26]

Simultaneously, in this strong claim made for the respect of public voices in the making of laws that affect rural people, the Court reaffirms the sentiments articulated in its previous decisions. In this line of decisions, it has duly recognised customary law as a legitimate source of South African law in terms of the Constitution.[27] The Court points out specifically that the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.[28] This

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[23] *Tongoane* at para 66:

> "These procedural safeguards are designed to give more weight to the voices of the provinces in legislation substantially affecting them. But they are more than just procedural safeguards; they are fundamental to the role of the NCOP in ensuring 'that provincial interests are taken into account in the national sphere of government', and for 'providing a national forum for public consideration of issues affecting the provinces.' *They also provide citizens within each province with the opportunity to express their views to their respective provincial legislatures on the legislation under consideration. They do this through the public involvement process that provincial legislatures, in terms of section 118(1)(a) of the Constitution, must facilitate.*" (emphasis added)

[24] *Tongoane* at para 106; also see *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 211.

[25] See *Tongoane* at para 25, where the Court describes:

> "Under apartheid, these steps were a necessary prelude to the assignment of African people to ethnically-based homelands. … Section 5(1)(b) of the Black Administration Act became the most powerful tool to effect the removal of African people from 'white' South Africa into areas reserved for them under this Act and the Development Trust and Land Act. And as we noted in *DVB Behuising*, '[t]hese removals resulted in untold suffering.' The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land."

[26] See sections 1 and 7 of the Constitution. Also see *Doctors for Life* at para 211, and *Tongoane* at paras 106-07.

[27] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 307-8; *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others* 2005 (1) SA 580 (CC) at para 45; *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC), at para 20; *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) in para 52; *Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)* at para 45.

[28] *Tongoane* at para 90 reads:

connects with the concept of public participation by signifying the importance of the role of the public, not just in the process of promulgating legislation, but also in its implementation and/or the ongoing development of complementary living laws.

This aspect of the judgment is therefore a welcome reminder to the government not to exclude the multiple voices that form the essence of the democracy established by our Constitution. And, whereas, in the BAA, the use of the term *'with due regard to native law and custom'* was nothing but mere lip-service, the Court seems to enjoin the government not to allow the term to disintegrate into a mere platitude in the present day. As it has declared in previous judgments, therefore:

> As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development *by communities of their own laws* to meet the needs of a rapidly changing society *must be respected and facilitated*.[29] (emphasis added)

CLARA permits traditional structures that were artificially formed and centralised by the apartheid state in order to effect its own rule over the majority black population to make decisions about land rights in communal areas at the macro level.[30] In doing so, it runs counter to the customary law lived and developed by communities themselves. This is because customary law in fact often provides for a more inclusive model of decision-making concerning land: this takes place at multiple levels of the community depending on who uses the land. CLARA also hereby gives the most decision-making power to structures in which women may have the most limited participation. (This is as compared to the greater participation women might enjoy in forums existing at lower, less intimidating levels of authority.) This means that women might not have an equal say in how land rights are determined and structured. CLARA therefore perpetuates the patterns of oppression and exclusion suffered by women under apartheid. These were entrenched by the formalisation of patriarchy that was eventualised through the establishment of the male-only and 'hostile-to-women' structures of authority established by the BAA.

> "whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community."

Also see para 79 (as well as para 89):

> "the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend."

[29] *Shilubana* at para 45.
[30] Section 24(2).

5. The Black Authorities Act 68 of 1951 and the Traditional Courts Bill B15-2008

The Traditional Courts Bill seeks to regulate the customary courts that operate in communal areas and bring them in line with the Constitution. However, in adopting a model that is very much in keeping with the centralised and patriarchal framework that the BAA (and Black Administration Act 38 of 1927) ingrained, it rather entrenches the fatal flaws imposed during colonialism and apartheid. Moreover, by operating in tandem with the TLGFA it entrenches the same contested BAA boundaries yet again. It also gives extraordinary powers to traditional leaders to punish anyone who attempts to challenge their apartheid-manipulated boundaries. The problems with the TCB may be summarised as follows. Firstly, power is centralised to a 'senior traditional leader'. This means that the powers of an essentially undemocratic court are extended even to the point of also permitting oppressive sanctions. These sanctions include the continuation of fining practices, which, as mentioned beforehand, occur presently to exploitative degrees (disproportionately affecting women). Secondly, choice is denied people in that opting out of traditional court jurisdiction is not permitted. Again this relates back to the fact that the jurisdictional boundaries established by the BAA are retained and rural people in the former homelands are forcibly 'subjected' to traditional authority in the former homelands.

