

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

Case No. 11678/06

In the matter between:

STEPHEN SEGOPOTSO TONGOANE
PHAHLELA JOAS MUGAKULA
MORGAN MOGOELELWA
RECKSON NTIMANE

First Applicant
Second Applicant
Third Applicant
Fourth Applicant

and

**THE NATIONAL MINISTER FOR
AGRICULTURE & LAND AFFAIRS**

First Respondent

**THE NATIONAL MINISTER FOR
PROVINCIAL & LOCAL GOVERNMENT**

Second Respondent

THE PREMIER OF EASTERN CAPE
THE PREMIER OF FREE STATE
THE PREMIER OF GAUTENG
THE PREMIER OF KWAZULU-NATAL
THE PREMIER OF MPUMALANGA
THE PREMIER OF NORTHERN CAPE
THE PREMIER OF LIMPOPO
THE PREMIER OF NORTH WEST
THE PREMIER OF WESTERN CAPE
**THE SPEAKER OF THE NATIONAL
ASSEMBLY**

Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent
Ninth Respondent
Tenth Respondent
Eleventh Respondent
Twelfth Respondent

**THE CHAIRPERSON OF THE NATIONAL
COUNCIL OF PROVINCES**

Thirteenth Respondent

**THE NATIONAL HOUSE OF TRADITIONAL
LEADERS**

Fourteenth Respondent

SECOND AND FOURTEENTH RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. In these Heads of Argument, we will refer to the first applicant as "Tongoane", the second applicant as "Mugakula", the third applicant as "Mogoelelwa", the fourth applicant as "Ntimane", the first respondent as the "Minister of Land Affairs", the

second respondent as the “Minister”, the twelfth respondent as the “National Assembly”, the thirteenth respondent as the “National Council of Provinces” (“NCOP”) and the fourteenth respondent as the “House”.

2. During or about January 2007, the House brought an application to intervene. By agreement between the parties the Court granted the application¹.

RELIEF SOUGHT

3. The applicants seek, *inter alia*, an order declaring the provisions of section 5, 20 and 28(1) - (4) of the Traditional Leadership and Governance Framework Act² (“the Framework Act”) to be unconstitutional and invalid. Alternatively declaring that the word “role” in section 20 is to be read whenever it appears as “customary”, “non-governmental role”.
4. The applicants have now correctly abandoned their ill-conceived constitutional attack on section 28(1) - (4) of the Framework Act.³

SUMMARY OF THE APPLICANTS’ CONTENTIONS

5. The applicants contend that the impugned provisions of the Framework Act are unconstitutional and invalid in that:
 - 5.1 The Framework Act introduces a new tier of government for rural African people which will in the great majority of cases be staffed by predominantly (60% of the membership) unelected traditional councils which are to a great extent constituted by the former apartheid-era tribal authorities, which are given recognition in terms of the Framework Act.⁴
 - 5.2 The Framework Act discriminates on the basis of gender.⁵
 - 5.3 Section 5 of the Framework Act obliges national and provincial government to promote partnerships between municipalities and traditional councils, through legislative and other measures.
 - 5.4 Section 20(2) seeks to regulate the process whereby an organ of State within the national or provincial government goes about allocating a role to traditional councils and identifies who should be consulted.⁶
 - 5.5 The “powers” conferred by sections 5 and 20 of the Framework Act are broad and extend far beyond those which would be conferred upon a traditional leader by customary law.⁷

¹ 9 February 2007: (Court Order) pages 2670 – 2693.

² 41 of 2003.

³ Applicants’ Heads of Argument: page 206, para 464.

⁴ Tongoane’s founding affidavit: page 19, para 24.4.

⁵ Applicants’ Heads of Argument: page 187: para 418.

⁶ Applicants’ Heads of Argument: page 188: para 420.

⁷ Applicant’s Heads of Argument: page 189: para 422.

SUMMARY OF THE MINISTER AND THE HOUSE'S CONTENTIONS

6. The Minister and the House contend that the constitutional attacks on the impugned provisions of the Framework Act are based on a complete misunderstanding of the institution of traditional leadership.
7. The applicants' attempt to create the impression that the institution of traditional leadership is a product of apartheid system and is not only misconceived, but it is based on the attempt to deliberately undermine the executive, legislative and judicial roles of the institution of traditional leadership from time immemorial.
8. The role of the institution of traditional leadership as set out in sections 5 and 20 of the Framework Act encapsulates the historic role that the institution always played. Consequently, there is no merit in the argument that a new tier of government is introduced.
9. Section 5 of the Framework Act promotes the principles of co-operative governance.
10. Section 20 of the Framework Act does not confer original powers listed in that section. The role for traditional councils or traditional leaders will be determined through legislative and other measures, within the confines of the Constitution.

BACKGROUND

11. In order to place the Minister and House's case in the proper perspective, it is important to sketch the following background:
 - 11.1 The institution of traditional leadership has been in existence in the continent of Africa from time immemorial. The African people knew no other form of government, except through the institution of traditional leadership itself. The traditional style of government was different from the modern western governments. Contrary to popular belief, the African ruler's power was never in the past absolute. A traditional ruler who attempted to impose dictatorial rule on his people would face revolt or secession.⁸ There was even a common saying: *kgosi ke kgosi ka batho* ("a chief is a chief through his people").⁹

⁸ I. Schapera *Government and Politics in Tribal Societies* C A Watts & Co, London (1956) 211.
Barbara Omen *Chiefs in South African Law Power & Culture in the Post-*

- 11.2 The institution of traditional leadership had the potential of developing and changing with the times. This was not to be: the forces of imperialism and colonialism interfered and the system was vulgarised.
- 11.3 In South Africa, successive apartheid governments passed various laws to control the institution of traditional leadership.¹⁰
- 11.4 When the homeland system was introduced, the government (through the homeland governments) continued to pursue its objective of total control over the lives of African people, by resorting to further legislative enactments.¹¹

Apartheid Era Oxford (2005) 183.

