Cape Town Office

3rd Floor Greenmarket Place • 54 Shortmarket Street • Cape Town 8001 • South Africa
PO Box 5227 • Cape Town 8000 • South Africa
Tel: (021) 481 3000 • Fax: (021) 423 0935 • Website • www.lrc.org.za
PBO No. 930003292
NPO No. 023-004

LRC
Legal Resources Centre

Your Ref: B8-2017
Our Ref: WW

Chairperson and Honourable Members
Portfolio Committee: Co-operative Governance and Traditional Affairs
Parliament of South Africa
c/o Ms Shereen Cassiem

Per e-mail: scassiem@parliament.gov.za

Dear Sir

SUBMISSIONS ON THE PROPOSED AMENDMENT TO THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT B8-2017

The Legal Resource Centre ("the LRC") is an independent non-profit public interest law clinic which uses law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, or historical circumstances. The LRC, both for itself and in its work, is committed *inter alia* to:

- Ensuring that the principles, rights, and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;
- Building respect for the rule of law and constitutional democracy;
- Enabling the vulnerable and marginalised to assert and develop their rights;
- Promoting gender and racial equality and opposing all forms of unfair discrimination;
- Contributing to the development of a human rights jurisprudence; and
- Contributing to the social and economic transformation of society.

The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban, Grahamstown, Makhado, Mthatha and Mbombela.

As part of its mandate, the LRC seeks to address the legal needs of those who cannot afford to access the justice system through the organised legal profession. In particular, we specialise in rural development, customary governance and equitable access to resources as required by the Constitution.

The LRC has been extensively involved in many of the leading cases before the High Courts, the Supreme Court of Appeal and the Constitutional Court dealing with the relationship and interaction between customary law, common law and the Constitution. In particular, we have sought to promote the status of customary law under the

Constitution and its development to be brought in line with constitutional principles. Matters in which the LRC was involved include:

Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC); *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) (Customary law land and property rights);

Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae);

Shibi v Sithole; SAHRC v President of the RSA 2005 (1) SA 580 (CC); *Mthembu v Letsela* 2000 (3) SA 867 (SCA) (Customary law succession);

Premier of the Eastern Cape and Others v Ntamo and Others [2015] ZAECBHC 14; 2015 (6) SA 400 (ECB); [2015] 4 All SA 107 (ECB) (Identification of headman in terms of customary law).

Pilane and Another v Pilane and Another [2013] ZACC 3, 2013 (4) BCLR 431 (CC) (rights of customary law communities to meet).

Sigcau v President of the Republic of South Africa and Others [2013] ZACC 18, 2013 (9) BCLR 1091 (CC) (identification and recognition of King).

Mayelane v Ngwenyama and Another [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC). (Customary marital property and maintenance);

Gongqose and Others v S; Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others [2016] ZAECMHC 1 (customary fishing rights);

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC) (Chieftanship and gender rights).

The LRC welcomes the opportunity to make these submissions to the Portfolio Committee on Co-operative Governance and Traditional Affairs on the proposed amendments to the Traditional Leadership and Governance Framework Act 41 of 2003 ('the Framework Act'). Our submissions are informed by the experiences of the clients that we represent in Limpopo, North West Province, Mpumalanga, KwaZulu-Natal and the Eastern Cape.

The History and context to this Bill

1. While this Bill purports to be a minor technical amendment simply extending timeframes, it in fact speaks to the fundamental underpinning of the Framework Act – and its failure. Simply extending the timeframes of implementation (for a second time) does not hide the fact that the mechanisms to be implemented don't work and can't be implemented effectively.

2. The 2000 Discussion Document on Traditional Leadership in a democratic South Africa of the then Ministry of Provincial and Local Government set out the early post-constitutional thinking on the inherited tribal authorities as follows:

Pre-colonially, traditional leaders ruled according to the principles of African democracy and accountability….With the advent of colonialism, the African traditional government was systematically weakened, and the bond between traditional leaders and their subjects was gradually eroded…When the National Party came into power in 1948…legislation increasingly strengthened tribal divisions and gave traditional leaders powers and roles they did not possess before….Essentially, these laws established a system of local government that placed the traditional leaders at the centre of the bureaucratic system of traditional authorities. Chieftainship came to be reduced to a very different institution. As one commentator noted: 'It was a public office created by statute. That is the reversal of the position of the chief in traditional society in which the role of the chief was to represent his people according to the dictates of customary practice. This reversal, effected by the Act, has plainly made the appointment, suspension and deposition of chiefs subject to political manipulation […] the customary structures of governance of traditional leadership were put aside or transformed. New structures were established in their place in terms of the Black Authorities Act of 1951.

3. Despite these early insights, the legislature eventually decided to adopt the model created by the Black Authorities Act of 1951 almost wholesale. Traditional leaders and their council would still receive their power from government and be accountable to government; the tribal identities of communities, leaders and authorities were replicated even given the many examples of "political manipulation" that distorted these identities.

4. During the hearing of the matter *Tongoane and Others v Minister of Rural Development and Others* at the Constitutional Court Deputy Chief Justice Dikgang Moseneke said that while there was a *"crying need for land reform*" in South Africa, *"to use the Black Authorities Act of 1951 as a platform for reform after 1994 is simply incredible".* We agree.

