

## TRADITIONAL LEADERSHIP AND SELF-GOVERNING BANTUSTANS OF SOUTH AFRICA: THROUGH THE EYE OF THE NEEDLE OF CONSTITUTIONAL DEMOCRACY

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### **1. Introduction**

The aim of this article is to discuss the status, roles and legal position of the institution traditional leadership in the defunct self-governing territories of South Africa. When Verwoerd became the Prime Minister of South Africa in 1959, he introduced the Promotion of Black Self-Government Act.<sup>1</sup> The main objective of this Act was to create self-governing territories<sup>2</sup>. The Black population was arranged and categorised into national units based on language and culture. There were the North-Sotho unit, the South-Sotho unit, the Swazi unit, the Tsonga unit, the Tswana unit, the Venda unit, the Xhosa unit and the Zulu unit.<sup>3</sup> The administrative authorities in these national units were to be based on the tribal system.

The apartheid government's contention was that each nation had to develop according to their own culture under their own government. The government further argued that in this process of separate development, no nation was supposed to interfere with each other.<sup>4</sup> Unlike the states of Bophuthatswana, Transkei, Ciskei and Venda that opted for independence, the leaders of the self-governing territories had not accepted the idea of independence. These self-governing national units consisted of different and separate territories on the basis of language and culture, namely KaNgwane, Lebowa, KwaNdebele, Gazankulu, KwaZulu, and QwaQwa. The unique features and legislative peculiarities of each self-governing territory will also be identified and discussed.

In order to place the roles and status of the traditional leadership in those territories in a broader perspective, it is important to sketch a brief historical overview of the institution of the traditional leadership during the pre-colonial, colonial and apartheid periods. This article further discusses the innovations brought about by both the Interim Constitution<sup>5</sup> and the "final" Constitution<sup>6</sup> of the Republic of South Africa on the institution of traditional leadership. This article therefore, demonstrates how the constitutional dispensation in South Africa dismantled the homeland system and paved a way for the transformation of the institution of traditional leadership to be in line with the constitutional imperatives. The Constitution is the supreme law of the country and therefore any role of the traditional authorities must comply with the overall constitutional requirements.<sup>7</sup>

### **2. Brief historical overview**

The institution of traditional leadership has been in existence in the whole continent of Africa from time immemorial. The African people knew no other form of government, except the institution of traditional leadership itself. The traditional style of government was different from the modern western governments. Contrary to popular belief, the African traditional leader's power was never in the past absolute. A traditional leader who attempted to impose dictatorial leadership on his people would face revolt or secession.<sup>8</sup> There was even a common saying: *kgosi ke kgosi ka batho* ("a chief is a chief through his people").<sup>9</sup> The institution of traditional leadership had the potential of developing and changing with the times. However, this was not to be the case.

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<sup>1</sup> Act 46 of 1959. The aim of this piece of legislation was among other things to provide for the gradual development of self-governing black national units and for direct consultation between the government of the Union of South Africa and the national units in regard to matters affecting the interests of such national units. According to the Preamble of Act 46 of 1959, it was expedient to develop and extend the black system of government and to assign further powers, functions and duties to regional and territorial authorities.

<sup>2</sup> The words "self-governing territories" are used interchangeably in this article to refer to the "Bantustans", "homelands", "national units" and "black units".

<sup>3</sup> Section 2(1) of Act 46 of 1959.

<sup>4</sup> Act 46 of 1959. The Act described 'black population' as a heterogeneous group.

<sup>5</sup> The Constitution of the Republic of South Africa Act 200 of 1993. Herein referred to as the Interim Constitution. The 1993 constitutional arrangement laid a foundation for the transformation of the institution of traditional leadership.

<sup>6</sup> Constitution of the Republic of South Africa Act 108 of 1996. Herein referred to as the "final" Constitution.

<sup>7</sup> See in this regard section 2 of the 1996 Constitution.

<sup>8</sup> Schapera I Government and Politics in Tribal Societies (CA Watts and Co. London 1956) 211.

<sup>9</sup> TW Bennet Human Rights and African Customary Law Under the South African Constitution Juta and Co. Ltd (1999) 66-67.

The forces of imperialism and colonialism interfered and the institution of traditional leadership was vulgarised. With the advent of colonialisation, the most important powers of the traditional leaders were taken over by the colonial state and later by the apartheid state. This colonial arrangement weakened the role of traditional leaders and institutions in governing the African traditional communities.<sup>10</sup> However, the day-to-day running of the affairs of traditional communities was left to traditional leaders as agents of the colonial masters. Traditional leaders were no longer accountable to their communities but to the colonial or apartheid governments. In South Africa, successive colonial and apartheid governments passed various laws to control the institution of traditional leadership.<sup>11</sup> When the bantustan system was introduced, the apartheid government (through the bantustan governments) continued to pursue its objective of total control over the lives of African people by resorting to further legislative enactments.<sup>12</sup>

According to Rugege, the institution of traditional leadership was transformed into tribal authorities of alien state by the apartheid government. The apartheid government gave more powers to the tribal authorities to control the African population in order to serve its interests.<sup>13</sup> According to Ntsebeza, “additional prestige and authority were granted to traditional leaders who were collaborators.”<sup>14</sup> As a result, some of the traditional leaders became oppressive towards their people. Many traditional leaders therefore lost legitimacy with their people.

However, it is a historical fact that not all traditional leaders collaborated with the colonial or apartheid regime. Many brave traditional leaders joined and actively participated in the struggle against colonialism and apartheid.<sup>15</sup> Some of the traditional leaders supported the freedom fighters and assumed party positions in some instances.<sup>16</sup> Suffice to mention that the pre-colonial respect and status accorded to the institution of traditional leadership was greatly eroded by colonial and apartheid regimes in South Africa. The intention was to weaken and deny traditional leaders their proper role within their communities.

### ***3. Legal and political landscape of self-governing Bantustans***

#### **3.1. Gazankulu**

The apartheid government through the enactment of the Promotion of Black Self-Government Act created Gazankulu. This tiny bantustan was situated in the former Northern Transvaal adjoining Venda, in what is now called the Limpopo province. In February 1973, Gazankulu attained self-governing status.<sup>17</sup> According to Cadman, Ntswanisi<sup>18</sup> had consistently rejected the bantustan style of independence.

<sup>10</sup> Rugege S “The Institution of Traditional Leadership and its Relation with Elected Local Government” 2002 Seminar Report 13.

<sup>11</sup> The most known legislation being the Black Administration Act 38 of 1927. This Act regulated the institution of traditional leadership. It provided *inter alia* for recognition and application of customary law and made provision for limited powers and roles of traditional leaders.

<sup>12</sup> Various pieces of legislation were enacted and provided for some sort of powers and functions of the traditional leaders. For example, the Black Authorities Act 68 of 1951 made provision for the establishment of tribal authorities in respect of recognised traditional communities with due regard to local law and customs. The powers, functions and duties of a traditional authority included *inter alia* the administration of the affairs of the tribe and assistance and guidance to the traditional leader in connection with the performance of his functions.

<sup>13</sup> Rugege S “The Institution of Traditional Leadership and its Relation with Elected Local Government” 2002 Seminar Report 13-14. With regard to tribal authorities, the Black Authorities Act 68 of 1951 created the three tiered system of control namely tribal or traditional authority, regional authority and territorial authority.

<sup>14</sup> Ntsebeza L Democracy Compromised: Chiefs and the Politics of Land in South Africa (HSRC Press Cape Town South Africa 2006) 18.

