



THE OFFICIAL RECOGNITION OF TRADITIONAL COUNCILS AND THE LEGAL STANDING OF COMMUNITY MEMBERS

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Traditional leaders and traditional councils are given official recognition by different national and provincial laws in South Africa. By recognising these institutions, these laws give traditional leaders and councils certain legal powers, which include the powers to manage the resources and financial affairs of specific “traditional communities” for the benefit of community members. However, the same laws that recognise traditional leaders and councils also provide certain protections to ensure that community members and the government can hold traditional leaders and councils accountable for their actions.

This factsheet explains some of these provisions and looks at what some of the South African courts have said about these issues.

WHAT THE LAW SAYS ABOUT TRADITIONAL LEADERS AND COUNCILS

At a national level, the most important law governing traditional leadership is the Traditional Leadership and Governance Framework Act 41 of 2003 (or the Framework Act). The Framework Act grants official recognition to traditional councils (and senior traditional leaders as the chairpersons to these councils) if they comply with certain requirements. Some of these requirements are that there have to be regular elections for 40% of the membership of traditional councils and that a third of the members of traditional councils must be women. Many traditional councils across the country have not met these requirements but have continued to be recognised and paid by government. Although there are questions about whether these traditional councils are properly constituted if they fail to meet these requirements, some courts (especially the North West High Court) have ruled that these traditional councils continue to have official status. A new draft law to be introduced in Parliament soon, the Traditional Affairs Bill, tries to skip over the confusion about traditional councils’ status. It does this by giving fresh recognition to traditional councils as they existed at the time of the Framework Act and ignoring any changes that have been made to these councils over the last decade.

Each province (except the Western Cape) also has its own provincial law governed by the Framework Act to recognise traditional leaders and councils. The provincial laws must comply with the Framework Act, and explain in more detail what the powers and functions of traditional leaders and councils are in a specific province. A key criticism of both the Framework Act and the provincial laws is that they entrench the controversial tribal boundaries created in terms of the 1951 Bantu Authorities Act as the jurisdictional areas of today’s “traditional councils”. They also recognise and retain traditional leaders who were appointed during the apartheid era.

In the North West, the provincial law currently governing traditional leadership is the North West Traditional Leadership and Governance Act 2 of 2005 (also called the North West Act). This law replaces the old Bophuthatswana Traditional Authorities Act 23 of 1987 (or the Bop Act), which was an apartheid law that regulated traditional

leadership in the former Bophuthatswana Bantustan. The North West Act has kept many provisions that are very similar to the Bop Act.

The North West Act grants official recognition to pre-existing “traditional authorities” as traditional councils and gives these institutions, together with traditional leaders, the powers to manage and administer the funds of “traditional communities”. Section 3, read with section 43, of the Act provides that the Premier should officially recognise traditional leaders and councils once they have complied with the requirements already mentioned by publishing their names in the *Government Gazette*. An important provision of the North West Act is section 30, which reads:

- (1) *The Premier shall cause to be opened for each Traditional Council a trust account, into which shall be paid such amounts as are hereinafter specified and from which all expenditure incurred in connection with any matter specified with the duties and functions of the traditional community shall be met.*
- (2) *The Premier may on good cause shown by the Traditional Council and **being satisfied that there are sufficient controls and financial systems**, permit such a Traditional Council to open a trust account, into which shall be paid such amounts as are hereinafter specified and from which all expenditure incurred in connection with any matter specified within the duties and functions of the traditional community concerned shall be met.*
- (3) *There shall be paid into an account opened as referred to in subsections (1) and (2) –*
 - (a) *all fees, charges and voluntary contributions which are payable to the traditional community;*
 - (b) *all cash proceeds derived from any property of the traditional community;*
 - (c) *any donation made by any person, institution or organisation to and for the benefit of the traditional community;*
 - (d) *all other amounts derived from any source whatsoever for the benefit of the traditional community.*

This means that all the finances from any source that are for the benefit of a traditional community must be paid into a traditional council account. Importantly, the law says that the Premier may only allow a traditional council to manage and administer this account if he or she is sure that there are good financial controls in place to monitor and account for the money that is paid into this account.