⁹ T. W Bennett *Human Rights and African Customary Law: Under the South African Constitution* Juta & Co Ltd (1999) 66 – 67.

¹⁰ The most known legislation being the Black Administration Act 38 of 1927 (Some of the legislation has been referred to in the applicants' papers).

¹¹ For example, the following legislation was enacted and provided for some sort of powers and functions of the traditional leaders.

KwaZulu-Natal Province

KwaZulu-Natal Act on the Code of Zulu Law;
 KwaZulu Amakhosi and Iziphakanyiswa Act 9 of 1990;
 KwaZulu Ingonyama Trust, 1994 (Act 3 of 1994);
 Black Authorities Act of 1951 (Act No. 68 of 151) and a host of other legislation passed in the 1990's.

North West Province

Bophuthatswana Traditional Authorities Act, 1978 (Act No. 23 of 1978);
 Proclamation 110 of April 18, 1957 [Applicable to traditional leaders who were resident outside the former Bophuthatswana and were appointed in terms of the Black Administration Act, 1927.
 Black Authorities Act;
 Bophuthatswana Registration of Customary Unions Act, 1977(Act 8 of 1977);
 Bophuthatswana Wheel Tax Act, 1979 (Act No. 23 of 1979).

Mpumalanga Province

KwaNdebele Tadtional Authorities Act, 1984 (Act No. 8 of 1984);
 KwaNdebele Ingoma Act of 1984.

Free State Province

Black Authorities Act;
 Government Notice No. 11 of February 25, 1985
 Regulation 7 of Proclamation 110 of 1957;
 Qwaqwa Administration of Authorities, 1983 (Act No. 6 of 1983);
 Qwaqwa Levying of Tribal Taxes Act, 1983 (Act No. 5 of 1983).

Eastern Cape Province

Transkei Authorities Act;
 Transkei Constitution Act, 1976 (Act No. 15 of 1976);
 Ciskei Administrative Authorities Act, 1984 (Act No. 37 of 1984);

- 11.5 The applicants seek to create the impression that traditional communities and traditional councils were nothing but the products of apartheid. In fact quite the opposite is true. It is a historical fact that not all traditional leaders collaborated with the apartheid regime. Many brave traditional leaders joined and actively participated in the struggle against apartheid. To paint a picture of the traditional leadership's institutions being creatures of colonialism and apartheid is to further distort the history of the institution.
- 11.6 Furthermore, the applicants seek to create the impression that traditional leaders had no role in the administration of communal land. This is a distortion of a well recorded history on the role of the institution in the administration of communal land. In fact, many traditional leaders who joined the struggle and organised rebellion against land invasions, were doing so in order to defend their land.
- 11.7 When the South African Native National Congress was formed, many traditional leaders participated in its formation. In fact the inaugural conference of the ANC in 1912 decided to establish two houses, the Upper and Lower House. The Upper House comprised seven paramount chiefs as Honorary Presidents.¹²
- 11.8 The ANC congress was attended by nearly all traditional leaders in the land.¹³
- 11.9 Traditional leaders were included in the Upper House in accordance with African tradition. They represented the rural masses who were in the majority and were the most affected by the land invasions by the forces of colonialism.¹⁴

Black Authorities Act;
Regional Authority Courts Act, 1982 (Act No. 13 of 1982).

Limpopo Province

Black Administration Act;
Proclamation 110 of 1957;
Black Authorities Act of 1951;
Lebowa Royal Allowance Act;
Venda District and Territorial Courts Act (Act No. 15 of 1986);
Venda Traditional Leaders Administration Proclamation, 1991.

¹² Francis Meli *A History of the ANC South Africa Belongs to Us*, Zimbabwe Publishing House, Harare (1988) 38

The Honorary Presidents were:

Dalindyebo of the Thembus;
Montsioa of the Barolong;
Lewanika of the Barotseland (part of Zambia);
Letsie II of the Basotholand;
Khama of Bechuanaland;
Marelane of Pondoland; and
Moepi of the Bakgatla
Dinizulu, the Zulu Chief who was deposed and exiled to the Transvaal by the British was later included

¹³ Peter Walshe *The Rise of African Nationalism in South Africa* A D Donker Publisher (1970) 33.

¹⁴ Francis Meli 39.

THE ROLE OF TRADITIONAL LEADERS IN THE ADMINISTRATION OF COMMUNAL LAND

12. In the past, a system of individual land tenure was never practised. It was accepted that the relevant traditional leader in consultation with his or her council will allocate portions of land to families for residential and cultivation purposes. Once the land is allocated to the family, the head of the family will not have the power to alienate such land. However with the passage of time, it came to be accepted that the allocation of land would in the normal course be carried out by a representative of a traditional leader (headman/women). Even though the head of the family will exercise some measure of control over the land, it was always accepted that the land was “communal” in that the concept of ownership in the sense of western law was unknown. In **Amodu Tijani v Secretary, Southern Nigeria**,¹⁵ the Privy Council held that:

“Land belongs to the community, the village or the family, never to the individual. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode or speech is sometimes called the owner.”
(Underlining supplied)

13. In **Sibasa v Ratsialingwa and Hartman No**,¹⁶ Roper J said:

“The conception that a Chief may hold property only as a sort of trustee for the tribe is a modern one which owe its origin to European influence.”

14. In **Sobhuza II v Miller**,¹⁷ the Privy Council again emphasised the principle that individual ownership was foreign to customary law, because land belongs to the community.
15. Now in this scheme of things, a question arises as to who had the power to terminate a right to land or alienate land. A traditional leader in terms of traditional law had that power but he or she was required to consult with the council of elders and the community.¹⁸ A senior traditional leader and/or headman/woman had the power to allot residential and arable lands. Grazing land was a communal asset accessible to all members of the community. A headman/headwoman had control to a certain extent over grazing land. However, it was accepted that members of the community within the area of jurisdiction of a senior traditional leader would have access to such grazing land.
16. The powers that traditional leaders had derived from the belief that since the present ruler was a direct descendent of the founder of the nation and

¹⁵ [1921] 2 (AC) 399 PC 404.