<sup>15</sup> Francis Meli A History of the ANC South Africa Belongs to Us (Zimbabwe Publishing House, Harare 1988) 38. When the South African Native National Congress was formed, many traditional leaders participated in its formation. In fact, inaugural conference of the ANC in 1912 decided to establish two houses, the Upper and the Lower Houses. The Upper House comprised seven paramount chiefs as Honorary Presidents. The Honorary Presidents were: Dalindyebo of the Thembus, Montshioa 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 Transvaal by the British was later included.

<sup>16</sup> Ntsebeza L Democracy Compromised: Chiefs and the Politics of Land in South Africa (HSRC Press Cape Town South Africa 2006) 18. For example, Chief Albert Luthuli was the president of the ANC. However, in 1952 a dramatic step was taken when Chief Luthuli was dismissed from his traditional leadership of the Umvoti Mission Reserve in Zululand. The reason for the dismissal of Chief Albert Luthuli was that he refused to give up his membership of the ANC. For more information in this regard, see Khunou SF “Critical Assessment of the Role and the Effectiveness of Traditional Leaders in Traditional Local Government: Road of Despair or Hope?” Unpublished Paper Presented at a Conference of Society of Law Teachers of Southern Africa 2002 Grahamstown 7.

<sup>17</sup> Cadman V “Gazankulu Land of Refuge and Relocation” 1987 Indicator South Africa 101.

<sup>18</sup> When the first elections of the homeland for the Legislative Assembly were held Ntswanisi was elected the first Chief Minister of Gazankulu. He was a professor with fairly well established credentials. Ntswanisi guided the territory through difficult circumstances. There was opposition to the homeland leaders in general and Ntswanisi was no exception. The legitimacy of his government was

In 1983, Ntswanisi cemented his stance when he met other likeminded Bantustans leaders to sign a declaration of intent. The signatories to this document committed themselves to work ceaselessly for the establishment of the greater South Africa based on non-racialism and democracy.<sup>19</sup>

In 1983, Ntswanisi established Ximoxo Xa Rixaka. This organisation was a national cultural liberation movement. Ximoxo Xa Rixaka had approximately 35 000 members by December 1984. Cadman identified the following as the fundamental aims of Ximoxo Xa Rixaka:<sup>20</sup>

- ❑ To promote the ethnic culture and interests of Gazankulu's Tshangaan/Tsonga people;
- ❑ To abolish racial discrimination; and
- ❑ To identify government created institutions through which black interests can be facilitated.

Many of the traditional leaders supported Ximoxo Xa Rixaka because of its pro-Tshangaan/Tsonga cultural position. Both Ntswanisi and his successor Nxumalo<sup>21</sup> staffed the Legislative Assembly and Cabinet of Gazankulu with some of the most influential traditional leaders. Recognised traditional leaders in Gazankulu were also an integral part of the whole civil service because the government paid them for services they rendered in their tribal offices. However, it must be noted that unlike in other Bantustans discussed below, the traditional leaders in Gazankulu were not the driving force of the Bantustan administration. Many of the traditional leaders opposed independence, thus agreeing with Ntswanisi that independence would strip the Tshangaan-Tsonga off their citizenship.<sup>22</sup>

Gazankulu like many bantustans of South Africa was largely rural and poor. The majority of the people were unemployed in the under-developed rural areas. These people became unpopular with the traditional leaders who were well off because of the stipends and salaries they got from government. Some of the traditional leaders were accused of bribes and corruption. Suffice to say that although the institution of traditional leadership was not completely obliterated in Gazankulu, its origins and traditional image, pride and glory suffered a serious blow. Though many Tshangaan/Tsonga still adhered to their traditional life, many viewed traditional leaders with a great deal of suspicion. Gazankulu, like many South Africa's bantustans was no better exception or different exemplary as a bantustan.<sup>23</sup>

### 3.2 Kangwane

According to Cooper *et al*, many Swazi people in South Africa lived in scattered reserves in the former Eastern Transvaal<sup>24</sup>. These Swazi people<sup>25</sup> inhabited the areas of White River and Nelspruit. It was through the process of resettlement that the apartheid government heavily challenged Swazi traditional leaders and people.

questioned and many political groupings believed that the homeland of Gazankulu like other South African homelands was an extension of the apartheid system. See in this regard TARG Report Politico-Historical Background: The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Programme Vol. VI (Potchefstroom 1996) 43.

<sup>19</sup> Cadman V "Gazankulu Land of Refuge and Relocation" 1987 Indicator South Africa 101.

<sup>20</sup> Cadman V "Gazankulu Land of Refuge and Relocation" 1987 Indicator South Africa 101.

<sup>21</sup> After the death of Chief Minister Ntswanisi, the Gazankulu Minister of Works, Nxumalo was elected the Chief Minister of the homeland administration.

<sup>22</sup> It was not surprising that in June 1993, the Gazankulu administration invited Mandela to address its Legislative Assembly and Mandela advised them to forget about the past and its criminal actions. He further urged them to work together to address the rights of workers, including civil servants, traditional leaders, teachers and nurses. According to Mandela, the ANC viewed the homeland's parliament as highly illegitimate, however, he had accepted the invitation to address the Assembly without hesitation. In this context, when Mandela appealed for co-operation between ANC and the public servants, traditional leaders became no exception. Most of the traditional leaders regarded Gazankulu as part of South Africa. Therefore, they supported the ANC call for democratic and united South Africa.

<sup>23</sup> Copper C *et al* Survey for Race Relations of Southern Africa (Johannesburg 1994) 637. In any case, there was no way Gazankulu could be better than other homelands of South Africa. Gazankulu like other homelands was financially dependent on apartheid government, which had no intention to improve their socio-economic conditions in the same way as it did to the so-called white South Africa.

<sup>24</sup> Some of the areas of the former Eastern Transvaal form what is now the Mpumalanga Province of South Africa. See in this regard, Copper C *et al* Survey for Race Relations of Southern Africa (Johannesburg 1994) 637-640.

<sup>25</sup> Anon Swazi <http://reafricatours.com/swazi.html>, [Date of Access 15 June 2006] 2. Swazi people consisted of a group of closely related Nguni chiefdoms organised around patrilineal descent groups. At that time a powerful Chief Ngwane I seized control over a considerable number of smaller neighbouring chiefdoms of Nguni and Sotho people to strengthen his own chiefdom and army against Chief Mthethwa forces led by Dingiswayo. Later Chief Ndwandwe subjugated Mthethwa and killed Dingiswayo. Thereafter Ndwandwe put Chief Ngwane I under pressure and he fled to the territory known as Swaziland while some members of his group inhabited some of the areas of the territory which is today known as Mpumalanga Province.

Firstly, Swazi traditional leaders lost vast tracks of their land. Secondly, traditional leaders' sons who were to inherit leadership became scattered and eventually traditional leadership ended up in the wrong hands. The Swazi traditional communities were also broken up. The Apartheid government settled these people on a narrow stretch of land along the northern and western borders of Swaziland in the middle of the 1970s. The area was named KaNgwane. The Swazi people under the control of their traditional leaders owned these areas communally.<sup>26</sup>

In 1977, a legislative assembly was established in KaNgwane where Mabusa became Chief Executive Councillor. Since its inception in 1977, the Legislative Assembly requested the South African government to grant it self-governing status. However, the Council of Mabusa vehemently rejected the concept of independence. The Cabinet argued that independence of KaNgwane would result in the forfeiture of the claim by the South African born Swazis to a share in a South African political power and its wealth. It is worth noting that the Swazi Council of Chiefs denounced the idea of self-government and independence of KaNgwane. Instead, they proposed that KaNgwane should be incorporated into Swaziland.<sup>27</sup> However, the Council of KaNgwane on the other hand wanted self-government status.<sup>28</sup>

KaNgwane obtained self-governing status from South Africa in terms of the Self-Governing Territories Constitution Act<sup>29</sup> in June 1982.<sup>30</sup> Sezwati was made an additional official language of the homeland. An Executive Council served as a Cabinet while the Chief Executive Councillor and Executive Councillors assumed the status of a Chief Minister and Ministers respectively. The Self-Governing Territories Constitution Act provided for the duties, powers and functions of traditional leaders.<sup>31</sup> The Chief Minister of KaNgwane, Mabusa interpreted the South African government's consent to grant KaNgwane self-government as evidence of sincerity by the central government not to incorporate KaNgwane into Swaziland.

