

DRAFT SUBMISSIONS ON THE TRADITIONAL COURTS BILL ON BEHALF OF STEPHEN SEGOPOTSO TONGOANE AND THE KALKFONTEIN B AND C COMMUNITY

Introduction

I am a resident at Kalkfontein 143JR near Settlers, in the province of Mpumalanga. I am one of the leaders of the Kalkfontein B and C Community and the secretary of the Board of Trustees of the Kalkfontein B and C Community Trust ("the Kalkfontein Trust"). I make these submissions in my personal capacity and on behalf of the Kalkfontein B and C Community that are equally affected by the provisions contained in the Traditional Courts Bill ("the bill").

Our forefathers, a group of co-purchases from diverse ethnic backgrounds grouped together to purchase land in 1921 and 1923 in terms of an exemption in the Natives Land Act, which meant that the Minister of Native Affairs as he was at the time, held the title to the farm on our behalf and denied us ownership over the land by deed of title, bought by our forefathers.

This enabled the Apartheid Government to include the farm Kalkfontein in the now defunct homeland of KwaNdebele without our knowledge or any consultation ignoring our rights of ownership to the farm.

The KwaNdebele Government subsequently included Kalkfontein within the jurisdiction of the Ndundza Pungutsha Tribal Authority in 1986 when that tribal authority was created pursuant to the creation of the Kwa Ndebele homeland, ignoring our request for a community authority.

The newly created traditional leader, Daniel Mahlangu treated our land as his private property, selling land allocations for "khonza fees" to over 1000 outside families. His actions precipitated a period of violence and disturbance, which ultimately resulted in a Commission of Enquiry and repeated litigation in the Transvaal Provincial Division and ultimately in the Land Claims Court. The Land Claims Court granted us full title to the land in terms of the Restitution of Land Rights Act 24 of 1994.

Apartheid legislation has imposed on us a tribal authority against our will, a fact acknowledged by the senior government ethnologist Dr N van Warmelo as far back as the 1950's. Imposing on us a tribal authority through Apartheid legislation has had devastating effects on our security of tenure and property rights and we do not recognize the legitimacy or authority of the Ndundza Pungutsha Tribal Authority.

The bill as it currently stands relies substantially on the Traditional Leadership and Governance Framework Act "the TLGFA" in order to define a traditional community, a traditional council, and a traditional leader. The TLGFA automatically recognises a tribal authority, which was appointed in terms of previous Apartheid legislation in our case the Ndundza Pungutsha Tribal Authority, as a traditional authority in terms of the TLGFA.

Section 1 of the bill uses the following definitions:

"traditional community"- means a traditional community recognised as such in terms of the TLGFA.

"traditional council"- means a traditional council which has been recognised and established under the TLGFA

"traditional court"- means a court established as part of the traditional justice system which functions in terms of customary law and customs; and is presided over by a king, queen, senior traditional leader; headman, headwoman or a member of a royal family who have been

designated as a presiding officer of a traditional court by the Minister in terms of section 4, and which includes a forum of community elders who meet to resolve any dispute which has arisen

“*traditional leader*” means a person who in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the TLGFA.

This is very problematic for communities such as ours who are subsumed within imposed traditional council boundaries. It undermines the status of our land rights as owners as recognised as such by the Land Claims Court, but also our identity as separate groups of people.

In addition to this, the bill complements the TLGFA and subsequent pieces of legislation enacted, by providing traditional leaders that are recognised by the state with significant powers over people living within their jurisdictional boundaries. Communities that follow their own systems of land administration and dispute resolution in our case through the Kalkfontein Trust rules and mechanism will automatically fall under the jurisdiction of the traditional court and traditional leader in their area even if they *per se* do not recognise the traditional leader.

The bill (s20(c)) makes it an offence to refuse to attend court proceedings, and authorises traditional courts to deprive those living within their boundaries of any benefits that accrue in terms of customary law and custom (s 10(2)(i)) as a sanction for a criminal offence. By virtue of the fact that a right in land is such a customary benefit, this bill is a clear violation of our rights in property as owners of Kalkfontein. A sanction no other court can impose.

