

A-119
[119]

**SUBMISSION TO CONSTITUTIONAL COMMITTEE, TEC COMMITTEE AND
NEGOTIATING COUNCIL**

JOINT POSITION PAPER CONCERNING ROLE OF TRADITIONAL LEADERS

1. INTRODUCTION

- 1.1 Traditional leaders and their Councils as established by custom and usage is a cornerstone of any sound administration.
- 1.2 We have pointed out on numerous occasions that a traditional ruler was and is still, contrary to popular belief, the most democratic institution. It forms a firm foundation for stability in all traditional communities.
- 1.3 The institution has survived notwithstanding the fact that it was brutally attacked by the colonial and apartheid systems of governments.
- 1.4 The Institution, status and the role of traditional leaders shall be recognised and protected in the constitution. (Vide the principles adopted by the Negotiating Forum on 2nd July, as well as Clause XII of Schedule 7 of the Draft Interim Constitution).
- 1.5 Clause XVI of Schedule 7 to the Draft Interim Constitution provides that at each level of government there shall be democratic representation and provision is made that the principle shall not derogate from the provisions of principle XII.
- 1.6 The principles adopted are binding to the Constitutional Assembly and are justiciable.
- 1.7 We are accordingly of the view that provision should be made for effective participation of traditional leaders in all levels of government.

2. **ROLE OF TRADITIONAL LEADERS DURING THE TRANSITION PHASE.**

2.1 **TEC LEVEL**

2.1.1 The role of traditional leaders in this critical phase is of paramount importance. Let it be known that the overwhelming majority of the toiling masses owes their allegiances to their traditional leaders. However, be that as it may, the colonial rule and system of apartheid alienated us from the people thereby weakening the power of the people.

2.1.2 The meaningful and effective role of traditional leaders is therefore a **MUST** during this phase. Our past experience has taught us and the people that the only way in which this valuable institution could be protected is by putting traditional leaders above party politics.

2.1.3 We are mindful of the fact that since we are members of the Negotiating Council we will be part of TEC which will be Multi-Party in character. However, our role is so critical such that it will be meaningful only if a Sub-Council on the role Traditional leadership is constituted.

2.1.4 The powers of this sub-council should inter alia provide for:-

- a) the conditions of service of traditional leaders;
- b) monitor and recommend on legislative and executive measures either existing or proposed, which may affect traditional leader's powers during the transition.
- c) Ensure free political activities in areas controlled by traditional leaders.

- d) Advise other sub-councils on matters of material concern to their communities.
- e) Ensure that traditional leaders are not under the control of existing administrations.

2.1.5 We strongly believe that if such Council is established traditional leaders will be saved from the yoke of apartheid system and all their areas will be available to all political parties. Needless, for us to stress the need for creating and promoting a climate conducive to free political participation as well as to eradicate any impediments to legitimate political activities.

3. **TRANSITIONAL CONSTITUTION**

We firmly believe that a transitional Constitution should provide for an effective role of traditional leaders. This is in accordance with our view expressed under TEC above as well as the fact that the Negotiating Forum has adopted principles endorsing a role of traditional leaders at all levels. We visualise our participation as stated below in all three tiers of government.

4. **THE ROLE AT A LOCAL GOVERNMENT LEVEL.**

4.1 The Negotiating Forum has adopted as one of its justiciable principles which will be binding on the Constitutional Assembly, a principle to the effect that at each level of government there shall be democratic representation. However, the Council having taken into account the fact that in terms of our culture a traditional leader is born, it adopted a proviso to the effect that nothing contained in the principle will derogate from the role of traditional leaders according to indigenous law.

4.2 In accordance with the aforementioned principle we are of the view that traditional authorities should be provided for both in the interim and the final

constitution.

4.3 We are of the view that traditional authorities differ from local authorities in proclaimed towns, inter alia, in the following material respects:

4.3.1 Traditional authorities are much more social systems than local government institutions. Their primary function is, therefore, to regulate and control relationships and social behaviour within a traditional community. Local authorities are mainly focusing on the rendering of services.

4.3.2 The authority of traditional authorities vests in Traditional leaders-in-council. This means that a traditional leader merely conveys or pronounces the wishes of the people.