The KaNgwane traditional leaders petitioned the then Prime Minister of South Africa, PW Botha, in 13 August 1982 in attempt to oppose self-government. The petition was also supported by the members of Inyatsi ya Mswati Movement. Chief Dlamini of the Swazi loyalists and traditionalists who were pro-incorporation formed this movement. The petition document outlined a close relationship between all the Swazis and the historical claims of Swaziland to both KaNgwane and Ingwavuma. The document further claimed that Inyandza National Movement (INM), which opposed the transfer of KaNgwane into the Kingdom of Swaziland was made up of non-Swazis who had no interest of the Swazis at all. Chief Dlamini of Inyatsi ya Mswati movement commented:<sup>32</sup>

The conditions in Swaziland were superior to those Swazis in South Africa and that Swazis were South African citizens by incident of history and not by choice.

Chief Dlamini, supported by King Sobhuza II of Swaziland, continued to press for border adjustments and for the creation of a "united" Swazi nation. It appeared that any incorporation of KaNgwane into Swaziland could have resulted into about 75 000 South African born Swazis forfeiting their claim of South Africa citizenship.<sup>33</sup> However, Mabusa made it clear at the official ceremony held at Kanyamazane stadium granting self-government to KaNgwane that: "KaNgwane's future did not include independence and the homeland should be seen only as a "stop-gap" measure.<sup>34</sup> The politics of KaNgwane was unique in the sense that unlike in other bantustans, traditional leaders did not spearhead the issue of independence or self-government. As shown above, some of the traditional leaders opposed the idea of self-government and pushed for the incorporation of KaNgwane into Swaziland. Since traditional leaders were not at the forefront of self-government of KaNgwane, traditional authorities played a limited role in the politics of this bantustan.

<sup>26</sup> Cooper C *et al* Survey of Race Relations in Southern Africa (Johannesburg 1981) 52.

<sup>27</sup> Anon "Swazi" <http://reafricatours.com/swazi.html>, [Date of Access 15 June 2006] 3. The kingdom of Swaziland also pressured South Africa for the return of Swazi occupied areas of South Africa since the 1960s.

<sup>28</sup> Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1983-1984) 52.

<sup>29</sup> Act 21 of 1971.

<sup>30</sup> Anon "Swazi" <http://reafricatours.com/swazi.html>, [Date of Access 15 June 2006] 3-4. KaNgwane was declared a self-governing territory with a population of about 400 000 people. KaNgwane's Chief Minister Mabusa rejected the idea of incorporating KaNgwane into Swaziland. Mabusa also clashed with the government of South Africa by expressing strong support for the ANC.

<sup>31</sup> Section 11 of Act 21 of 1971.

<sup>32</sup> Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1983-1984) 52.

<sup>33</sup> Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1983-1984) 309. For this reason Mabusa stated in the Cabinet of South Africa that: "it was insincere in telling that preference should be given to possible unification with Swaziland. South Africa must prove its sincerity by asking Gazankulu and QwaQwa to amalgamate with Mozambique and Lesotho respectively".

<sup>34</sup> Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1983-1984) 52.

Even the extent to which bantustan politics dislocated the institution of traditional leadership was not so extensive. However, it is worth noting that traditional leaders at KaNgwane were not left without some “political bruises”. The apartheid government as well as the government of KaNgwane also tampered with their existence.<sup>35</sup>

### 3.3 Kwa-Ndebele

The South African government established KwaNdebele as a bantustan for blacks of Southern Ndebele people in the mid 1970s. When the original list of bantustans was drawn in 1959, no provision was made for the South Ndebele. This bantustan was established near Groblersdal in the former eastern Transvaal (TVL), now part of the Mpumalanga province. In 1979, a first stage Legislative Assembly was established in KwaNdebele. Its capital was Siyabuswa.<sup>36</sup> In 1981, the South African government granted KwaNdebele self-government status.<sup>37</sup> The Chief Minister of KwaNdebele was appointed from the ranks of traditional leaders. Between 1984 and 1986, Chief Skosana acted as the Chief Minister of the Bantustan. After his death, the Legislative Assembly elected another traditional leader by the name of Chief Mahlangu, the Chief Minister.

In order to justify the status of KwaNdebele as a self-governing national unit, the apartheid government planned to increase the size of the homeland’s geographical area. According to Makanjee, land consolidation plans increased KwaNdebele in size from 98 000ha to 341 000 ha at an estimated cost of R150m to R200m in 1983.<sup>38</sup> The consolidation plan proposed the addition of 11 Nebo farms between Groblersdal and Mapoch, which were owned by the South African Development Trust (SADT). According to Cooper *et al*, the plan further proposed 150 000 ha from the Moloto region and 63 000 ha from Moutse one, two and three to be added in KwaNdebele. The South African government also intended to acquire the Ekandustria growth point, the Enkangala residential area and 1000 ha around the Nyabele area for KwaNdebele. However, the proposed incorporation of Moutse and 11 Nebo farms to KwaNdebele was disputed by the people of Moutse and by the Lebowa administration.<sup>39</sup>

In view of the above consolidation plans proposed by the apartheid government, it appears clearly that the policy of separate development was full of contradictions and inconsistencies in KwaNdebele. The South African government always justified separate development on the basis of the fact that different tribal groups must be kept separate to ensure peace and harmony. KwaNdebele, however, was the creation of a mosaic homeland consisting of different traditional communities with different institutions of traditional leadership. This move contradicted the key objectives of the Promotion of Black Self-Government Act. KwaNdebele was an artificial conglomeration of traditional communities and different pieces of land. The inevitable result of the process intended to create KwaNdebele was marred with conflicts and hostilities between different traditional communities. For instance, Sotho speakers and the Ndebele took up arms against each other. Traditional leaders of these two communities were also in dispute regarding the incorporation of Moutse into KwaNdebele.<sup>40</sup>

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<sup>35</sup> KaNgwane was also integral part of the separate development and a territory established within a broader gamut of apartheid dispensation. It is for this reason among many others that legislation such as the Black Authorities Act 68 of 1951 regulated the institution of traditional leadership in KaNgwane. Therefore, it is suggested that the status and role of traditional leaders in KaNgwane were adversely affected by legislative enactments of apartheid.

<sup>36</sup> Siyabuswa is the Ndebele name, which literally means we are controlled.

<sup>37</sup> In *Minister of Law and Order, KwaNdebele and Others v Mathebe and Another* 1990 (1) SA 114 (AD), the court stated that KwaNdebele was self-governing territory having been so proclaimed from 1 April 1981 by Proclamation R60 of 1981.

<sup>38</sup> Makanjee V “KwaNdebele: A Unilateral Declaration of Independence” 1987 Indicator South Africa 62.