¹⁶ 1947(4) SA 369 (T) 390.

¹⁷ [1926] (AC) 518 (PC) 528.

¹⁸ **Mosii v Motsoeoakhumo** 1954(3) SA 191 (A) 922 (H) (The *dicta* indicates that the need for consultation with the community was part of custom). See also: Manfred O Hinz *Without chiefs there would be no game*, Out of Africa Publishers (2003) 41.

through a notional unbroken tie of blood, he or she provided a channel of communication with the ancestors of his people.¹⁹

17. The institution of traditional leadership resides on the notion that the power of traditional rule was from time immemorial informed and maintained by the ancestors.²⁰ The position of a traditional leader is hereditary. In other words, a traditional leader is not elected by the people but is born to throne. This institution centres on the hereditary traditional leader²¹ who is assisted by various categories of minor traditional leaders and headmen acting as his representatives in the different areas into which his traditional authority area is sub- divided.²²
18. Because of his or her relationship, he/she had the spiritual power necessary to maintain the natural order. In particular he or she was unable to ensure good rains and fertile crops. By reason of his or her control over the process of nature, the ruler presided at the major national rituals. In traditional communities, for example, he decided when the ploughing cycle was to begin and end and accordingly when his people could start to plough or harvest.²³ A traditional leader also had the power to order his subjects to work on his land and provide labour for public work. He could levy traditional tax.²⁴ Even though the functions of government were not differentiated into judicial, administrative and legislative category, it was accepted that the institution of traditional rule provided a form of government.²⁵
19. There is a saying that: “*Shango la shaya Thobela ndi mulano*” which means “without a traditional leader there would be chaos and disorder”
20. A traditional leader is not only the most important and most powerful member of the traditional community, he is the community, the embodiment of all the attributes, emotions and values that ensure its solidarity and continued existence. A traditional leader is therefore, more than just a person to his people, according to Hammond-Tooke “*He is the axis of their political relations, the symbol of their unity and exclusiveness and the embodiment of their essential values. The traditional leader is regarded as a father of his*

¹⁹ EM Letsoalo *Land Reforms in South Africa* (1987) 8; I Schapera *A Handbook of Tswana Law and Custom* (1954) 61 – 62.

The ideas of a long history of traditional leaders in South Africa support the belief that the traditional authority can be traced back to the ancestors who made life of the traditional people. See Khunou SF “A legal History of Traditional Leadership in South Africa, Botswana and Lesotho” (LLD Thesis: North-West University, Potchefstroom Campus 2007) 469.

²¹ In view of the above, it seems that traditional leadership was hereditary and based in the premise of the proverb *Kgosi ke Kgosi ka e tsetswe* literally translated to mean that traditional Leader is a leader by virtue of birth. See November ND and Wessels DP “The Political Status of Traditional Leadership in South Africa’s New perspectives” 2002 *Journal of Contemporary Historically* 136 to 158.

²² Oliver MJJ “Traditional Leadership and Institution” in Joubert WA (ed) *The Law of South Africa: Indigenous Law* (Durban 2004) 35-65.

²³ AC Myburgh and MW Prinsloo *Indigenous Public Law in Kwandebele* (1985) 41.

I Schapera *Native Land Tenure in Buchanaland Protectorate* (1943) 27 – 32.

EJ Krige *The Social System of the Zulu* (1936) 249.

²⁴ See Myburgh and Prinsloo 8.

²⁵ See Woolman *et al Constitutional Law of South Africa*, Second edition, Volume 2, para 26.2.

*people and is expected to ensure the smooth functioning of the community and its continued well-being.*²⁶

21. Any decision dealing with communal land involved members of a traditional community and the traditional leader concerned.
22. The system of land use and control was guided by the principle of communal ownership. The Constitutional Court ("CC") in **Alexkor Ltd v The Richterveld Community**²⁷ recognised the existence of communal ownership of land under indigenous law.

LEGISLATION GOVERNING COMMUNAL LAND TENURE: APARTHEID ERA

23. In the past various legislation was passed that had an impact on communal land tenure. Such as the Black Land Act²⁸ and the Development Trust and Land Act.²⁹ These pieces of legislation had the effect of reserving certain land in rural areas for occupation by African people. All these Acts were repealed by the Abolition of Racially Based Land Measures Act.³⁰

THE UPGRADING OF LAND TENURE RIGHTS ACT³¹ ("THE LAND TENURE ACT")

24. This Act provided that "tribes" can acquire full ownership over their land with a consequent power of alienation.³² Under sections 2(2) and 3(1) of the Land Tenure Act, an individual right to acquire ownership is confined to erven in formalised townships and surveyed lands. The "tribe" is required simply to request the Minister to have ownership of the land registered in the "tribe's" name.³³ The Minister is authorised to grant such a request but is also empowered to impose a 10 year moratorium on sales, leases, donations and other forms of allocation to non-tribal members unless the "tribe" concerned obtains a court order permitting the transaction.³⁴ The authorisation by the Minister is only competent where alienation has been approved by a "tribal resolution"³⁵ and is not in conflict with the interests of members of the tribe.³⁶
25. Section 1(1) of the Land Tenure Act had the effect of overriding earlier case law as the decisions disposing of rights in communal land were to be "*taken by a majority of the members of the tribe over the age of 18 years present or*

²⁶ TARG Report Development Management: The Administrative and Legal Position of Traditional Authorities of South Africa and Their Contribution to the Implementation of the Reconstruction and Development Programme Vol. VII (1996) 4-6.

²⁷ 2004(5) SA 460 (CC) para 58.

²⁸ 27 of 1913.

²⁹ 18 of 1936.

³⁰ 108 of 1991.

Regarding earlier legislation: see also: AJGM Saunders "Southern Africa in need of Law Reform" (Proceedings of the Southern African Law Reform Conference) 11-14 August (1980) 72.