The North West Act also empowers the provincial government to perform a number of financial and governance oversight roles over traditional leaders and councils. Specifically, these powers relate to monitoring the financial affairs of traditional councils to ensure that the funds are being used for the benefit of the traditional community. Some of these provisions are:

- Section 30(4) gives the provincial Premier the power to monitor any investment of surplus funds in the tribal account (and can set conditions for any investment);
- Section 30(5) gives the Premier the power to approve estimates of revenue and expenditure and monitor whether actual expenditure corresponds to these estimates; and
- Section 30(6) says that any expenditure that does not fall within the estimated expenditure must be authorised by the Premier (unless this is not a recurring expense such as amounts paid in terms of a validly concluded debt).

Section 31(1) of the North West Act also provides that the financial records of the traditional community must be audited by the Auditor-General (the Auditor-General is an independent institution created in terms of the Constitution to monitor government's finances). Section 31(4) stipulates that after the Auditor-General has audited the financial records, he or she has to report to the Premier and the traditional community on the financial situation of the trust account.

OFFICIAL RECOGNITION OF TRADITIONAL COUNCILS AND LEGAL STANDING OR *LOCUS STANDI*

Some traditional leaders and councils have interpreted their official recognition in terms of these laws to mean that *only* they have the right to call meetings of the "traditional community", access information about community revenue or assets and have the sole authority to represent the traditional community. These traditional leaders and councils seem to believe that their official recognition in terms of the law protects them from community scrutiny and oversight. This interpretation is at odds with the participatory nature of customary law and can be criticised for undermining indigenous accountability mechanisms and for closing down the democratic space for community members to participate in decisions about their land, resources and finances. The Constitution specifies in section 211 that the recognition of traditional institutions and leaders is "according to customary law", and subject to the rights enshrined in the Constitution.

For instance, traditional councils have used their "official status" or "recognition" to prevent members of traditional communities from organising meetings to hold traditional leaders accountable. In court, traditional councils do this by arguing that because they are the official traditional council, other people in the community do not have the legal standing or *locus standi* to demand accountability or convene meetings for members of the traditional community.

DEFINITION: *Locus standi* or legal standing is the right to appear or become part of a court case. Before someone can become part of a court case, a person must have a direct and material (or important) interest in the case that is being heard by the court. If a person does not have *locus standi* then a court will not admit them or listen to their arguments.

In the North West High Court there have been court cases that have upheld this interpretation of the legislation and prevented communities from taking traditional leaders or councils to court. There have also been a number of conflicting court decisions in relation to the official recognition of traditional councils and the *locus standi* of members of traditional communities, making this issue more complex and uncertain.

WHAT THE COURTS SAY ABOUT THESE ISSUES

There have been several court cases that have dealt with the issues of *locus standi* of traditional communities and the official recognition of traditional councils. Most of the cases have only partially been about these issues. This means that not all of them may be relevant in a specific case. In some court cases, the courts have found that traditional communities do not have *locus standi*. For instance, the North West High Court found in *Pilane and Another v Pheto and Others* that members of the

community (who said that they were members of the royal family of the Bakgatla ba Kgafela) had no *locus standi* to call a meeting of the royal family.

Two other important cases, however, found differently. In *Traditional Authority of the Bapo ba Mogale Community v Kenoshi and Another*, a case that was decided in the North Gauteng High Court, Judge Legodi said that the issue of *locus standi* was a technical argument that was “nothing else than a smokescreen”. By focusing on the technical issue of *locus standi*, the administrator was trying to avoid the serious claims of corruption that were made against him by community members. The judge found that the members of the community had a direct and important interest in protecting their assets, which is enough for them to have *locus standi*. The judge also said that the North West provincial government and the Premier should comply with their oversight obligations in terms of the North West Act to ensure accountability.