<sup>39</sup> Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1984-1985) 51. See also *Mathebe v Regering van die Republiek van Suid Afrika* 1988 (3) SA 667 (TPD), where the court stated that the decision of the State President of the Republic of South Africa as contained in Proclamation R227 of 1985, promulgated in terms of section 1(2) of the Self-Governing Territories Constitution Act 21 of 1971, whereby the area of Moutse was added to the self-governing territory of KwaNdebele was invalid because the decision was taken not with the object of promoting the political development of the population of Moutse. See also *Lebowa v Government of the Republic of South Africa* 1998 (1) SA 344 (AD), where the court dismissed an appeal from a decision in a Provincial Division refusing an application by the government of Lebowa for an order declaring that the district of Moutse formed part of the self-governing territory of Lebowa. The court accordingly declared the Proclamation R229 of 1985, which added Moutse to the self-governing territory of KwaNdebele null and void and of no force and effect. For more information regarding the powers of the State President on the self-governing territories. See also *Government of the Republic of South Africa v Government of Kwazulu* 1983 (1) SA 164 (A), where the court held that the State President may amend the area of self-governing territory only after there has been consultation by the Minister with the Cabinet and Legislative Assembly of the territory concerned. This requirement indicated that parliament of South Africa regarded these bodies of self-governing territories as sufficiently independent or representatives of the citizens of such a territory to be entitled to be consulted before changes could be effected by the State President.

<sup>40</sup> This shows how the Bantustan political arrangement made by the apartheid government divided ethnic groups and made them to fight each other in South Africa.

Traditional leaders of Moutse region disputed the transfer of their communities into KwaNdebele. In a meeting, which was organised by Dr Phatudi, the then Chief Minister of Lebowa, Chief Mathebe of Moutse told about 3 000 people that Chief Skosana of KwaNdebele had told him that the Moutse people were now his subjects. The KwaNdebele proposal of amalgamating people was done for the sake of creating a homeland, which implies that the weak traditional communities were likely to be absorbed by the bigger ones against their wishes with the danger of imposing foreign traditional authorities on traditional communities.<sup>41</sup> Another critical issue, which became a problem for the politics of KwaNdebele was the fact that senior members of the KwaNdebele government did not call for the independence.

Mbokotho, the pro-independent vigilante group was in favour of independence.<sup>42</sup> Tribal traditionalists, traditional leaders, civil servants and the youth under the aegis of KwaNdebele Youth Congress (KWAYCO), however, opposed independence.<sup>43</sup> According to Makanjee, at least 160 people were killed in 1986 in bitter clashes between KwaNdebele authorities, Mbokotho and anti-independence activists vigilant action. More people joined those who opposed independence. Chief Mahlangu of the KwaNdebele royal family was detained outside Pretoria Supreme Court (now North-Gauteng High Court) in 1987 after applying for a restraining order against the KwaNdebele police. The police outside the British Embassy in Johannesburg also detained his brother, Prince Cornelius Mahlangu, in May 1987. Both the royal kraal of Chief Nzundza and the meeting place for anti-independence were fire bombed in 1987.<sup>44</sup>

Contrary to the expectations of the South African government, the traditional leaders of KwaNdebele who dominated the Legislative Assembly and the Ndebele government, denounced at all cost the proposed independence of KwaNdebele. Unlike in many Bantustans, the traditional leaders in Kwa-Ndebele assumed a totally different position concerning the independence of Kwa-Ndebele. To the disappointment and frustration of the South African government, the apartheid regime harassed and detained those who were at the forefront of the anti-independence campaign.<sup>45</sup> It was under these political circumstances that traditional leaders were humiliated for their antithesis of independence. They suffered the consequences of their actions. However, it must be noted that the KwaNdebele traditional authorities have proven to be extraordinarily resistant.<sup>46</sup>

### 3.4. KwaZulu

The KwaZulu self-governing territory<sup>47</sup> was created in terms of the Self-Governing Territories Constitution Act. Upon the creation of this bantustan, Chief Buthelezi became its Chief Minister. According to Anthea, Chief Buthelezi not only consistently refused independence of KwaZulu but also sought to dissuade other bantustan leaders from accepting this option. That is why in 1973 Chief Buthelezi organized a conference of homelands' leaders in which he encouraged them to reject the independence of their territories. Chief Buthelezi later vigorously criticized the leaders of Transkei and Bophuthatswana, namely Chiefs Matanzima and Mangope, for renegeing the initial agreement reached in the 1973 Conference where it was agreed that leaders of the homelands should reject independence.<sup>48</sup>

<sup>41</sup> It seems that the apartheid government's attempt to amalgamate different traditional communities to create and build a homeland of KwaNdebele failed.

<sup>42</sup> Makenjee V "KwaNdebele: A Unilateral Declaration of Independence" 1987 Indicator South Africa 62. Mbokotho was later banned by the Legislative Assembly, which cancelled proposed independence plans for December 1986.

<sup>43</sup> Makenjee V "KwaNdebele: A Unilateral Declaration of Independence" 1987 Indicator South Africa 62.

<sup>44</sup> Makenjee V "KwaNdebele: A Unilateral Declaration of Independence" 1987 Indicator South Africa 62.

<sup>45</sup> See *Mabena v Commissioner of Police KwaNdebele and Another* 1988 (4) SA 446 (TPD), the court noted that Mabena, a member of radical group, which was anti-independence of KwaNdebele was regularly harassed and arrested by the police. The court declared that such arrests were unlawful since Mabena was not arrested by the members of KwaNdebele Police Force.

<sup>46</sup> Makenjee V "KwaNdebele: A Unilateral Declaration of Independence" 1987 Indicator South Africa 62

<sup>47</sup> In *Government of the Republic of South Africa and Another v Government of KwaZulu and Another* 1983 (1) SA 164 (A), Rabie CJ described the status of self-governing territory as follows: "It is clear that while KwaZulu is not an entity that completely severed from the state, it is not a mere instrument or representative of South Africa. The parliament of South Africa has in certain respects permitted it to act independently of the state. It is clear that a self-governing territory such as KwaZulu is recognised by parliament as a territory, which is entitled to have its own flag and its national anthem and also a territory, which can conclude conventions, treaties and agreements with the South African government. There are features which indicate that parliament does not regard a self-governing territory created in terms of the 1971 Act as a mere instrument or representative of the state".

<sup>48</sup> Anthea J *The Story of Natal: 16 Years of Conflict* (Johannesburg 1997) 23. Chiefs Mangope and Matanzima opted for the independence of Bophuthatswana and Transkei respectively. Through this arrangement, they gave the South African government an opportunity to strip off the inhabitants of these homelands the citizenship of South Africa. An idea that became true as many people in these homelands were subjected to devastating conditions of misery and poverty.

Chief Buthelezi's strategy was to become the Chief Minister of KwaZulu so that he could prevent the independence of KwaZulu and made sure that the Zulu people did not forfeit their South African citizenship. Anthea explained that because of Buthelezi's strategy, the ANC supported the view that Buthelezi should assume traditional leadership despite the fact that his entitlement to traditional leadership was uncertain.<sup>49</sup> It seemed the ANC preferred Buthelezi rather than Mceleli, his first born brother, as a tactic on the basis that Buthelezi would challenge and fight the apartheid system and secure the interests of the ANC. The ANC used the traditional leadership position of Buthelezi to suit their political interests and agenda. The traditional office of Buthelezi as the traditional leader of the Zulus was the making of the ANC, which did not seem to differ much from the apartheid government.<sup>50</sup>

Subsequently, Buthelezi was appointed acting traditional leader in 1953 and finally in 1957. The apartheid government confirmed Chief Buthelezi as traditional leader of the Buthelezi traditional community. Maré and Hamilton asserted that Buthelezi believed in the position of traditional leadership and its validity during his tenure of office as the Chief Minister of KwaZulu. It is submitted that Buthelezi was sensitive about his own traditional leadership and he more often uttered claims for its legitimacy. The reason why he regularly did so was to justify the authority due to him. He and KwaZulu Legislative Assembly therefore legislated the roles<sup>51</sup> of traditional leaders in KwaZulu and placed himself at the top of all the traditional leaders. However, some of traditional leaders defied him and rallied behind the King of KwaZulu.<sup>52</sup> To bring traditional leaders under his direct control,<sup>53</sup> Buthelezi created a special Directorate in the department of the Chief Minister (his department) to accelerate the activation and participation of traditional leaders in local government. He also encouraged the training of traditional leaders in local government activities. In view of this approach, it should be stressed that Buthelezi and the KwaZulu government took efforts to make the traditional leaders more effective in the local government.<sup>54</sup>

However, traditional leaders who were so incorporated in the Bantustan government of KwaZulu had to pay a big price. For instance, they were required to be loyal to the Bantustan government and its institutions. The KwaZulu government continued to pursue its objectives of total control over the lives of traditional communities and the traditional leaders by resorting to apartheid legislation and further legislative enactments promulgated by the KwaZulu national assembly.<sup>55</sup> In 1974, Buthelezi launched the Inkatha to demonstrate opposition to apartheid. With the formation of the Inkatha, Buthelezi did everything within his power to reduce the independence of traditional leaders. He placed them at the centre of Inkatha politics.