It is submitted that some statements made by the Constitutional Court in *Tongoane* shed light on the TCB's inconsistency with the Constitution. This is for three main reasons. Firstly, like CLARA, the TCB is founded on jurisdictional boundaries established by the BAA. Secondly, it was also drafted without consulting ordinary rural citizens, but only traditional leaders. Ordinary people are therefore forcibly confined to arbitrary apartheid jurisdictions. Thirdly, the TCB does not respect the living customary law practices that exist on the ground. It too is therefore likely to be found to be unconstitutional. In light of the above, the President's assurances to the National House of Traditional Leaders that '[w]e are confident that the Bill will go through Parliament this year and will mark the end of the Black Administration Act'[31] are very worrying.

5.1. Centralisation and Extension of Power, Granting Permission to Impose Extremely Oppressive Sanctions

The South African Law Reform Commission (SALRC) recommended the recognition of the contribution of respected councillors (male or female) who emerge organically from within communities at its lower hierarchical levels and have a proven track record of resolving disputes in a customary setting. Yet, first, the TCB makes no provision for the role of traditional councils and instead centralises all decision-making powers to the 'senior traditional leader'. It thereby distorts customary practices on the ground and retains the BAA model of centralisation that recognised only a nominal role for the councillors, at best. And, second, the TCB does not recognise customary courts at any of the lower levels than the community-wide chief's court.

By these omissions, it also disadvantages women. In the first case, this is because the vast majority of senior traditional leaders are men. The SALRC had therefore recommended that women's

[31] 20 April 2010. Response by the South African President to the debate on his opening address to the National House of Traditional Leaders, Pretoria.

representation in the councils that hear and decide disputes be guaranteed by law. In the second instance, it is because there are strong indications that decentralised power enables women greater possibilities for influencing the living customary law. The TCB's failure to expressly recognise the full range of traditional courts that currently operate – family, clan, ward, village councils and meetings – silences countervailing voices. It also precludes strong women councillors from emerging through participation and experience in co-existing decentralised dispute resolution forums.

Having then centralised power to the individual senior traditional leader the TCB extends this individual's powers to allow him to determine and impose heavy sanctions. Certain of these sanctions are controversial because of the nature of the far-reaching powers they imply for traditional leaders acting as presiding officers. For example, according to clause 10(2)(g), the traditional court may issue:

> an order that one of the parties to the dispute, both parties or any other person performs some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court.

5.2. Denial of Right to Choose and Restrictive Jurisdictional Boundaries

In clauses 5(1) and 6, the TCB denies rural residents the entitlement to choose their forum by preventing them from opting-out of their local traditional courts' jurisdiction. In fact, it makes it an offence for anyone within the jurisdiction of a traditional court, even a passer-by, not to appear before it, if summoned. It thereby undermines the consensual character of customary law. This, again, contradicts the SALRC's recommendation that people be permitted to opt out of traditional court jurisdiction. Instead, it supports traditional leaders' arguments that allowing people to opt out would undermine their authority. It is important to note that there is evidence to suggest that having diverse dispute resolution forums from which to choose increases the accountability of traditional courts by permitting people to avoid certain courts if they are thought to be illegitimate, or known to be biased. More than that, it must be remembered that the authority that might be thought to be undermined by allowing people to opt out of traditional court jurisdiction is one established by the Black Administration Act and BAA.

I shall not recount the argument already repeatedly made above concerning the nature of the jurisdictional boundaries that exist to demarcate the boundaries of authority of traditional leaders in South Africa today. Suffice it to say that, as with CLARA, the TCB adopts the same jurisdictional boundaries reinforced by the TLGFA, which in turn were first delineated in terms of the BAA. Hence, these are the same boundaries which the repeal of the BAA will not affect, regardless of representations that attempt to convince us that the BAA is being repealed in favour of constitutional alternatives.

5.3. Lack of Public Participation in Drafting of Bill and Running of Courts

Given the importance of public participation recently articulated by the Constitutional Court it is evident that the TCB falls short of adherence. The memorandum to the TCB itself states that in its drafting the Department of Justice and Constitutional Development consulted with traditional

leaders at national and provincial level – i.e. people who make up the very institutions at issue – but not with ordinary people from diverse quarters.