4.3.3 The position of a traditional leader is hereditary, while in local authorities the position of the mayor and the duration of his office is linked to regular elections.

4.3.4 The authority of the Traditional leaders is less limited than that of a mayor. His authority is derived from tradition and is exercised in consultation with the community.

4.3.5 Traditional authorities are in most cases not legal personae while local authorities are legal entities.

4.3.6 There is also no real division between the political, administrative and judicial authority (trias politica) in traditional authorities as in the case with local authorities within proclaimed towns. The political and judicial authority is traditionally the responsibility of the indigenous leaders in

accordance with traditional norms and values. Their executive function and their own financial resources, however, has never really been developed to its fullest potential. This was done deliberately to weaken the power of traditional leaders and the people.

4.3.7 In traditional authorities decisions are based on consensus.

4.4 We are, in accordance with the principle of democracy which as we have pointed out is not new to our system of democracy, advocating for an establishment of traditional authorities which should be composed of Traditional leaders and democratically elected Councils with powers to administer the affairs of the people within their area of jurisdiction, This inter alia, should entail:-

4.4.1 A Traditional authority shall, subject to the provisions of any other law;

4.4.1.1 generally administer the affairs of the people within its area;

4.4.1.2 assist, support and guide its head in the exercise or performance of the powers, authorities and functions conferred upon him by tradition and under any law;

4.4.1.3 promote the interests and the advancement and well-being of the residents of, and the development and improvement of the land in its area;

4.4.1.4 consider, and make recommendations to the competent authority in connection with applications for:-

- i) the establishment of and, provision of buildings for or accessories to Government schools;
- ii) old age and blind person's pensions and disability

grants;

iii) arable and other allotments;

iv) licences;

4.4.1.5 exercise or perform the powers, authorities and functions assigned to the authority from time to time by the law in such matters as, in his opinion, fall within the sphere of administration, including any of the following matters:

4.4.1.6 land administration;

4.4.1.7 hygiene, sanitation and health services generally including the establishment, management and maintenance of clinics or other similar institutions and cemeteries;

4.4.1.8 soil conservation including the development, improvement and maintenance of water supplies, the control of grazing and grass-burning, the eradication of weeds, the protection of trees and the co-ordination of soil conservation measures;

4.4.1.9 the prevention of fauna and flora;

4.4.1.10 The improvement of livestock and animal husbandry generally and the establishment of co-operative dairy and other schemes;

4.4.1.11 the organisation of farmers' associations, agricultural shows, demonstrations and competitions;

4.4.1.12 other developments of a parochial nature;

4.1.1.13 the prevention of cruelty to animals;

4.1.1.14 the destruction of vermin;

4.1.11.15 impose traditional customary levies;

4.5 We are of the view that traditional Councils should be democratically elected to represent people in various wards within the area of jurisdiction of a traditional leader.

4.6 **ESTABLISHMENT OF DISTRICT COUNCILS**

4.6.1 A District Council shall be established in respect of all magisterial districts under each region.

4.6.2 **Composition :**

The District Council shall be composed of directly and indirectly elected councillors from each traditional authority, commercial farm and where applicable from Councillors elected in each village. Traditional leaders from each Traditional Authority shall be ex officio members of the District Council.

4.6.3 **Chairpersonship :**

The District Council shall be chaired by District Administrator/District Commissioner whose office shall be on office in the public service.

4.6.4 **Powers :**

The Council shall be responsible for co-ordination of services, the drawing up of budgets and development planning within its area of jurisdiction.

4.7 **KINGS COUNCIL**

4.7.1 **Introduction**

4.7.1.1 A King as a traditional leader always performs his duties on the advice of the people. What we have stated above apply mutatis mutandis in respect of the role of our kings.

4.7.1.2 We may mention that our Kings were either deposed or demoted to an inferior status by the colonial and apartheid regimes. Our kings are referred to as Paramount Chiefs and Amakhosi/Marena/Dikhosi, etc, are referred to as chiefs. This was done by the colonial and apartheid system in order to weaken the power of the people.