<sup>49</sup> According to Anthea, the reason for this uncertainty was due to the fact that Buthelezi was the son of the Chief's tenth wife and was illegitimate. It is submitted that Buthelezi's father, Chief Mathole was too old to father a child at the time he married Buthelezi's mother, the Princess Magogo. In view of the illegitimate status of Buthelezi, his brother Mceleli, the first born of the first wife of Chief Mathole disputed his claim. See in this regard Anthea J The Story of Natal: 16 Years of Conflict (Johannesburg 1997) 23-44.

<sup>50</sup> Anthea J The Natal Story: 16 Years of Conflict (Johannesburg 1997) 44.

<sup>51</sup> See the Kwazulu Amakhosi and Iziphakanyiswa Act 9 of 1990. This Act provided for the recognition, appointment and conditions of service, discipline, retirement, dismissal, deposition, roles, duties and functions of Amakhozi. Matters pertaining to discipline included suspension of Amakhosi (senior traditional leaders) or Iziphakanyiswa (a traditional leader who holds office in terms of customary electoral procedure) misconduct and enquiry.

<sup>52</sup> Maré G and Hamilton G An Appetite for Power: Buthelezi's Inkatha and South Africa (Johannesburg 1987) 89. At the time of writing this article, the King of the Kingdom of KwaZulu was His Majesty King Goodwill Zwelithini.

<sup>53</sup> TARG Report Politico-Historical Background: The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Programme Vol. VI (Potchefstroom 1996) 20. The direct control of traditional leaders in KwaZulu by the government and Chief Buthelezi bred a considerable number of problems. These general problems were identified by TARG as follows: (a) The perpetuation of government appointment and control of traditional leaders. (b) The politicisation of traditional leadership. (c) Traditional leaders had to act as go-between between the state and their subjects. Here traditional leaders acted as servants of the KwaZulu government. (d) The enhancement of powers of traditional leaders opened the way for corruption, maladministration, bribery and incompetencies. (e) The legitimacy of traditional leaders was questioned as they were seen as the instruments capable to implement homeland laws. (f) Since the KwaZulu government paid the salaries of the traditional leaders, their loyalty was called into question. (g) Traditional leaders were subservient to the government of KwaZulu.

<sup>54</sup> Maré G and Hamilton G An Appetite for Power: Buthelezi's Inkatha and South Africa (Johannesburg 1987) 88-89.

<sup>55</sup> The well-known legislation being the Black Administration Act 38 of 1927 and the Black Authorities Act 68 of 1951. Although the KwaZulu national assembly did not enact these two pieces legislation, they were inherited from both the colonial and apartheid governments and became applicable in the self-governing territory of KwaZulu. Other legislation which regulated the institution of traditional leadership in KwaZulu before 1994 included *inter alia* the Kwazulu Amakhosi and Iziphakanyiswa Act 9 of 1990, the Kwazulu Act on the Code of Zulu Law 16 of 1985, the Kwazulu Act on Appeals from Courts of Amakhosi and Headman No. 11 of 1988, the Kwazulu Tribal Taxation Act. 7 of 1974 and the Kwazulu Act on Financial Regulations for Tribal and Community Authorities No. 17 of 1979.

According to Maré and Hamilton, Buthelezi told traditional leaders in Ulundi in September 1977 that the institution of traditional leadership could only survive as long as it served the interests of the people and their role in Inkatha. Buthelezi politicised the institution of traditional leadership in KwaZulu. By drawing the traditional leaders into Inkatha, Buthelezi reduced their powers and created a conducive political environment to manipulate them.<sup>56</sup> As the membership of the Inkatha increased, Chief Buthelezi's capacity to confront the apartheid state also grew in size and bounds. He revealed his capacity to challenge the apartheid state in 1979.<sup>57</sup> As commented above, throughout his term as the Chief Minister of KwaZulu, Chief Buthelezi rallied the traditional leaders of KwaZulu around the notion of rejecting independence of KwaZulu. However, in the 1980s Chief Buthelezi's support of the ANC withered. He vigorously opposed the idea of an armed struggle and disinvestments, which were the key strategies of the ANC to dismantle apartheid.

As Cooper *et al* noted his argument against disinvestments was that it would increase poverty and unemployment and instead he called for increased investment contrary to the ANC call for disinvestments.<sup>58</sup> He also rejected to accept Congress of Traditional Leaders of South Africa (CONTRALESA) in KwaZulu, which was the ally of the ANC. As the gap between the ANC and Inkatha became wider, Chief Buthelezi began to strengthen his position by recruiting the KwaZulu traditional leaders to join Inkatha. The KwaZulu police and Inkatha Youths consistently harassed those who refused to join Inkatha. For example, when the First Session of the Fourth KwaZulu Legislative Assembly was held at Ulundi in October 1982, Chief Mapumulo who refused to join Inkatha was assaulted outside the Assembly at its opening by Inkatha Youths. Chief Buthelezi condemned the assault but emphasised that whoever challenged him challenged the people.<sup>59</sup>

Besides many convoluted political problems and violence which fraught the people of KwaZulu in the 1990s, the KwaZulu government managed to consolidate the institution of traditional leadership more than any of the other bantustans.<sup>60</sup> For instance, according to Cooper *et al*, shortly before the Bantustans were dismantled there were about 208 proclaimed tribal authorities in KwaZulu grouped under 24 regional authorities. Seven tribal court houses were completed in 1982 with 22 under construction. Buthelezi's government deepened the roots of the institution of traditional leadership but not their powers.<sup>61</sup> It follows from the above that the history of traditional leaders in the bantustan of KwaZulu rested and revolved around the leadership of Buthelezi. He led traditional leaders throughout the period of bantustan administration and the first 15 years of democracy in South Africa. He fought against the demise of institution of traditional leadership and he shaped and trimmed the institution according to his patterns and whims. He also manipulated the institution of traditional leadership.<sup>62</sup>

### 3.5 Lebowa

Lebowa was a bantustan for the North-Sotho and Pedi people. This bantustan was geographically situated in the former Northern Transvaal in what is today called the Limpopo province.

<sup>56</sup>Maré G and Hamilton G *An Appetite for Power: Buthelezi's Inkatha and South Africa* (Johannesburg 1987) 88-89. This assertion is confirmed by the fact that Buthelezi warned that if traditional leaders did not involve themselves in the affairs of the movement it would be regarded as dereliction of duty and active involvement against Inkatha would be of course much worse. He told them that Pretoria no longer controlled their fate as Chiefs, which would be decided at Ulundi if necessary. The position of traditional leaders in KwaZulu became so weak. As a result they struggled to protect an image of inherited respectability. See also in this regard McIntosh A *et al* "Traditional Authorities and Land Reform in South Africa: Lessons from KwaZulu-Natal" 1996 *Journal of Development Southern Africa* 31.