³¹ Act 112 of 1991.

³² Sections 2 of the Land Tenure Act.

³³ Section 20(1) of the Land Tenure Act.

³⁴ Section 19(2) of the Land Tenure Act.

³⁵ Section 19(3)(a) of the Land Tenure Act.

³⁶ Section 19(30) of the Land Tenure Act.

See also: T W Bennett *Customary Law in South Africa* (2004) 400 – 406 and authorities collected therein.

represented at a meeting convened for the purpose of considering such disposal..."

26. The Land Tenure Act infuses elements of democracy with the customary practices. Even at that stage, it could be argued that a traditional leader and his or her council had no power to alienate land without the consent of members of the community. As appears below, the applicants' submission that traditional leaders exercise absolute power and that the traditional councils are undemocratic is incorrect and completely out of touch with recent legislative interventions.

INTERIM PROTECTION OF INFORMAL LAND RIGHTS ACT³⁷ ("IPILR ACT")

27. The IPILR Act was enacted in order to give customary and other interest holders more secure possession of their land. It provides that no person may be deprived of an informal right to land without his or her consent.³⁸
28. Section 2(2) provides that where land is held on communal basis, a person may be deprived of such land or right in accordance with the custom and usage of that community. The decision to dispose of any such right may only be taken by the majority of the holders of such rights present or represented at a meeting convened for that purpose.³⁹

CONSTITUTIONAL NEGOTIATIONS AND THE INTERIM AND FINAL CONSTITUTION

29. During the constitutional negotiations at Kempton Park, the issue of the role of traditional leaders was subjected to intense debate. At some stage, the negotiation process was under serious threat due to insistence by traditional leaders, who wanted their role clearly defined in the interim Constitution.⁴⁰
30. The interim Constitution provided for *ex officio* status of the traditional leaders in local government structures.⁴¹ This status was recognised by the CC in **African National Congress and Another v Minister of Local Government and Housing, KwaZulu and Others**.⁴²
31. It is significant, to note that the interim Constitution also entrenched the role of traditional leaders in our democratic society.
32. This is so, due to the fact that the framers of the interim Constitution realised that traditional institutions and customary law cannot be easily wished away. The system will continue to exist as the majority of the people in the rural

³⁷ 31 of 1996.

³⁸ Section 2 of the IPILR Act.

³⁹ Section 2(4) of IPILR Act.

⁴⁰ T.W. Bennett *Human Rights and African Customary Law Under the South African Constitution*, the Rustica Press, Western Cape Ltd (1999) 21.

See also Barbara Oomen (2005) 45 – 53.

⁴¹ Section 182 of the Constitution of the Republic of South Africa Act 200 of 1993

⁴² 1998 (3) SA 1 (CC) 11, paras 17, 18 and 19.

areas still adhere to their customs and traditions. The words of Sachs J in **S v Makwanyane and Another**⁴³ are apposite:

“The secure and progressive development of our legal system demands that it draws the best from all the streams of justice in our country...”

“Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot fortunately extend the equality principle backwards in time to remove the humiliations and indignities suffered by the past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalized” (Underlining supplied)

33. We submit that if the idea of an African renaissance is to succeed, important African values and traditions, jettisoned during the era of colonialism and apartheid, should be resuscitated and infused into our daily lives. Of course such values and traditions have to be consistent with the Constitution.⁴⁴

STATUS AND ROLE OF THE INSTITUTION OF TRADITIONAL LEADERSHIP

34. Section 211(1) was considered in **Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa**.⁴⁵ The institution, status and role of traditional leadership were recognised by the CC. To this end the Court said:

“In our view, therefore, the NT complies with CP XIII by giving express guarantees on the continued existence of traditional leadership and the survival of an evolving customary law. The institution, status and role of traditional leadership are thereby protected. They are protected by means of entrenchment in the NT and any attempt at inference would be subject to constitutional scrutiny. The CA cannot be constitutionally faulted for leaving the complicated, varied and ever-developing specifics of how such leadership should function in the wider democratic society, and how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation.” (Underlining supplied)

35. The Constitution envisages the continued existence of traditional authorities which may perform functions subject to any applicable legislation and customs.⁴⁶
36. It is estimated that there are 829 traditional authorities which continue to exercise certain powers and perform functions in terms of statutory law and

⁴³ 1995 (3) SA 391 (CC) 514, paras 364-365.

⁴⁴ Sections 211 and 212 of the Constitution recognises the institution and its status.

⁴⁵ 1996 (4) SA 744 (CC) at 834 F-G para 197.

⁴⁶ Section 211(2) of the Act 108 of 1996.

customs. The continuation of legislation governing these structures is guaranteed in terms of the Constitution.⁴⁷

37. Section 211(3) enjoins the courts to apply customary law when the law is applicable, subject to the Constitution. In the words of Justice Albie Sachs:⁴⁸

“The strength of customary law lay in its organic connection with the lives and culture of the people. If customary law is to be revitalised it must accordingly link itself up to the new energies of a people in transition and be sensitive to the real nuances and contradictions of daily life. Its anchor must be in the sense of justice and fairness of a community and its star the broad values of the Constitution.

The Constitutional Court has referred to the need to leave the complicated, varied and ever-developing specifics of how customary law should develop and be interpreted, to future social evolution, legislative deliberation and judicial interpretation. Does that mean that customary law is finished, archaic, obsolete? On the contrary, the above approach, focusing on core values rather than clusters of formalised rules, implies the liberation and transfiguration of customary law. It re-establishes its connection with the community. It ensures its revitalising through imbibing the juices of daily life. It is important that democracy not be regarded as blunt instrument that clubs customary law on the head. On the contrary, democracy finds protected space for customary law while freeing it at the same time from rigidly established (in colonial and apartheid times, frequently invented) and increasingly out of touch of formalised codes. To recover its original vitality, customary law must respond to the lives that people lead now, to their sense of justice and fairness, and to the multifarious and at times contradictory ways in which an actively and evolving culture impacts on the actual lives of actual people. People are not being forced willy nilly to “modernise” or to “develop”; they are being freed to enjoy all aspects of the modern world to which they voluntarily choose to have access”. (Underlining supplied)

38. There is no doubt that customary law will continue to play an important role in the lives of many people. What is important, however, is to recognize its existence and take concrete steps to “revitalise” it. In fact, the passing of the Recognition of Customary Marriages Act⁴⁹ and the Framework Act are indeed visible steps towards the entrenchment of customary law and the institution of traditional leadership.