4.7.1.3 The powers and area of jurisdiction of our kings (as well as all other traditional leaders) is original and any legislation which seeks to take away such powers should be restrictively interpreted, as it offends a well established system of administration. Therefore traditional Authorities as stated under paragraph 4.3 above as well as local authorities (urban) are structures under the jurisdiction of a King.

4.7.1.4 We believe that in accordance with the principle of democracy, Kings Councils should be elected to administer the affairs of the kingdom.

4.7.2 **Establishment :**

A Kings Council shall, where applicable, be established in respect of all districts within the jurisdiction of a King.

4.7.3

Composition :

This Council shall be chaired by a King or his deputy and shall be composed of Councillors elected from District Councils and traditional leaders who are chairpersons of traditional authorities.

The Council may also appoint persons who are experts or possess sufficient experience in administration and community affairs as members.

4.7.4

Powers of the Kings Council :

4.7.4.1 The powers of the Kings Council or by whatever new name it may be referred to should include the following:

A King or any other traditional leader:

- a) enjoy the status, rights and privileges and be subject to the obligations and duties conferred or imposed upon his office by the recognized customs or usages of the people;
- b) be entitled, in the due fulfilment of his functions, to the loyalty, respect, support and obedience of every resident of the area for which he has jurisdiction.
- c) in co-operation with the other local and regional governments and subject to such lawful orders or instructions as may, from time to time, be given to him by or through any competent representative of the Government, carry on the administration of his area;
- d) maintain law and order and report to the

Government, without delay, any matter of import or concern, including any condition of unrest or dissatisfaction;

- e) exercise within his area, in relation to any resident:-
 - i) the powers of arrest conferred upon him, in his capacity as a peace officer.
 - ii) the powers of search and seizure, relating to stolen stock, liquor, habit-forming drugs, arms and ammunition and explosives.

- f) Ensure the protection of life, persons, and property and the safety of bona fide travellers within his area, and report forthwith to the competent authority:-
 - i) the death of any person from violence or other unnatural cause;
 - ii) the outbreak of any contagious or infectious disease;
 - iii) any pretended witchcraft or divination;
 - iv) any misuse of government property;
 - v) any irregular receipt or use of public monies

- g) if a state of lawlessness exists in his area or, in his opinion, cannot otherwise be prevented, order that all or any of the following shall be prohibited for a period not exceeding fourteen (14) days at any one time;
- i) the gathering of men in groups;
 - ii) the brewing of beer or the holding of any feast within such area as he shall specify;
 - iii) the carrying by any person of a shield or more than one ordinary stick;
 - iv) the shouting of war cries or the blowing of bugles or whistles;
- h) make known to the residents of his area the requirements of any new law;
- i) ensure compliance with all laws and the orders and instructions of any competent authority;
- j) prevent cruelty to animals;
- k) detain and, when so required by law, impound any livestock depastured unlawfully or found straying within, or introduced illegally or under suspicious circumstances into, his area and report the fact to the competent authority; and

- l) generally seek to promote the interests of the people of the kingdom and actively support, and himself initiate, measures for the advancement of the people;

5. **ROLE AT A REGIONAL LEVEL**

5.1 We would like to reiterate that it is our well considered view that traditional leaders are a cornerstone of any stable administration based on the will of people in Africa (our emphasis).

5.2 The history and our experience has taught us that Political parties and governments may come and go but our institution and our role exist forever.

5.3 In line with our view that traditional leaders should play a meaningful role in the nation building we are strongly of the view that a House composed of traditional leaders should be provided for at a regional level. Traditional leaders should elect amongst themselves the required numbers of the traditional leaders they would like to compose the House. We are of the view the Kings or their representatives should have an ex officio seat in the House.

5.4 **Structure :**

The composition of the House, its powers and functions should mutatis mutandis be the same as those stated below in respect of the House at a national level.

6. **AT A NATIONAL LEVEL**

INTRODUCTION

6.1 Before the Colonialists and Imperialists conquered and took over occupation of our land, South African, traditional leaders and their people were rulers of the land in accordance with tradition and culture. We remember those days with pride and more often than not we refer to them as the "good old days".