<sup>57</sup>Anthea J *The Natal Story: 16 Years of Conflict* (Johannesburg 1997) 130. Anthea quoted Sunday Express writing about Buthelezi that: "although Chief Buthelezi broke the law by defiantly quoting Nelson Mandela at a public meeting, nothing happened. It also transpired that Buthelezi said things, which were banned about the government and the system and again nothing happened. However, when other black leaders said the same things they were sent into exile or marginalized and he (Buthelezi) still walked on a tightrope".

<sup>58</sup>Cooper C *et al* *Survey for Race Relations of Southern Africa* (Johannesburg 1994) 345.

<sup>59</sup>Cooper C *et al* *Survey for Race Relations of Southern Africa* (Johannesburg 1994)347.

<sup>60</sup>South Africa *Debates of Constitutional Assembly* (Cape Town 1994)134-135. Rabinowitz stated that KwaZulu was fortunate in retaining strong traditional values. It gave the people of that region the kind of community, traditions and identity. He went further to say that the sadness of urbanisation and loss of identity (and violence) was linked to the weakening of ubuntu, which was the culture of respect common to all Africans. It seemed that the government of KwaZulu in its attempt to consolidate traditional leadership went further to consolidate and sustain Zulu culture and tradition more than any other homeland in South Africa.

<sup>61</sup>Cooper C *et al* *Survey for Race Relations of Southern Africa* (Johannesburg 1994) 349.

<sup>62</sup>This analysis regarding Buthelezi is based on conclusions, which have been drawn by the author concerning the political and traditional roles Buthelezi played in his capacities as a traditional leader and Chief Minister of KwaZulu in the history of KwaZulu administration and South Africa in general.

Lebowa became a self-governing territory in 1973.<sup>63</sup> Dr Phatudi was elected Chief Minister of Lebowa. His chief rival in 1973 was the prominent traditional leader known as Chief Matlala who was in favour of independence. Dr Phatudi<sup>64</sup> was not in favour of the independence for Lebowa. In 1978, Dr Phatudi was re-elected Chief Minister and his rivals for leadership were Ramusi of the Lebowa People's Party (LPP) and Chief Molapo who led the Black People's Party (BPP).<sup>65</sup> Chief Matlala who supported the idea of independence did not succeed in his endeavours to lead Lebowa into independence.

The first capital of Lebowa was Seshego. Seshego was initially built as a dormitory and labour reservoir township for the then Pietersburg.<sup>66</sup> Later the Lebowa administration moved the capital into Lebowakgomo. According to Cooper *et al*, about 3888 blacks who lived in Lebowakgomo in 1979 were civil servants and their families.<sup>67</sup> Many people were drawn from the traditional communities of Lebowa to render their services to the Lebowa administration. Some of the traditional leaders also left their villages to become members of the Lebowa Legislative Assembly. Other traditional leaders who were not members of the Assembly, were also paid by the Lebowa government for their leadership in the traditional areas.

This arrangement and new developments by the Lebowa administration tampered with the existence of the institution of traditional leadership. Traditional leaders who were in the Legislative Assembly of the Lebowa government were placed at the centre of Bantustan politics. Many of those who were paid by the government were also drawn into the government administration, thus shifting their allegiance from their people to the Bantustan authorities.<sup>68</sup>

### 3.6 Qwaqwa

QwaQwa was the self-governing territory for the Southern Sotho people. Like all other Bantustans, architects of the policy of separate development created it. Its first Legislative Assembly was created in 1975.<sup>69</sup> In 1980, QwaQwa was granted self-governing status by the government of South Africa. Unlike other Bantustans of South Africa, QwaQwa was a very small area with limited economic resources. It comprised mainly of two tribal areas under paramount traditional leaders. These areas were the Bakwena tribal area and the Batlokwa tribal area. Both Bakwena and Batlokwa tribal areas were divided into the seven and three districts respectively with their own district traditional leaders.<sup>70</sup> Its Chief Minister, Chief Mopeli of Dikwankwetla Party (DP), had since its creation, rejected independence.<sup>71</sup> The reason was that it was feared that to rubber stamp and countenance the policy of apartheid, the government would rob the Southern Sotho their birthright of the greater South Africa. Like some of the homelands stated above, the QwaQwa Legislative Assembly also consisted of traditional leaders. However, Chief Mopeli and the homeland's traditional leaders continuously rejected the independence of QwaQwa.<sup>72</sup>

<sup>63</sup>TARG Report Politico-Historical Background: The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Programme Vol. VI (Potchefstroom 1996) 33. The Lebowa homeland was reclassified as a self-governing state in the 1970s and it did not take the option of gaining independence. According to TARG report, under reclassified status system of a self-governing state, the traditional leaders held land on behalf of the communities under them and allotted it to the members of the traditional community.

<sup>64</sup>TARG Report Politico-Historical Background: The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Programme Vol. VI (Potchefstroom 1996) 33-34. Lebowa as a self-governing state had a Chief Minister, Dr CN Phatudi as opposed to other independent states namely, Bophuthatswana, Transkei, Venda and Ciskei, which had Presidents. According to TARG report, Dr Phatudi guided and led Lebowa through the trying times of era in which political instability was heightening and the legitimacy of Chief Ministers, traditional leaders and homeland governments was rejected. The homeland leaders were regarded as "puppets" of the then South African apartheid government.

<sup>65</sup>Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1980-1981) 305.

<sup>66</sup>Pietersburg is now known as Polokwane.

<sup>67</sup>Cooper C *et al* Survey of Race Relations of Southern Africa (Johannesburg 1983-1984) 307.

<sup>68</sup>Traditional leaders became the agents and servants of the Bantustan authorities and shun away from their people.

<sup>69</sup>Cooper C *et al* Survey for Race Relations of Southern Africa (Johannesburg 1984) 307.

<sup>70</sup>Both the Tlokwa and Kwena traditional communities formed the Batlokwa and Mopeli tribal authorities. The communities developed into a Black Regional Authority and later Territorial Authority for which the Basotho-QwaQwa Legislative Assembly was established on 1 October 1971. The area became self-governing territory on 1 November 1974 by Proclamation R203 of 1974. See in this regard *Lefuo v Staatspresident en 'n Ander* 1983 (3) SA 924 (O), where the court said that the establishment of QwaQwa as envisaged in the Black Authorities Act 68 of 1951 and the Self-Governing Territories Constitution Act 21 of 1971 constituted an area within which homogenous community resided.

<sup>71</sup>Cooper C *et al* Survey for Race Relations of Southern Africa (Johannesburg 1984) 307.

<sup>72</sup>Cooper C *et al* Survey for Race Relations of Southern Africa (Johannesburg 1984) 439. According to Cooper *et al* on 28 January 1990 at a rally in the Bloemfontein, the Chief Minister of QwaQwa, Mopeli intimated that: "they were very anxious to help Mr De Klerk to negotiate a new Constitution with all the leaders on a non-group basis. He also stated that there was no room for homelands in a new

Chief Mopeli's stance was that the homeland would not opt for independence. It seemed, however, that there was pressure for independence from certain circles inside the homeland.