Pilane v Pilane was another court case which was decided in the Constitutional Court (the highest court in the country). In this case, a clan which was part of the Bakgatla ba Kgafela unsuccessfully tried to protect their local assets and hold an officially recognised traditional leader, Nyalala Pilane, to account. After their attempts to secure accountability through traditional structures and by approaching government failed, the leaders of the Bakgatla ba Kautlwale decided that they had no option but to secede from the Bakgatla ba Kgafela tribe. The traditional leader applied for a court order to block a meeting called to discuss the secession from going ahead, saying that only he and the officially recognised traditional council had the power to call meetings of this nature. The North West High Court awarded various interdicts to stop the Kautlwane clan from calling this and other similar meetings in future.

The Bakgatla ba Kautlwale then went to the Constitutional Court to challenge the decision by the North West High Court. The Constitutional Court set aside the interdicts granted by the North West High Court. In the majority judgment, which was written by Justice Skweyiya, the Court said that the interdicts which stopped people from meeting infringed many rights that are protected in the Constitution, including the right to freedom of expression, freedom of association and assembly. The Court also said that these interdicts threatened the constitutional principle of accountability.

The Court said that it knew that the traditional council had tried to prevent people from meeting before, and that this made it important for the Constitutional Court to “provide clarity on the rights of the people living in the traditional community and living in traditional communities more generally”.

Importantly, the Constitutional Court said that the existence of officially recognised structures “does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation”. The court also found that “there is an inherent value in allowing dissenting voices to be heard and, in doing so, permitting robust discussion which strengthens our democracy and its institutions”. The court therefore found that allowing traditional communities to hold traditional leaders and councils accountable is important to keep these institutions honest and to make sure that they perform their functions appropriately.

The Constitutional Court has ruled in many judgments that “customary law is a living body of law” that is “active and dynamic”. This means that customary law changes and develops according to “the changing lives of the people it governs”. The Constitutional Court thus upholds a fundamentally democratic interpretation of customary law. The law comes from practice, and practice comes from the people. The essence is that customary law is not autocratic and imposed from the top down – it is determined by the practice of ordinary people from the ground up.

OFFICIAL RECOGNITION OF TRADITIONAL COUNCILS AND ACCOUNTABILITY MEASURES

The national and provincial laws that provide for the recognition of traditional leaders and councils also provide important controls and protections to ensure that these institutions act within the law and manage the affairs of the traditional community in a transparent and accountable way. However, the provincial government in the North West does not seem to be enforcing these important checks and balances in a way that holds traditional councils to account. Therefore, while the provincial government provides and affirms the “official status” of traditional leaders and councils as “official”, it fails to enforce those provisions of the law that require financial oversight and accountability.

To worsen the situation, community members and groups that are trying to enforce the law and hold traditional leaders and councils accountable are unable to do so because the North West High Court has ruled that they do not have the legal standing or *locus standi* to bring these abuses to court.

CONCLUSION

When members of “traditional communities” try to hold traditional leaders and councils accountable, traditional councils use the “official status” they are granted according to laws such as the Framework Act and the North West Act to stop them. This reliance on “official status” to stifle internal debate and undermine accountability reinforces the autocratic version of “official” customary law we inherited from apartheid. The Constitutional Court has warned us against relying on official versions of customary law that entrench past distortions. It has directed us to the important consensus-seeking character of customary law. In the 2013 *Pilane v Pilane* judgement the Court expressed concern about the way in which traditional leaders are using litigation to undermine basic rights (in paragraph 71):

The restraint on the applicants’ rights is disquieting, considering the underlying dissonance within the Traditional Community and the applicants’ numerous unsuccessful attempts to have this resolved. The respondents’ litigious record also portrays a lack of restraint on the part of the Traditional Community’s official leadership in employing legal devices to deal with challenges that should more appropriately be dealt with through engagement. This could be seen as an attempt to silence criticism and secessionist agitation and, if so, would not be a situation that the law tolerates.

The law is meant to apply equally to everyone. The provisions of the law are also meant to be applied equally. Yet government appears more intent on enforcing the provisions of the law that provide official recognition to traditional leaders, than on enforcing the checks and balances on their power contained in the same legislation. Community members have no option but to step forward and go to court themselves to try to enforce the checks and balances that government ignores. But when they do they are told they have no legal standing to do so, and they are awarded heavy costs orders that force them to pay not only their own legal costs but also the legal costs of the traditional leaders who seek to silence them. This situation cries out for intervention at a higher level.