- 6.2 We therefore believe that strictly speaking a new South Africa should be a united kingdom.
- 6.3 We further believe that our culture is not static and as such should keep pace with modern development.
- 6.4 We accordingly concede that the era of one party rule in Africa is gone and we have reached a phase of Multi-Party democracy.
- 6.5 However, as we have pointed out above, in our experience no system is not changing.
- 6.6 It is well-nigh irrefutable that the concept of democracy which was adopted by the governments of the Western civilized countries is fairly new in our continent. It is therefore our duty as successors of traditional rulers of this country to oversee this process.
- 6.7 We have already stated that the overwhelming majority of the people owe their allegiance to the traditional leaders and regard them as the only personification of political authority and there is a potential danger that they may not readily accept the authority without the involvement of traditional leaders.
- 6.8 We are strongly of the view that to deny traditional leaders a position at the centre would be a serious affront. Traditional leaders still possess sufficient influence in traditional communities to hinder implementation of any government policy if they choose to do so.
- 6.9 We are therefore strongly of the opinion that there should be a House of traditional leaders at a National level as well - with the necessary powers which should be negotiated and agreed to at the Negotiating Forum.

6.10 What we have stated under paragraph 5 above concerning representation of traditional leaders should mutatis mutandis apply.

7. **HISTORIC BACKGROUND**

7.1 SOUTH AFRICA

Before the advent of Colonial rule in this country the Traditional Leaders were rulers of their subjects. They were vested with all powers of State viz: Legislative, Administrative and Judicial Powers. The rule of Traditional Leaders, contrary to the belief of some people, was the most democratic form of government. The Traditional Leader was a Chief-in-Council. The Communities participated freely at all traditional meetings. These principles are firmly entrenched in our communities and that is why the institution of Traditional Leaders has survived colonial rule. We agree with Father Tiber that "men may come and men may go but I go on forever".

Our history proves conclusively that Traditional leaders fought with their people in defending their kingdoms. King Hintsa was brutally murdered by the British colonialist, Richard Southey. Maqoma died on Robben Island, Kings Langalibelele, Cetywayo, Dinizulu, Sekhukhuni, Faku, Moshoeshoe, Ngungunyana, Ramabulana, Sekonyela, Queen Manthatisi, and many others fought against Colonialism, oppression and the exploitation of the people and their spirits constitute firm foundation for the liberation struggle.

We therefore emphasise the point that Traditional Leaders and their subjects were rulers of this country and cannot be left out in any level of government.

7.2. **OBSERVATION FROM AFRICAN STATES**

7.2.1 BOTSWANA

The all-party talks were free from conflict on two questions which

of Chiefs was established on independence.

The promulgation of the new Ghananian Constitution left no one in doubt about the unique position of chiefs. "The institution of chieftaincy together with its traditional councils as established by Customary Law and usage is hereby guaranteed".

7.2.5 ZAMBIA

If there is any lesson to be learnt from comrade K.Kaunda, particularly in the reconstruction and constitutional development of Zambia, it is that the traditional leaders were never elbowed out, as it seems likely to happen here, nor put in a lumber room.

"Another feature of our present constitution which will be adopted in the Independence Constitution is the House of Chiefs. My view and support for our chiefs are well known, and I re-affirm that it will be the intention of my Government to uphold the position of Chiefs in our country and to consult them and seek their advise on all matters affecting their people and themselves". Comrade K. Kaunda addressing a special meeting of chiefs once said;

"The mobilization of the efforts of the people will be a task for which all chiefs are fitted, by reason of the respect for a chieftainship which you have inherited from your predecessors. You can act as a link between the old and the new in Zambia which will enable the country to go ahead as one nation, as one people".

8. COMPOSITION

- (1) The House shall be composed of ten members from each region, such members should be elected by members of the House of Traditional Leaders of such region where applicable within 10 days of the commencement of the first session after

presented serious problems in one or both of the other High Commissions Territories - the position of the Chiefs and their tribal authority and safeguards for white interests. The Chiefs were offered a House of Chiefs separate from the Unicameral Legislative Assembly. The establishment of the House of Chiefs in Botswana was as a result of the Chiefs participation in the Constitution Making Process of that country. Proctor rightly opines that to have denied the Chiefs a position at the centre would have been a serious affront.