⁴⁷

Schedule 6, item 2 of the Constitution.

⁴⁸

Albie Sachs “Towards the Liberation and Revitalisation of Customary Law *Fundamina*, Special Edition on the Proceedings of the Conference on Law in Africa: New Perspectives on Origins, Foundations and Transition held in Pretoria on January 13-15, (1999) 12 (organised by the Southern African Society of legal Historians).

⁴⁹

Act 120 of 1998.

SECTION 5 OF THE FRAMEWORK ACT

39. The applicants contend that section 5 of the Framework Act is unconstitutional, and in particular in that it confers executive governmental powers on traditional councils:

Section 5; *Partnerships between municipalities and traditional councils*

- (1) *The national government and all provincial governments must promote partnerships between municipalities and traditional councils through legislative or other measures.*
 - (2) *Any partnership between a municipality and a traditional council must-*
 - (a) *be based on the principles of mutual respect and recognition of the status and roles of the respective parties; and*
 - (b) *be guided by and based on the principles of co-operative governance.*
 - (3) *A traditional council may enter into a service delivery agreement with a municipality in accordance with the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000), and any other applicable legislation.*
40. The applicants contend further that section 5 (2) (b) applies the principle of corporative government. These principles are provided in chapter 3 of the Constitution and apply only within the national, provincial and executive spheres of government.
41. We submit that this argument is without any merit. Section 5 encourages partnerships between municipalities and traditional councils. Historically traditional leaders played a role in the development of the communities under them. In **African National Congress and Another v Minister of Local Government and Housing, Kwa-Zulu Natal and Others**,⁵⁰ O'Regan J said:

"Historically, elected local government in South Africa has generally been confined to urban areas and divided along racial lines. Outside urban areas, the functions of local government have been performed by a range of different institutions. In those rural areas where traditional authorities existed, chiefs and headmen performed some of the functions of local government in terms of the Black Administration Act 38 of 1927."(Underlining supplied)

42. Most of the traditional leaders were and continue to be involved in the building of schools, clinics, roads and other facilities within their areas of jurisdiction.⁵¹ A traditional council as an organ of State,⁵² is obliged to promote the

⁵⁰ 1998(3) SA 1 (CC) 6, para 5.

⁵¹ Ndlela's answering affidavit: pages 1276 to 1278, paras 7-9.

See also Khunou's supporting affidavit: pages 15 and 12, sub-para 31.2.

⁵² Sections 239 and 41(1) of the Constitution.

principles of co-operative governance. The applicants are not in anyway suggesting that the role of traditional councils set out in section 5 of the Framework Act encroaches upon national, provincial and local government functional areas.⁵³

SECTION 20 OF FRAMEWORK ACT

43. The applicants contend that the word “role” in section 20 should be read wherever it appears as “customary, non governmental role.” This contention misses the point that the word “role” flows from the Constitution.
44. In any event, section 20 of the Framework Act does not confer original powers listed in that section. The role for traditional councils or traditional leaders will be determined through legislative and other measures, within the confines of the Constitution. By way of an example, the Department of Justice and Constitutional Development has piloted a bill⁵⁴ (published for public comments), dealing with the role of the institution of traditional leadership in the administration of justice. The bill has to be in line with the Constitution, otherwise any interested person may still challenge its constitutionality.
45. The Minister of Justice and Constitutional Development has, in terms of section 6 of Justice of the Peace and Commissioners of Oaths Act,⁵⁵ designated traditional leaders as Commissioners of Oaths. This is, indeed, a commendable step.
46. In playing that role as Commissioner of Oaths, traditional leaders assist the Departments of Home Affairs, Safety and Security, Education, *et cetera*, in bringing the services of government closer to the people.

SAFETY AND SECURITY

47. The other role played by the institution of traditional leadership was traditional policing service. They protected the lives and property of their traditional communities. To this day the traditional police services functions vary from one province to another i.e. act as messengers and maintain law and order.
48. Section 20 of the Framework Act envisages a role that may be assigned by a competent authority to the institution of traditional leadership to play a role in matters of safety and security at a local level. Such an assignment whether legislative or otherwise has to be in line with the Constitution.

TRADITIONAL COURTS

Western Cape Minister of Education and Others v Governing Body of Mikro Primary School and Another 2005(10) BCLR 973 (SCA).

Rail Commuters Action Group and Others Transnet Ltd t/a Metrorail and Others 2005(2) SA 359 (CC).

⁵³ Schedules 4 and 5 of the Constitution.

⁵⁴ Traditional Courts Bill B15 – 2008.

See P Rakate The Status of Traditional Courts under the Final Constitution, CILSA (1997).

⁵⁵ 16 of 1963.

49. The most important institutions which were responsible for the administration of justice were traditional courts. Traditional courts were deeply rooted and embedded in the inner systems of indigenous culture. The powers, duties, actions and obligations of traditional leaders were tried into the inner chambers of custom and culture that became synonymous with the principle of *ubuntu*.⁵⁶
50. Traditional leaders serve in these courts as supreme judges and acted with the advice of their executive council. The traditional courts have jurisdiction over criminal and civil cases. Court proceedings are held openly both verbally and figuratively. The process and procedure are all inclusive. All present including women in the court are given the opportunity to participate in both the examination and cross-examination of all the parties to the case.⁵⁷
51. The main objectives of the traditional administration of justice are around the key principles of *ubuntu* namely, rehabilitation of the offenders, compensation of the aggrieved party, promotion of peace within the community and promotion of reconciliation and inquisitorial procedure.⁵⁸
52. We have already referred to the Traditional Courts Bill which seeks to assign and strengthen the role of the institution of traditional leadership in the administration of justice.