Women and children make up most of the rural constituencies, and often find themselves in a vulnerable position in relation to male-dominated traditional institutions as those formed by the BAA. Women face particular problems in customary courts and are therefore the people most adversely affected by the TCB's failings. Failure to consult them is apparently reflected in many of the problems with the TCB.

Finally, the powers given to traditional courts in the TCB override in-built indigenous protections that serious matters such as the cancellation of land rights be debated with the community at various levels, and ultimately require the endorsement of a general meeting of the entire community. Again, the TCB does not recognise these levels of debate and decision-making and instead vests legal authority exclusively in the senior traditional leader in his role as presiding officer. To this extent, the TCB is at odds with customary principles. Instead, it favours the more patriarchal and centralised notion of power that is embodied in the BAA's model of traditional authority. It also undermines important checks and balances built into customary dispute resolution processes.

While the TCB presumes to conform to the Constitution, it offends several constitutional entitlements. And, although it is said to give expression to customary law, in fact, it has more in common with the legacy of apartheid legislation that it is meant to replace than with the reality of negotiated change and living customary law on the ground.

6. Conclusion

We have set out in great detail here how the legislation adopted to regulate the realm of traditional leadership in democratic South Africa has largely followed in the footsteps of the BAA, rather than overhauling the BAA's legacy. In sum, what the new legislation does, especially the TCB, is re-create second-class citizenship for people living in the former homelands. They become insulated from the reach of the laws applying to other South Africans and subject to customary law as defined and interpreted by traditional leaders. The consensual nature of customary law is undermined when it is applied within fixed jurisdictional boundaries derived from the BAA as is done in the TLGFA, CLARA and TCB. This result is inconsistent with the government's stated aim of undoing the legacy of the Bantu Authorities Act.

A final note on the three pieces of recent legislation and where they fit in the government's approach to the former homelands. There are several statements in government that are worth noting, about 'the institutionalisation of traditional leadership'. The common phrases used include '*recognition* and *promotion* … of the institution of traditional leadership', which appears repeatedly along with the words, 'status', 'role and place' (of the institution, of traditional leadership, traditional councils and traditional leaders). The interesting thing is how the 'institution' is embraced as fitting into the government's goals whilst scarcely reflected upon as the bastion of the legacy of the BAA and other apartheid-building pieces of legislation. For instance, in President Zuma's speech at the opening of the National House of Traditional Leaders on 23 February 2010, he noted that government has 'passed several laws since the founding of our democratic republic, to give effect to [the] constitutional *recognition* of *the institution* of traditional leadership.' Furthermore, the COGTA budget vote document in February 2010 repeatedly mentions '*promoting* the role and place of *the institution* of traditional leadership' as its objective and only once mentions

'empowering communities', thus making it clear that the establishment of the new department of traditional leadership is mostly about '*institutionalising* traditional leadership'.

It is unfortunate that the government should fail to see that 'the institutionalisation of traditional leadership' dates right back to the 19th Century when Frederick Lugard articulated the policy of 'indirect rule'.[32] This policy was embodied by three specific institutional reforms: (i) the recognition of the traditional leaders (Native Administration), (ii) the establishment of Native Courts, and (iii) Native Treasuries to which the indigenous leaders collected the taxes from their subjects. As demonstrated above, this dated three-part policy with colonial origins that was later entrenched by apartheid legislation, including the BAA, is largely realised in the TLGFA, CLARA and TCB today. In light of this evidence, to make as if the repeal of the Black Authorities Act is a big victory over apartheid and its oppression of rural people is disingenuous when, in fact, as shown above, the legacy of the BAA is being entrenched and not repealed.

It is for the above reasons then that we ask parliament to:

i. Take notice of the fact that the key structures and boundaries created by the BAA live on in the TLGFA, the CLRA and the TCB;

ii. Take notice of the concerns of the Constitutional Court regarding the reliance on BAA tribal authorities and boundaries as a basis for post-apartheid land reform;

iii. Take notice of the implications of recent government policy pronouncements that would confer governance powers on BAA-inspired traditional councils; and

iv. Take clear and decisive steps to do away with the legacy of the BAA as perpetuated in the cited laws.