It was also realised that tribesmen still looked to the Chiefs for leadership and often regarded them as the only personification of political authority.

7.2.2 NAMIBIA

As far back as 1958 opposition to S.A. rule was led by Chief Kutako and the Herero Chiefs Council. The Traditional Leaders were instrumental in the formation of SWAPO. They also petitioned the United Nations. We believe that without the support of traditional authorities SWAPO would not have been able to win the freedom for Namibian people.

7.2.3 SWAZILAND AND LESOTHO

These Countries are still ruled by Kings as the Kings and their subjects successfully defended their territories.

"Tinkundla" which is composed of traditional leaders is also provided in the Constitution.

7.2.4 GHANA

In GHANA the first involvement was in 1949 in the Coussey Committee on Constitutional reform which had strong representation from Traditional elements. The National liberation movement, among other things, fought for the protection of traditional interests. As a result of its input, a House

its election.

- (2) The House of Traditional Leaders in each region shall constitute an electoral collage for the purposes of sub-section (1).
- (3) Any member of the House of Traditional Leaders at regional level elected in terms of sub-section (1) shall vacate his or her seat in the House of Traditional Leaders at such regional level.
- (4) Traditional leaders who are Kings on the date of commencement of this Act shall be ex officio members of the house.

9. CHAIRPERSON OF HOUSE OF TRADITIONAL LEADERS

- (1) At its first meeting, and before proceeding to despatch any other business, the newly elected House of Traditional Leaders, with the Chief Justice or a judge designated by him or her acting as chairperson, shall elect one of its members to be the chairperson of the House, who shall be vested with all powers, duties and functions assigned to him or her in terms of the Constitution and by the rules and orders of the House.
- (2) The chairperson shall preside at the meetings of the House and at joint sessions which may be deemed necessary.
- (3) In the absence of the chairperson, a person shall be elected by traditional leaders from amongst their numbers to preside at their meetings during such absence.
- (4) The chairperson shall vacate his or her office if he or she ceases to be a member of the House, may be removed from office by a resolution of the House, and may resign by lodging his or her resignation in writing with the secretary of the House.

- (5) If the office of the chairperson of the House becomes vacant, the House shall in like manner fill the vacancy.
- (6) The Chairperson of the House or any person presiding at a meeting of the House shall not have a deliberative vote, but shall have and exercise a casting vote in the case of equality of votes.

10. **SECRETARY TO HOUSE**

- (1) There shall be a Secretary to the House of Traditional Leaders whose office shall be an office in the public service.

11. **OATH OF ALLEGIANCE**

- (1) Every member of the House shall, before taking his or her seat therein, take and subscribe before the House of Traditional Leaders the oath of allegiance set out below viz.

(Hold the Bible by his right hand)

"I do swear that I will be faithful and bear true allegiance to the (Peoples Republic of S A) and that I will preserve, protect and defend the Constitution of the Republic as by law established.

SO HELP ME GOD

SIGNED

12. **TENURE OF OFFICE OF MEMBERS**

- (1) The term of office for Members of the House shall be five (5) years.
- (2) A member of the House shall vacate his or her seat in the House :-
 - (a) On dissolution of the House;
 - (b) If he ceases to be a traditional leader or member of the House of Traditional Leaders of a Region;
 - (c) Resigns his or her seat in writing;
 - (d) Absents himself voluntarily from the House for 10 consecutive sitting days, without having obtained the leave of the House on grounds specified in the rules and standing orders;
 - (e) Become a member of the National Assembly, or Legislature or Senate;
 - (f) Become permanently incapacitated or ill as to be unable to perform his or her duties.
- (2) If a seat of a member is vacated in terms of subsection (1), the Regional House of Traditional Leaders which nominated him shall nominate a person to fill the vacancy.

13. **RULES OF PROCEDURE**

- (1) Subject to the provision of this constitution, the House may, subject to the approval of the President, make rules regulating its own procedure and in particular, and without prejudice to the generality of the foregoing power, make rules for all or any of the following matters -
 - (a) The appointment or election and tenure of office of the Chairman of the House;

- (b) The time and place at which the House shall sit;
- (c) The manner in which the views of the House shall be recorded and, if necessary, expressed to a minister, the National Assembly, Senate or any other person or body;
- (d) The regulation and orderly conduct of the proceedings of the House;
- (e) The manner in which the elected members of the House shall be elected.