DISCRIMINATION ON GENDER

53. The applicants allege that the institution of traditional leadership is patriarchal.⁵⁹
54. The constitutional challenge further directs itself to discrimination based on gender. The preamble of the Framework Act makes it clear that discrimination based on gender would not be countenanced.⁶⁰ The section of the Act dealing with the composition of a traditional council provides another example indicating that the Legislature was committed to eradicate any traces of gender discrimination. This is done by way of introducing a quota for women. Furthermore, elements of democracy and tradition are fused in that 40% of members of a traditional council are directly elected by the community and 60% will still be identified in line with traditional practices and custom.⁶¹
55. Furthermore, we submit that the Framework Act prescribes a minimum threshold. The statistics indicate that the number of women exceeds the

⁵⁶ Khunou SF "A Legal History of traditional Leadership in South Africa, Botswana and Lesotho" (LLD Thesis: North-West University, Potchefstroom Campus 2007) 22-23.

⁵⁷ *Ibid* 26-27.

⁵⁸ Rakate PK "The Status of Traditional Courts Under the Final Constitution", XXX CILSA (1997) 175.

⁵⁹ Tongoane's founding affidavit: pages 74 – 74, paras 142 – 149.

⁶⁰ See the preamble of the Framework Act

⁶¹ Section 3(2) of the Framework Act

See also section 2(3) of the Framework Act

minimum threshold. We submit that the institution is in the process of a progressive transformation.⁶²

DEVELOPMENT OF CUSTOM AND CULTURE

56. The other role of the institution of traditional leadership is to develop customary law to be in line with the Constitution. Section 39 (3) of the Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum should promote the spirit, and purport and the object of the Bill of Rights. Traditional councils have responsibility to bring change in the area of their jurisdiction.
57. The traditional authority is an important institution, which gives effect to the traditional life and plays an essential role in the day-to-day administration of their areas and lives of traditional communities. In **Shilubana and Others v Nwamitwa and Others**,⁶³ the CC held that the traditional authorities' power is the high water mark of any power within the traditional community on matters of succession. The CC held that no other body in the community has more power than traditional authorities.⁶⁴
58. In **Mabuza v Mbatha**,⁶⁵ Hlophe JP said:
- “The approach whereby African law is recognised only when it does not conflict with the principles of public policy or natural justice leads to an absurd situation whereby it is continuously being undermined and not properly developed by the Courts, which rely largely on 'experts'. This is untenable. The Courts have a constitutional obligation to develop African customary law, particularly given the historical background referred to above. Furthermore, and in any event, s 39(2) of the Constitution enjoins the Judiciary when interpreting any legislation, and when developing the common law or customary law, to promote the spirit, purport and objects of the Bill of Rights.*
59. Customary law can be described as a law that is based on nothing else other than tradition, custom or usage. In **Bhe and Others v Magistrate, Khayalitsha and Others**.⁶⁶ In dealing with the status of custom or (customary law), the CC stated that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights.
60. In **Alexkor Ltd and Another v Richtersveld Community and Others**,⁶⁷ the CC said: *“While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution”.*

⁶² Ndlela's answering affidavit: page 1293 to 1294, sub-paras 19.2 – 19.5.

⁶³ 2008 (9) BCLR 914 (CC) 933, H – I.

⁶⁴ Paras 72 and 75.

⁶⁵ 2003 (4) SA 218 (C) 228, para 31.

⁶⁶ 2005(1) BCLR 1 (CC).

⁶⁷ 2004 (5) SA 460 (CC), para 51.

61. It is clear from the above legislative measures and authorities that it can never be seriously suggested that sections 5 and 20 of the Framework Act are unconstitutional.

APPLICANTS' ALLEGATIONS

MULTI-LAYERED SYSTEM

62. The applicants and their experts contend that the key feature of communal system is a multi-layered system of indigenous or customary law.
63. We contend that the applicants' argument is incorrect. We have already referred to a number of authorities indicating that the land is communally owned.⁶⁸
64. Section 2 of the IPILR Act confirms communal ownership and does not confer on the holder a real right to land. This Act further makes provision for the deprivation of rights to land held on communal basis.⁶⁹
65. We contend that "family property" includes land allotted to the family by the traditional leader concerned to the family group.⁷⁰ The traditional authorities, particularly traditional leaders are the custodians of communal land.

MUGAKULA ALLEGATIONS AND ARGUMENT

66. Mugakula alleges that:
- 66.1 The land (Pafuri) was officially designated to the Makuleke community, of which he was a "Chief". This designation occurred by virtue of the permission of the Governor-General, pursuant to a recommendation by the Commissioner of Native Affairs, on 2 of February 1907. The remainder of this land was subsequently designated as part of the released area in terms of the Development Trust Land Act, 18 of 1966;
- 66.2 The Makuleke community occupied this land and used it in terms of the coherent system of indigenous law. The Makuleke community has established a system of political, social and economic lifestyle, inherited from their forefathers, and based on customs.⁷¹
- 66.3 As a result of the transaction involving the South African Native Trust, formed in terms of sections of the Native Trust and Land Act, 18 of 1936, Pafuri was excised from the area administered by the Trust, and same incorporated into the Kruger National Park and the remainder thereof incorporated into the Madimba Corridor. In exchange, the area known as portion of the farm Ntlhaveni N2 MU was incorporated (as compensation) into the area of land administered by the trust, and later into the homeland of Gazankulu.⁷²

⁶⁸ Kutama's affidavit: page 1554, para 17.

⁶⁹ Section 2 of the IPILR Act.

⁷⁰ Dr Khunou's affidavit: pages 1481 – 1483, para 15.