Chief Mopeli rejected the South Africa government's idea of a confederation of states and stated that the homeland government should rather be developed into a regional government within a federal South Africa. It is reported that Chief Mopeli clashed with the Commissioner-General Van Rooyen over the issue of independence of QwaQwa. As it transpired, the QwaQwa Commissioner-General pushed for the idea of independence. He asserted that while the South African government would never force QwaQwa to become independent the whole idea was that the homelands would do so and that QwaQwa would ultimately develop politically into some form of independence.<sup>73</sup>

Traditional leaders in QwaQwa had great powers and privileges. Firstly, the composition of the Legislative Assembly favoured them. Maloka reported that in QwaQwa of the 60 members of the Legislative Assembly in the 1970s, 20 were elected and 40 nominated by tribal representatives. This arrangement counteracted democratic representation in the Legislative Assembly. Secondly, traditional leaders were paid in their capacities as 'traditional leaders'. In QwaQwa, each of the 36 traditional leaders who were members of the Legislative Assembly were paid R51 536 per annum and extra R2 400 for their traditional duties.<sup>74</sup>

Although the traditional leaders in QwaQwa similar to other homelands were seen as "puppets" of the apartheid government, it is important to state that the institution of traditional leadership played a critical role in rejecting the independence of QwaQwa. In so doing, the apartheid government was unable to successfully complete its grand project of apartheid. Unlike most traditional leaders in the TBVC states<sup>75</sup>, the traditional leaders in QwaQwa challenged the legitimacy of Bantustan system and the political relevance of apartheid.

#### **4. The Road to Constitutional Democracy**

##### **4.1. Traditional Leadership and Political Changes**

On 11 February 1990, Nelson Mandela was released from Victor Verster Prison near Cape Town. Pollard correctly stated that the release of Mandela from prison, coupled with the unbanning of the ANC, South African Communist Party (SACP), Pan Africanist Congress (PAC) and other subsidiary political organisations intensified and accelerated the black led struggle against *apartheid*. It was during this time that traditional leaders more especially members of CONTRALESA began to play a crucial and positive role in the mass led struggle.<sup>76</sup> Rural masses were mobilized and sensitised more than ever before in the history of South Africa. According to Pollard, Mandela declared the following when he was released:<sup>77</sup>

I stand before you not as a prophet, but as a humble servant of you, the people. Your tireless and heroic sacrifices have made it possible for me to be here today. I therefore place the remaining years of my life in your hands.

The majority population, both urban and rural, had for a long time been longing to replace the bantustan system of governance with a more just and equitable social, political and economic order.

South Africa and that the homeland system should be overhauled immediately with a view of scrapping it. He was therefore of the view that existing structures should be transformed into a non-racial government within a greater South Africa and thus be amalgamated in South Africa".

<sup>73</sup> Cooper C *et al* Survey for Race Relations of Southern Africa (Johannesburg 1984) 540.

<sup>74</sup> Maloka T "Populism and the Politics of Chieftancy and Nation Building in the New South Africa" 1996 J of Contemporary Studies 175. Unlike in homelands such as Bophuthatswana and Ciskei where traditional leaders were paid in proportion to the number of their subjects or followers.

<sup>75</sup> TBVC is an acronym of Transkei, Bophuthatswana, Venda and Ciskei.

<sup>76</sup> Pollard AB "No Easy Walk to Freedom" 1994 Africa Today 70. See also Van Kessel I Beyond our Wildest Dreams: The United Democratic Front and the Transformation of South Africa (London 2000) 84, where it is stated that despite the political problems, which CONTRALESA encountered at its nascent stage of development, CONTRALESA felt it was important to organise and unite all traditional leaders of South Africa and to urge them to refrain from aligning themselves with the apartheid regime. These problems involved among other things the involvement of South African Youth Congress (SAYCO) in the formation of CONTRALESA, which was viewed by some of the traditional leaders with a great deal of suspicion. As Van Kessel noted, this suspicion was not unfounded and was based on the argument that SAYCO ultimate goal was to abolish the institution of traditional leadership. SAYCO was of the view that there was no place of traditional leaders in a democratic South Africa, which they were striving for.

<sup>77</sup> Pollard AB "No Easy Walk to Freedom" 1994 Africa Today 70.

The first major political challenges facing Mandela and the ANC led broad based movement were to advance a series of domestic demands. These demands included *inter alia* the repeal of discriminatory laws including those, which impacted directly or indirectly on traditional authorities, rural and urban black communities, the establishment of an Interim Constitution and a democratically elected Constituent Assembly (CA) to draft a new *Constitution*.

The transition to constitutional democracy in South Africa required major changes not only to apartheid national government and respective governments of self-governing Bantustans but also to other spheres of government and the institution of traditional leadership as well. The political changes that started in 1992 and the process of negotiating a new democratic Constitution injected new urgency and sense of change into the institution of traditional leadership. One of the few structural changes envisaged by the constitutional democracy was the determination of a policy with regard to traditional leadership and institutions and the alignment of these institutions with the democratic principles provided for in the new South Africa.<sup>78</sup>

### **5. Traditional Leaders and Constitutional Talks**

The South African debate on traditional leaders and their role in local government was key in the constitutional negotiations<sup>79</sup>. Of primary concern was the issue of sustainable democratic governance at grassroots level. At the core of this issue was the future of institution of traditional leadership, which for many years has been the form of government “closest to rural people”.<sup>80</sup>

The issue of the institution of traditional leadership and democratic constitutionalism was also central to the negotiations. The political parties and representatives of traditional leaders negotiated for the recognition and protection of the institution of traditional leadership and customary law. Consequently, the traditional leaders proposed constitutional order that recognised the institution of traditional leadership<sup>81</sup>. At some stage, the negotiation process was under serious threat due to insistence by traditional leaders who wanted their role to be clearly defined in the Interim Constitution. Hence, the Interim Constitution provided for limited recognition of the institution of traditional leadership and Houses of Traditional Leaders at both national and provincial levels.<sup>82</sup>

Suffice to state that the traditional leaders negotiated for the type of Constitution that would respect and uphold their aspirations and powers in the new democratic South Africa. With the complete restructuring of South Africa’s constitutional system, traditional leaders insisted on inclusion and protection of not only customary law but also traditional leadership itself. Accordingly, both the Interim and the 1996 Constitutions specifically accord constitutional recognition to the institution, status and role of traditional leadership.

### **6. A Domain of the Interim Constitution**

The transition to a new constitutional order changed the old position substantially. For example, the Interim Constitution dismantled *inter alia* the homeland system.<sup>83</sup> One of the institutions implicated in this transformation process was the institution of traditional leadership.

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<sup>78</sup> N Olivier “Recent Development in Respect of Policy and Regulatory Frameworks for Traditional Leadership in South Africa at Both National and Provincial Level” Hinz MO (ed) in *The Shade of New Leaves Governance in Traditional Authority: A Southern African Perspective* (in Collaboration with Helgard K Patemann Lit Verlag Berlin 2006) 75.

<sup>79</sup> During the initial negotiations and drafting of the Interim Constitution, the issue of the institution of traditional leadership proved to be a particularly problematic issue. Middle ground had to be found between the institution of traditional leadership and the new principles of equality, representation and constitutionality. Therefore, the issue of traditional leadership in the new South Africa was a subject of intense debate. See in this regard Khunou SF “A Legal History of Traditional Leadership in South Africa, Botswana and Lesotho” LLD- Thesis: North-West University (Potchefstroom Campus 2007) 190-196.

<sup>80</sup> Keulder C *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (HSRC Pretoria 1998) 1.

<sup>81</sup> The negotiations *inter alia* culminated into Chapter 11 of the Interim Constitution.

<sup>82</sup> Section 183 of the Constitution. This section provided for the establishment of the provincial houses of traditional leaders consisting of the representatives elected or nominated by traditional authorities. Section 184 of the Interim Constitution also provided for the establishment of the Council of Traditional Leaders (now known as the National House of Traditional Leaders) consisting of a chairperson and 19 representatives elected by traditional authorities in the Republic. The chairperson and members of the council are elected by an electoral college constituted by members of the provincial houses of traditional leaders.