The Bill enables the traditional court to summon individuals who have opposed it and strip those individuals of their customary entitlements or to order them to perform “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” (s10(2)(g)).

Section 3(1) of the bill sets out the guiding principles when applying the bill, subsections 3(a)(i),(ii),(iii) maintain that the traditional justice system needs to be aligned with the constitutional order by embracing the values enshrined in the constitution. In terms of the constitution a person wishing to take a matter to court should have a choice whether customary law or common law should apply. However, people in rural communities from the erstwhile homelands do not have a choice of which system of law they wish to apply to a dispute and have to automatically succumb to the version of customary law enforced by the traditional leader having jurisdiction for their area, which may be different from their own interpretation of customary law, as it is in our case. Our right to apply to and use the ordinary courts as we have had in the past is restricted. This clearly violates section 9(1) of the constitution.

Section 9(3)(b) of the bill does not permit legal representation in a traditional court, and yet the Traditional Court may make an orders in terms of section 10 and in more particular in terms of terms of section 10(2) make an order in the form of a sanction against the person found guilty of a criminal act without legal representation.

This sanction moreover can be in the form of forfeiting a benefit in terms of customary law, which benefits includes a right in land. Further it may direct that a criminal matter be submitted to the National Prosecuting Authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; this without legal representation a clear violation of the right to a fair trial as contained in section 35 of the constitution.

Sections 9 (4)(a), 9 (4)(b), 9(4)(b)(i) and 9(4)(b) (ii) of the bill states that where two or more systems of customary law are applicable to a dispute before a traditional court the court must apply a system of law that the parties expressly agree should apply and in the absence of an agreement, the traditional court must decide which system of law to apply in accordance with the guidelines: that the system of customary law applicable in the area of jurisdiction of the court should take precedence over any other system of customary law; or the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection.

We submit that this is very problematic and will prejudice our community because when there is no agreement on which system of customary law is applicable the traditional leader is given the discretion to decide which system of law is applicable in the area of jurisdiction of the court. In addition to this in our community the original co-purchasers and their heirs originated from a variety of ethnic groupings, including Ndebele, Northern Sotho and Tswana. Also if one system of customary law is picked over another and one of the parties is unaware of that particular customary law they will be severely prejudiced if they have to represent themselves or if the person chosen to assist them is not knowledgeable on that particular system of law.

Through the manner our land has been dealt with, we have found ourselves under a Traditional Authority, which falls under the jurisdiction of Ndebele customary law. Nothing prevents the Traditional Authority from deciding matters in terms of Ndebele customary law as the only customary law they know, this despite the fact that the majority in the community are not of Ndebele ethnic origin but of Tshwane and Pedi origin.

Throughout the bill there is reference to customary law and customary practices, however, there is nothing in the definition section of the bill defining customary law or customary practices. There is an overall assumption that the presiding officers (i.e. traditional leaders, headman etc) are the experts on customary law and customary practices and therefore traditional versions of authoritarian and patriarchal customary law are enhanced.

Moreover we submit that no proper notice was given in order to make submissions and there is a need for proper consultation process in rural areas. This bill, should it become law, will have a far-reaching and fundamental impact on rural people. In the Moutse district for example our history of the land we purchased, how we were denied title as a result of Apartheid legislation and the manner in which traditional authorities were imposed on the Kalkfontein Community, is not unique. Due to complete lack of consultation these communities are not aware of the bill, the impact it will have and cannot make inputs.

The only reason that I know about it is because I was told about it by my lawyers on Monday afternoon. I requested my lawyer to assist me to make a written submission, but reserve the right to make further oral submissions at public hearings to be held on 13 May 2008 before the parliamentary portfolio committee to afford me the opportunity to inform and consult with my community to make further inputs.

Mr. SS Tongoane

On behalf of the Kalkfontein B & C Trust

Dated: 6 May 2008