We ask this committee, which is responsible for the repeal of the BAA, to engage with other parliamentary committees and structures to *effectively* eliminate the legacy of the Act. In particular, we stress the importance of proper consultation with the rural people directly affected by these laws. The legislative process has thus far been dominated by privileging the voices of the traditional leader lobby – the very sector that stands to gain from the laws – over the voices of ordinary rural people. We have consistently asked the Portfolio Committee on Justice and Constitutional Development to undertake proper consultation with rural people about the TCB, but to no avail so far. President Zuma has subsequently announced that the Bill will be passed by the end of this year. As shown, this course is not in keeping with the democratic values South Africa espouses. By contrast, the requests we put above are consistent with the motivation given for the repeal of the Bantu Authorities Act.

[32] Lugard, F. J. D. (1922). The Dual Mandate in British Tropical Africa. Edinburgh, William Blackwood and Sons at 200-03.

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Your Ref:
Our Ref: HJS/mc/

21 July 2010

The Chair
Portfolio Committee on Rural Development and Land Reform
Parliament
Cape Town

Att: The Secretary
Ms. P. Nyamza
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Dear Mr Sizani

20 July 2010: Public Hearings on the Blacks Authorities Act Repeal Bill

The Legal Resources Centre is a non-profit public interest law firm. Much of the work of our organisation is devoted to representing poor rural communities, and our comments on the Blacks Authorities Act Repeal Bill [B 9—2010] ISBN 978-1-77037-639-7 ["BAA repeal bill"] are on behalf of such communities. Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.[1]

We submitted comments to the department and your committee on the Communal Land Rights Bill in 2003, and to the relevant committees on the Traditional Leadership and Governance Framework Bill in 2003 and the Traditional Courts Bill in 2008. The BAA repeal bill is of course related to the package of rural governance statutes relevant to rural communities.

1 *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The act was declared unconstitutional by the Constitutional Court in May 2010. The LRC represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act including the communities of Daggakraal, Pilane, Xalanga and others. The LRC represents numerous rural communities in land claims, including litigation in the Land Claims Court.

We wholeheartedly endorse the overall objective repeal of obsolete statutes and the current and future series of public hearings and debate about any new bill dealing with communal land and the Traditional Courts Bill currently under consideration by your sister committee. But such repeals of old statutes and the introduction of new statutes occur within a particular historical context. Also, new law must comply with the letter of the Constitution and serve its spirit. It is in this light that we make our observations below.

We also attach a longer outline of the historic and current legal regime, and the relevance of the constitutional regime to governance systems and their impact on rural communities. Our concerns with sections 5 and 20 of the Traditional Leadership and Governance Framework Act are also elaborated upon.

The current context for law reform:

a) The order and the judgment of the Constitutional Court declaring the Communal Land Rights Act unconstitutional have important implications for law reform. The court insisted that any new law that impacts on living customary law, must comply with section 76 of the Constitution. The provincial legislative assemblies will have to get involved and provincial hearings will have to be held. This did not happen in 2003 when the Traditional Leadership and Governance Framework Bill was considered by the Local and Provincial Government Portfolio Committee under the chairmanship of former MP, Yunus Carim.

b) Rural communities now have an opportunity to participate in the law making process. First, the Minister for Rural Development and Land Reform is preparing a new green paper policy about rural development. Once a policy has been discussed, this may lead to new draft bills prepared by the department. Any new bill on communal land tenure reform must be dealt with by parliament and the provincial assemblies which must provide for public participation which should include public hearings.

c) Opposition to the CLRA and those parts of the Traditional Leadership and Governance Framework Act of 2003 and the Traditional Courts Bill of 2008 that reinforce discriminatory and undemocratic old apartheid laws, is not opposition to the institution of traditional leadership, or to customary law. There is widespread acceptance of the valuable role played by customary law and the need for indigenous legal processes to be recognised and supported. Our concern relates to the distortion of customary law, and the way in which the new laws bolster unilateral chiefly power and undermine indigenous accountability mechanisms. The laws are criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan political system and used to justify the denial of equal citizenship to all South Africans.

d) The resolutions of the African National Congress 52nd National Conference held in Polokwane in December 2007 are relevant to the lawmaking initiatives of the governing party in Parliament. The TLGFA and its provincial counterparts predate the Polokwane resolutions, and they are the subject matter of the resolutions. Various resolutions under the chapter heading Rural Development, Land Reform and Agrarian Change and resolution 84 under Social Transformation, read as follows[2]:

2 Other relevant resolutions include a) the curbing and monitoring of policing functions of the “traditional authorities” and their alignment with SAPS functions; b) “there must be an alignment of traditional courts with

"Strengthen the voice of rural South Africans, empower poor communities and build the momentum behind agrarian change and land reform by supporting the self-organisation of rural people; working together with progressive movements and organisations and building forums and structures through which rural people can articulate their demands and interests...