14. **PRIVILEGES AND IMMUNITIES OF THE MEMBERS**

- (1) Notwithstanding the provisions of any other law, no member of the House shall be liable to any civil or criminal proceedings, arrest, imprisonment or damages by reason of any matter or thing which he or she has brought by petition, bill, motion or otherwise or may have said before or in any meetings of the House or any Committee thereof.
- (2) Provisions for the other privileges and immunities of members of the House shall be made by writ of Parliament.

15. **POWERS OF THE HOUSE**

We propose that Section 58 (4) should be inserted to the Draft Interim Constitution and should read :

- (4) The National Assembly or Senate shall not proceed upon any Bill (including any amendment to a Bill) that would, if enacted alter any of the provisions of this Constitution or affect -
 - (a) the designation, recognition, removal of the powers of traditional leaders or their councillors;

- (b) the organisation, powers or administration of indigenous/customary courts;
- (c) indigenous law, or the ascertainment or recording of customary law, or
- (d) traditional or indigenous organisation or communal property, unless
 - (i) a copy of the Bill has been referred to the House of Traditional Leaders after it has been introduced in the National Assembly or Senate; and
 - (ii) a period of 30 days has elapsed from the date when the copy of the Bill was referred to the House of Traditional Leaders.

16. FUNCTION OF THE HOUSE

- (1) The House shall consider the copy of any Bill which has been referred to it under the provisions of (Section 58[4]) of this Constitution and the House should be entitled to submit resolutions thereon in the National Assembly or Senate.
- (2) Any resolution which has been submitted to the National Assembly in accordance with the last foregoing subsection shall forthwith be laid before the Assembly by the chairman of the House, or any official of the National Assembly.
- (3) Any minister who is responsible for a Bill such as is referred to in subsection (1) of this section , or his representative, may attend the proceedings of the House when the Bill is being considered, provided that should the members of the House require the minister to attend he or she will be obliged to attend the proceedings of the House.
- (4) Any minister shall consult the House in respect of any matter on which he desires to obtain the opinion of the House, and for that purpose the minister or his

representative may attend the proceedings of the House.

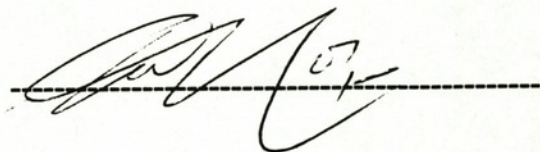
- (5) The House shall be entitled to discuss any matter within the executive legislative authority of the [Peoples Republic of S A] of which it considers it is desirable to take cognisance in the interests of indigenous or traditional communities) it represents and to make representations thereon to the President, or to send messages thereon to the National Assembly or Senate. Nothing herein contained shall preclude the President from soliciting the views of the House in policy decisions of the government.
- (6) A person attending the proceedings of the House by virtue of the provisions of sub-section (3) or (4) of this section shall be entitled to take part in the proceedings of the House relating to the matter in respect of which he attends as if he was a member of the House, provided that he or she shall not be entitled to vote in the House.

CONCLUSION

It must be remembered that we are of Africa, we are in Africa and the government we should produce must be of African orientation. Our future political dispensation shall have failed if it does not have overtones of who we are and where we come from.

Lastly our history does not start from 1910 or 1652, in fact it goes beyond that. The truth is that the people who were robbed of their land and authority to rule were non other than the TRADITIONAL LEADERS.

**DATED IN KEMPTON PARK WORLD TRADE CENTRE ON
THIS THE 13 AUGUST 1993.**

A handwritten signature in black ink, written over a horizontal dashed line. The signature is stylized and appears to be a name with a surname.

CAPE TRADITIONAL LEADERS

A handwritten signature in cursive script, appearing to be 'M. M. M.', positioned above a dashed horizontal line.

OFS TRADITIONAL LEADERS

A handwritten signature in cursive script, appearing to be 'N. J. J.', positioned above a dashed horizontal line.

TRANSVAAL TRADITIONAL LEADERS