⁷¹ Magakula founding affidavit: page 192: para 8, page 193: para 11.

⁷² Mugakula's founding affidavit: page 194, para 14; page 195, para 16.

- 66.4 He further alleges that instead of him being incorporated as a “Chief” in terms of his hereditary entitlement, he was appointed as headman of the people resident at Block H, I and J Ntlhaveni.⁷³
- 66.5 The Makuleke community was then subsequently incorporated under Mhinga Traditional Council and thus placing them under the jurisdiction and control of this rival chieftaincy.⁷⁴
- 66.6 The former traditional leader Adolph Mhinga, (father of the present traditional leader, Cedric Mhinga) was imposed on them in terms of the Bantu Authorities Act 68 of 1951. There is an attempt to undermine the status of their tribe as well as the status of their chief and, as such, portraying them as falling under the Ama-Shangaane tribe, led by the aforesaid chief.⁷⁵
- 66.7 Chief Mhinga, appointed his own headman and imposed that headman the Makuleke community.⁷⁶
- 66.8 The Makuleke community, as a result of the aforesaid actions of the traditional leader, was and still is at the mercy of the Mhinga tribal authority and consequently hindered the educational, economic, social health and welfare development of the Makuleke people.⁷⁷
- 66.9 The aforesaid headman allocates sites on land belonging to the Makuleke people, to outsiders. He in turn receives payment for these allocations. Furthermore, the headman arrested the Makuleke women for collecting wood on the land notwithstanding that these women were acting within their rights.⁷⁸
- 66.10 The commission was established to examine the status of the Makuleke chieftaincy or traditional leadership. This commission was chaired by Prof. Ralushai (it came to be known as “the Ralushai commission”). This commission recommended that the chieftainship of the Makuleke should be restored to the community. By way of memorandum, Chief Mhinga and the Mhinga tribal authority vigorously opposed their reinstatement as traditional leaders of the Makuleke community.⁷⁹
67. We demonstrate below that the above allegations are baseless.
68. Apart from the fact that Mugakula does not dispute that they moved into the area of the jurisdiction of the Mhinga Traditional council, we submit that Mugakule has always been a headman under the Mhinga traditional council. This is illustrated in the lineage of headmen of the Makulekes⁸⁰. Furthermore, the Native Location Commission’s designation and recognition of Mugakula as headman⁸¹ was indeed in line with the history of the Mhingas.

⁷³ Mugakula’s founding affidavit: page 197, para 21.

⁷⁴ Mugakula’s founding affidavit: page 197, para 22.

⁷⁵ Mugakula’s founding affidavit: page 193, para 11 – 12.

⁷⁶ Mugakula’s founding affidavit: page 198, para 24 -25.

⁷⁷ Mugakula’s founding affidavit: page 199, para 27.

⁷⁸ Mugakula’s founding affidavit: page 209, para 49; page 210, para 51.

⁷⁹ Mugakula’s founding affidavit: Page 201, para 31; page 203, para 34.

⁸⁰ Mhinga’s answering affidavit, page 1679, para 5.1.

⁸¹ Mhinga’s answering affidavit, page 1685; par 15.

69. We submit that senior traditional leader lawfully appointed another headman namely Nwamba. The appointment was done in accordance with tradition and custom. There was a fusion of traditional practice and democracy in that the people in Block H requested that a headman in line with this tradition be appointed. After he was appointed the provincial government was approached to confirm his appointment.⁸²
70. With regard to the Ralushai Commission, it is important to note that the Ralushai Commission's report was never made public. The Premier did not accept nor reject the recommendations of the Commission. Furthermore, the Premier did not exercise any discretion with regard to the report.⁸³

MOGOEELWA'S ALLEGATIONS AND ARGUMENT

71. Mogoelwa brings the application on behalf of the members of the community of Mayaeyane in Makgobistad. However, a community meeting was held in November 2006. The meeting revealed that no mandate was ever given to Mogoelwa to bring this application on their behalf.⁸⁴
72. Mogoelwa does not dispute that the meeting took place. He merely alleges such a meeting should have been held by the Makgobistad community as a whole, for a valid resolution to be adopted.⁸⁵ Mogoelwa concedes that Mayaeyane is an integral part of Makgobistad in that a resolution binding on the Mayaeyane community could only be adopted by the entire Makgobistad community.⁸⁶
73. In law, the Mayaeyane community could validly adopt a resolution binding on them. This is so because of the provisions of IPILR Act:
- 73.1 The IPILR Act was enacted in order to give customary and other interest holders more secure possession of their land. It provides that no person may be deprived of an informal right to land without his or her consent.⁸⁷
- 73.2 It must be noted that the application of this Act has been extended from time to time by the Minister.
- 73.3 "Community" is defined as follows: "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group"; and
- 73.4 "Informal right to land" means: "(a) the use of, occupation of, or access to land in terms of:
- (i) any tribal or customary or indigenous law or practice of a tribe;

See annexure "SCM3": page 1711.

⁸² Mhinga's answering affidavit, page 1692 para 27.4.

⁸³ **Nephawe v Premier, Limpopo Province and Another** 2003 (5) SA 245 (T), paras 52, 81 and 82.

⁸⁴ William's answering affidavit page 1741, para 8.

⁸⁵ Mogoelwa's replying affidavit: page 2203, para 96.2.

⁸⁶ Mogoelwa's replying affidavit: page 2176, para 42.1.

⁸⁷ Section 2 of the IPILR Act.