"Build stronger state capacity and devote greater resources to the challenges of rural development, land reform and agrarian change...

"Ensure that the allocation of customary land be democratised in a manner which empowers rural women and ***supports the building of democratic community structures at village level****, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued.*

"84 The allocation of customary land be democratised and should not only be the preserve of the traditional leaders"

The context of the BAA Repeal Bill

1. The Black Authorities Act of 1951 represented the Apartheid government's abuse of parliamentary sovereignty in order to enable state organs and their delegates to yield power arbitrarily and without question. When those in the position of power may define for themselves what that power entails, their subjects become unable to defend themselves against the potential of tyranny.

2. History tells us that this abuse was applied as a means of subordinating the majority black population of South Africa. The Black Authorities Act represented the arbitrary subordination of the rural black population: arbitrary, as in the words of Albert Luthuli, it was 'neither democratic nor African'. The BAA Repeal Bill describes it thus: "The Act was a legislative cornerstone of apartheid by means of which Black people were controlled and dehumanised, and is reminiscent of past division and discrimination".

3. As many other colonial attempts to 'codify' custom, the BAA represented a distorted version of the custom tailored to serve the needs of an all powerful minority government that did not even allow the subjects of this Act the most basic rights of citizenship.

4. The end of the tyranny of Apartheid was marked by what has been described as a 'constitutional revolution' based on three principles: civil and political rights to be accorded to all regardless of race; the doctrine of parliamentary sovereignty to be replaced by that of constitutional supremacy[3] and the strong centralised government replaced by a decentralised system of governance.

5. The repeal of the Black Authorities Act signals one of the significant final steps in removing the traces of parliamentary sovereignty and 'indirect rule' from our democracy. However, if the repeal is to be more than a mere symbolic act, it is

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our new constitutional dispensation and particular attention must be paid to the incorporation and development of our indigenous law"; c) "traditional leaders should be mobilised to play a more significant role in promoting peace and stability in rural areas".

3 Section 2 of the Constitution declares it the "supreme law of the Republic".

crucial that the Act that is to fill the void left by the repeal will be true to the principles of a constitutional democracy and will ensure that, as far as possible, the damage done by the BAA, is undone.

The nature of the Bantu Authorities Act of 1951

6. The Bantu or Black Authorities Act was enacted to 'provide for the establishment of certain Black authorities and to *define their functions'*. While the system of parliamentary sovereignty meant that these authorities could be created and their functions defined merely by the enactment of a statute, there was further no need to align these functions with any constitutional principles.

7. In a constitutional democracy, power and authority can only be lawful if it is derived from the Constitution – any statutorily created function that cannot be traced back to a constitutional mandate, is unlawful. As such, the BAA is a glaring example of the difference between the old order and the new: it is no longer possible for the legislator to – at will – 'establish' authorities and 'define' their functions.

8. However, the repeal of the Black Authorities Act should not merely be a formal exercise erasing a law that would be procedurally inconsistent with our new constitution. The repeal rather opens the way for a new system of rural traditional leadership to be established which is sourced from the Constitution and that is thus consistent with all constitutional principles and values.

9. We propose that an exercise for planning a new system would involve the fresh establishment of traditional councils taking into account customary law and the constitutional principles. This means that section 28, which allows for the continuation of the illegitimate BAA tribal authorities, should be repealed by this Repeal Bill. Further, section 5 and 20 of the TLGFA should direct provincial law makers to ensure the alignment of traditional council roles with the governmental powers and functions of local and provincial government. The Constitution prohibits overlap in this regard.

The Constitution as the source of traditional leadership

10. The Constitution provides for traditional leaders in chapter 12:

211 Recognition

(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

212 Role of traditional leaders

(1) National legislation may provide for a role for traditional leadership as an

institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders; and

(b) national legislation may establish a council of traditional leaders.