5. The two mechanisms that were supposed to ameliorate the problems inherent to the old model contained in the Framework Act were:

    a. Elections of 40% of members of traditional councils to join the 60% chiefly appointees; provided that a third of the council should be women; and
    b. A Commission on Traditional Leadership Claims and Disputes to settle any boundary and leadership disputes.

6. The Commission and its provincial sub-committees have struggled with legitimacy since their inception. Most of the initial commissioners, including the Chair, resigned years ago citing unhappiness with its functioning, the quality of its work and political interference.[1]

7. But the requirements for the recognition of traditional councils have been an even greater problem. In Limpopo, no elections have ever been held. In the Eastern Cape, they have happened sporadically but largely without the

[1] See Peires, Jeff 'History versus customary law: Commission on Traditional Leadership – Disputes and Claims' in *South African Crime Quarterly* 2014:14.

knowledge of the majority of the community concerned. In the North West Province, elected members of traditional councils have been suspended for expressing dissent in council meetings. The Memorandum attached to the proposed amendments acknowledges that these elections have in the majority of cases not been conducted properly or at all.

8. The failure to properly constitute the traditional councils has been exaggerated by the even greater failure of these 'traditional councils' to comply with other requirements in the Act, including requirements concerning regular community meetings and financial reporting.[2]

9. The fact that traditional councils are not properly constituted and/or functioning is significant because of the wide-ranging powers assumed by these councils under the Act. The Act provides, vaguely, that traditional councils are mandated to "administer the affairs of the traditional community". To understand what that may mean, one can refer to section 20 of the Act which allows government to provide for roles for traditional leaders and councils through legislative and other means, in a variety of fields including land, natural resources, development and the dispensation of justice. This section would thus suggest that the mandate to "administer the affairs of the community" does NOT include administering the land and other resources, otherwise there would be no need to create further legislation to provide for such roles.

10. Our experience on the ground, however, is that traditional councils are assuming all these powers with the apparent backing of the Department. Traditional Councils are regularly signing lease agreements, mining and other transactions and development deals on behalf of their communities as if they have the authority to do so. In the absence of any express provision prohibiting this behaviour, this practice is widespread.

11. In this context, the failure of traditional councils to adhere to the requirements of the Framework Act – weak that they are – is having a devastating impact on communities.

The proposed amendment

12. The Framework Act as originally enacted in 2004 envisioned traditional councils to hold elections and validate themselves within one year of the Act coming into force. That did not happen, The Act was thus amended, in 2009, to say that traditional councils in fact had seven years from 2004 in which to comply. In most cases, that has also not happened. Many tribal authorities have thus ceased to exist in law, but are continuing to wield extraordinary power.

13. Now the Department is seeking to once more extend the timeframe for compliance, without giving any indication whatsoever how they will ensure that provinces and councils will finally manage to do within one year what they have

[2] On behalf of clients, we have sought to obtain the financial reporting documents filed with provincial governments in Limpopo and the North West and as required by the legislation of those provinces, but in both cases it appears no traditional authority or council has ever complied with these requirements.

been unable to do for more than a decade. The only addition is that the Minister may, if councils again do not comply within one year, take 'the necessary steps' to ensure that the councils are 'reconstituted'. It is entirely unclear what those steps will or could be. It could even contemplate the Minister providing further extensions, or waiving the requirements keeping traditional councils from transforming.

14. In many instances, traditional councils are currently controlling hugely valuable assets. While we expect companies who control the interests of their shareholders to comply to high standards of financial reporting and accountability, the Department is turning a blind eye even to the failure of traditional councils to properly constitute, let alone report on how they manage the finances of the community, their shareholders. These are the assets of communities who suffered the brunt of the apartheid system. They deserve much better.

15. The amendment is merely an emergency measure to save the many traditional councils not complying from suffering the consequences of their non-compliance.

16. In this regard, it should be noted that where a council had not been recognised by the Premier by the expiry of the current seven-year period, it ceased to exist. That will also be true for the amended deadline. That is true whether or not the council has complied with s 3(2). S 28(4) is clear: continued existence after seven years is contingent on compliance with s 3(2) and registration. If that were not the case, the seven year (or one year) time limit in s 28(4) would have no meaning and there would be no need (and no incentive) for a council to comply with the democratising requirements of s 3(2).

17. That will not be in the interest of communities.

Conclusion

18. This proposed amendment seeks to provide a quick-fix for the dilemma of several traditional authorities currently having no status in law because of their non-compliance with the legislation. Simply throwing them a lifeline will do nothing to improve their performance, accountability and respect for the requirements that come with their mandate.

19. While our clients would like to see the Framework Act abandon its reliance on the 1951 Bantu Authorities Act entirely, for the purposes of this short-term amendment they propose that clear and enforceable consequences for non-compliance from traditional councils and provincial governments be included in the following proposed terms:

    a. the decisions taken and transactions entered into by a traditional authority not properly constituted, are null and void;
    b. proper constitution includes compliance with the requirements of financial and other reporting;

c. any members of a traditional authority not properly constituted that willfully attempts to exercise powers of a properly constituted traditional council shall be guilty of an offence.

20. We thank you for the opportunity to address your Committee on this very important proposed amendment.

LEGAL RESOURCES CENTRE
Per:

WILMIEN WICOMB