- (ii) *custom usage or administrative practice in particular area or community where land in question at any time vested in:*
- (aa) *the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);*
 - (bb) *the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution, 1971 (Act No. 21 of 1971); or*
 - (cc) *the governments of the former republics of Transkei, Bophuthatswana, Venda and Ciskei;*
 - (b) *the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of public office.*
 - (c) *beneficial occupation of land for a continuous period of not less than five years prior to 31 December, 1997; or*
 - (d) *the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question, but does not include-*
 - (e) *any right or interest of a tenant, labour tenant, sharecropper or employee if such right or interest is purely a contractual nature; and*
 - (f) *any right or interest based purely on temporary permission granted by the owner or lawful occupier of the land in question, on the basis that such permission may at any time be withdrawn by such owner or lawful occupier;”*

73.5 Furthermore, “tribe” is defined as follows:

- “(a) *any community living and existing like a tribe; and*
- (b) *any part of a tribe living and existing as a separate entity.”(underlining supplied)*

73.7 The Mayaeyane community is part of the larger traditional community of Makgobistad, but they have over the years, acquired informal land rights which they could in certain circumstances in terms of customary law and IPILR Act are able to take decisions on them.

- 73.8 As appears below, the Mayaeyane community is entitled in terms of the IPILR Act to take a decision regarding their rights.

CRITICISM OF DR KHUNOU'S EVIDENCE

74. Mogoelwa alleges that the individual interviews conducted by Dr Khunou mainly covered members of the Makgobistad traditional council and hereditary headmen. Mogoelwa further alleges that Dr Khunou's methodology would not have given him an impartial and unbiased perspective.⁸⁸
75. Dr Khunou interviewed a wide spectrum of people, including members of the traditional council. Over and above that, Dr Khunou reviewed historical records relating to Mayaeyane traditional council and other written material.⁸⁹
76. Mogoelwa and his experts do not dispute the fact that Dr Khunou is an expert in customary law. We submit that his evidence is sufficiently relevant to the matter and will be helpful to the court⁹⁰. We submit further that the methodology used by Dr Khunou is in line with the research of this nature.⁹¹
77. We submit that land in Mayaeyane was and still is allocated and administered by a senior traditional leader through a headman. This has been confirmed by Dr Khunou and James Matlhape.⁹²

RECKSON NTIMANE'S ALLEGATIONS AND ARGUMENT

78. Ntimane alleges that:
- 78.1 During the 1950's, part of Dixie was incorporated into what is presently known as Manyeleti Game Reserve. During 2001, the Dixie community was informed that certain company called Curato Investment (Pty) Ltd had signed a 99 year lease with Mnisi tribal authority for purposes of erecting a tourism lodge. According to the development would have resulted, in the further degradation of the land rights to members of the Dixie community. According to Ntimane, Dixie community has always conducted their affairs independent of the Mnisi tribal authority the same applied to various surrounding villages and farms. The community, exercises rights in relation to land in terms of customary law and customs and allocation of land to outsiders was administered by the headman.⁹³
- 78.2 Since ownership vests in the community, the land allocation was administered in terms of the customary law, rules and customs of the community.⁹⁴

⁸⁸ Mogoelwa's replying affidavit; page 2174; sub-para 35.1.

⁸⁹ Khunou's affidavit: pages 1467 – 1469, sub-paras 10.1 – 10.3.

⁹⁰ **Holtzhausen v Roodt** 1997 (4) SA 766 (W) 777.

See also **Ruto Flour Mills (Pty) Ltd v Adelson** (1) 1958 (4) SA 235 (T) 237B.

⁹¹ Dr Khunou's supporting affidavit: page 1470; sub-paras 10.7 -10.8.

⁹² Matlhape's supporting affidavit: pages 1768 - 1771.

⁹³ Ntimane's founding affidavit: page 325, para 9; page 328, para 15.

⁹⁴ Ntimane's founding affidavit: page 323, para 3.

79. Whilst it is correct that Dixie is communally owned, the rules referred to by Ntimane are rules applicable to the administration of communal land in terms of customary law, traditions and practises.⁹⁵
80. As a result of the forced removal from the Kruger National Park, members of the community were scattered in the neighbouring farms around Manyeleti. They settled in Pungwe farm (Dixie) and Tlhatlhane farm (Buffelshoek). In the 1940s Dixie was under the traditional leadership of hereditary headman Marigwana who reported to Hosi Shobyana and Jotham (who is my father). Before Mnisi took over the reigns, a regent was appointed namely Willy Mogidi.⁹⁶
81. Mnisi took over in 1975 when the headman of Dixie was Marigwane. After the death of headman Marigwane, John Mtombeni was appointed as headman in charge of Dixie.
82. In 2006, the son of Marigwane (i.e. Frank Madubula Nkuna) was appointed as headman in charge of Dixie. He is currently in charge of the area.
83. The Mnisi community, including Dixie followed a communal land tenure system. The headman assisted in the process of land administration.
84. It is clear from Mnisi's affidavit⁹⁷ that Dixie community had always been part and parcel of the Mnisi traditional authority. Mnisi traditional authority has always been appointing their headmen in terms of customary law. The system referred to by Ntimane is not part of that custom.
85. Dixie does not conduct its affairs independent of the Mnisi traditional council. Dixie and other surrounding farms form part and parcel of the Mnisi traditional authority as evidenced by the list of the Mnisi traditional authority councillors.⁹⁸ The Mnisi traditional council has women as members, including Ntimane's mother Anna Sithole⁹⁹.

KALKFONTEIN B AND C

86. In view of the fact that Kalkfontein B and C is now transferred to the Trust (and without conceding that sections 5 and 20 of the Framework Act are unconstitutional), the Minister and the House do not wish to pursue their case in this regard.¹⁰⁰

CONCLUSION

87. We submit that the applicants have failed to show that the impugned provisions are unconstitutional. There is no basis to declare sections 5 and 20 of the Framework Act unconstitutional.

⁹⁵ Mnisi answering affidavit: page 1776, para 8.1.

⁹⁶ Annexure "PPM2".

⁹⁷ Mnisi's answering affidavit: page 1773, para 3.

⁹⁸ Mnisi answering affidavit : page 1785, para 21.

⁹⁹ Sithole supporting affidavit: page 2277, para 7.

¹⁰⁰ Applicants' Heads of Argument: page 27, para 51.

88. We ask that the application be dismissed with costs, including the costs of two counsel.

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16 SEPTEMBER 2008**

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