11. Section 211(1) protects the "institution, status and role of traditional leadership, *according to customary law*" – and not a statutory distortion of such customary law.[4] Customary law is thus the principal source of recognition of traditional leadership in terms of the Constitution – and subject to the Constitution.

12. Section 212(2) provides for the only basis for the conferral of any new statutory role upon traditional leaders outside of residual customary law role recognised in section 211.

13. It should be noted that the Constitutional Court has held that the 'role' of traditional leaders envisaged by section 212(2) of the Constitution does not include the governmental role they played (partly in terms of the BAA) under Apartheid – and therefore national legislation providing for these roles may not include governmental 'powers and functions' awarded to the traditional leaders in terms of apartheid legislation.[5]

14. In summary, any authority that traditional leaders have must be grounded in customary law. Any national legislation providing for a role for traditional leaders outside of customary law may not provide for any governmental powers.

15. This interpretation is consistent with section 41(1) of the Constitution that provides that "in the Republic, government is constituted as national, provincial and local spheres of government" - with no reference to an additional sphere of government constituted by traditional leadership.

16. There are very important reasons why governance should never be extended beyond the spheres provided for in the Constitution. Accountable governance is a central feature of our constitutional democracy. Accountability takes various forms: from the recall of leaders and elections to motions of no confidence. The institution of traditional leadership as regulated by the Traditional Leadership and Governance Framework Act does not allow for such checks and balances and neither for countervailing decision making institutions under customary law. In these circumstances, traditional leaders cannot be held accountable under statute or customary law.

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4 In *Shilubana v Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45: *'As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated*'.

5 The Constitutional Court held: *"Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words 'powers and functions' in the first sentence of the CPXIII. The non-derogation provision in CP XVII would represent a surprisingly oblique way of achieving what the framers of the [constitutional principles] could have done directly. …"*

17. In addition, we submit that the provisions of the Traditional Leadership and Governance Framework Act, and in particular sections 5 and 20, confer powers that are broad and extend beyond those which would be conferred upon a traditional leader by customary law. They are generally of a public, governmental character and fall within fields of legislative and executive competence in the national and provincial spheres of government.

The Constitution as the guarantor of fundamental human rights

18. The BAA Repeal Bill states that the "provisions of the Act are both obsolete and repugnant to the values of human rights enshrined in the Constitution of the Republic of South Africa, 1996". While this assertion is broad, we are privileged to have had the opportunity yesterday and today to hear from some of the people on the ground what the specific impact of the provisions of the BAA on the rights of rural communities is. We should ensure that the new legislation does not fall into the same traps.

19. The legislation that will be enacted to fill the void left by the BAA – to the extent that it indeed does leave a void, as some of the institutions it created were explicitly linked to the creation of homelands and are now thus irrelevant – must emanate from the Constitution and be consistent with the values and principles it upholds.

20. The Constitutional Court in an earlier judgment concerning the certification of the constitution rejected the argument that tribal authorities created by apartheid statutes kept all their powers and remained constitutional and legitimate governance institutions.[6] In the *Tongoane* judgment the Chief Justice emphasised the relationship between the apartheid tribal authorities and the newly named traditional councils:

> *The Black Authorities Act gave the State President the authority to establish "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of CLARA apply. … It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 2003 (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land.*

21. Much of the substance of the institutions, and their powers and functions created by the BAA are confirmed and continued by post-apartheid legislation including the Traditional Leadership and Governance Framework Act and its provincial counterparts. It is hard to find justification for this development: it is common cause that the BAA was not a legitimate codification of customary law, practice or even of the status quo of the rural areas at the time of its enactment[7] and therefore it cannot be said that its contents deserve to be entrenched as customary law or as the historical continuation of a situation that predates Apartheid.

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6 *In Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 774 (CC).

7 See for example the boundaries declared by the BAA.

22. We repeat ourselves: the repeal of the Black Authorities Act should not merely be a formal exercise erasing a law that would be procedurally inconsistent with our new constitution. The repeal rather opens the way for a new system of rural traditional leadership to be established which is sourced from the Constitution and that is thus consistent with all constitutional principles and values.

Thank you for the opportunity to address your committee.

Yours faithfully

LEGAL RESOURCES CENTRE

Per: Nomfundo Gobodo and Shirhami Shirhinda