<sup>83</sup> See in this regard Schedule 7 to the Interim Constitution. In terms of this Schedule, the Self Governing Territories Constitution Act was repealed. As a result, the governments and institutions of self-governing territories were dismantled. However, the institution of traditional leadership in those territories was not dismantled. Furthermore, the institution, status and role of the constitutional position of the King of the Zulus and kingdom of KwaZulu were recognised and protected. This recognition was in line with the Memorandum of

The recognition of traditional customary institutions and the Bill of Rights in the Interim Constitution compelled the government since 1994 to transform South Africa as a democratic and unitary state based on the principles such as human dignity, equality, non-racism and non-sexism.<sup>84</sup> The recognition of traditional leadership was housed mainly in Chapter 11 of the Interim Constitution, which stated that:<sup>85</sup>

(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.

(2) Indigenous law shall be subject to regulation by law.

The Interim Constitution also provided that:<sup>86</sup>

A traditional leader of a community observing a system of indigenous law and residing on land within the area of jurisdiction of an elected local government shall *ex officio* be entitled to be a member of that local government and shall be eligible to be elected to any office of such local government.

The above constitutional provision provided a function or role for traditional leadership at local government level. This constitutionally recognised entitlement of traditional leaders signalled important protection of the roles of the traditional leaders. In *ANC v Minister of Local Government and Housing, Kwazulu-Natal*<sup>87</sup>, the Constitutional Court was confronted with exactly such protection of the role of traditional leaders in local structures. The Constitutional Court confirmed that section 182 of the Interim Constitution was an important constitutional entitlement for traditional leaders whose customary authority and role were being affected by the transition to democracy. Both sections 181 and 182 of the Interim Constitution were a victory for traditional leaders in the new democratic South Africa. The efforts and determination of traditional leaders which were articulated in these constitutional provisions provided for the recognition of traditional leaders and customary law as well as their roles in the local government of new South Africa. The new constitutional order intended to provide the institution of traditional leadership with functions and governmental roles at local level.

### **7. Traditional Leadership and Direct Provisions of the 1996 Constitution**

Chapter 12 of the 1996 Constitution deals directly with the constitutional framework for traditional leadership and institutions. Within this context, Chapter 12 provides the framework for amongst others the recognition and continued existence of traditional leadership and institutions. Section 211 of the Constitution, which deals with the recognition of traditional leadership and institutions provides as follows<sup>88</sup>:

(1) The institution, status and role of traditional leadership according to customary law, are recognised subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

The role of traditional leadership is defined in section 212 of the Constitution in the following words:

(1) National legislation may provide for a role of traditional leadership as an institution at local level on matters affecting local communities.

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Agreement for Reconciliation and Peace between the Inkhatha Freedom Party/KwaZulu government and the ANC and the South African government/ National Party.

<sup>84</sup>De Beer FC “South African Constitution, Gender Equality and Succession to Traditional Leadership: A Venda Case Study” Hinz MO (ed) in *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* in collaboration with Helgard K Patemann (Lit Verlag Berlin 2006) 216.

<sup>85</sup> Section 181 of the Interim Constitution.

<sup>86</sup> Section 182 of the Interim Constitution.

<sup>87</sup> 1998 (3) SA 1 (CC).

<sup>88</sup> Section 211 (1-3) of the Constitution.

- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-
- (a) National and provincial legislation may provide for the establishment of houses of traditional leaders (b) National legislation may establish a council of traditional leaders.

It is evident from the above that the 1996 Constitution guarantees the recognition, protection and continued existence of the institution of traditional leadership. The Constitution expressly declares that the institution, status and role of traditional leadership according to customary law, are recognised subject to the Constitution. This implies that such roles must be in conformity with the Constitution itself. The Constitution further mandates and authorises the national parliament to pass legislation to provide for a role for traditional leadership as an institution at local level on matters affecting local communities.<sup>89</sup> In compliance with this constitutional provision, the national parliament has among many others enacted the Traditional Leadership and Governance Framework Act<sup>90</sup> which deals *inter alia* with the transformation of the institution of traditional leadership, establishment of the traditional councils, appointment and recognition of traditional leaders and the guidelines for the allocation of the roles of the traditional leaders or traditional councils. The Communal Lands Rights Act<sup>91</sup> was also passed by the parliament to meet its constitutional obligation to enact legislation to provide legal security of tenure or comparable redress in accordance with section 25 (6) of the Constitution.<sup>92</sup>

### **8. Status and Role of Traditional Leaders Under the 1996 Constitution**

Section 211 (1) of the Constitution was considered in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*,<sup>93</sup> where the Constitutional Court dealt with the provisions relating to traditional leadership to establish whether it was repugnant to the Constitution or not. The institution, status and role of traditional leadership were recognised by the Constitutional Court. To this end, the Constitutional 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 by means of entrenchment in the NT and any attempt at interference 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.

In the light of the above part of judgement, it is evident that the recognition of traditional leadership and institutions include the recognition of the powers and functions of traditional leaders with regard to governance of the affairs of local communities in their traditional authorities' areas. Such recognition includes customary and statutory roles as well as the constitutional powers conferred to the traditional leaders. However, it is important to note that customary law as well as the statutes that confer the powers and functions on the institution of traditional leadership must conform with the Constitution.

Section 2 of the 1996 Constitution confirms the supremacy of the Constitution in these words: "the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled". Section 1 of the Constitution also provides *inter alia* that the Republic of South Africa is one sovereign democratic state founded *inter alia* on the values of supremacy of the Constitution and the rule of law.

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<sup>89</sup> Section 212 (1) of the 1996 Constitution. In terms of section 143 of the Constitution, the provincial legislatures may also enact the provincial Constitution to provide for the institution, role, authority and status of a traditional monarch where applicable. This means that such Constitution may define the powers, functions and duties of a traditional monarch.

<sup>90</sup> Act 41 of 2003. Herein referred to as the Framework Act.

<sup>91</sup> Act 11 2004. Herein referred to as the CLARA. This Act provides *inter alia* for the security of land tenure, democratization of communal land, registration and titling of land, establishment of land administration communities and the role of traditional councils as land administrators in traditional communities.

<sup>92</sup> Section 25 (6) of the Constitution states that: "a person or a community whose tenure of land is legally insecure as a result of past racial discriminatory laws or practices is entitled to the extent provided by an Act of parliament either to restitution of that property or to equitable redress". Section 25 (9) provides that parliament must enact legislation referred to in subsection 6.

<sup>93</sup> 1996 (4) SA 774 CC 834.

Section 212(1) and (2) of the Constitution envisage legislation that could make provisions for a role of traditional leadership as an institution in local administration and for establishment of provincial houses as well as a national council of traditional leaders. These provisions of the Constitution *inter alia*, imply that the customary rules which determine succession to positions of traditional leadership should be applied to ensure the continuation of this institution over time.<sup>94</sup> The Constitution particularly section 212(2) establishes institutions in all spheres of government. These institutions include the National House of Traditional Leaders, the Provincial House of Traditional Leaders and the Traditional Councils.<sup>95</sup> The Constitution establishes these institutions to ensure maximum participation and involvement of traditional leaders on matters of governance<sup>96</sup>.

These constitutional institutions extend the role of traditional leaders beyond their traditional areas of jurisdictions. For example, in terms of section 7(1) of the National House of Traditional Leaders Act<sup>97</sup>, the objectives and functions of the National House are *inter alia* to promote the role of traditional leadership within a democratic dispensation and enhance unity among different communities. The House may also advise the national government and make recommendations on matters pertaining to traditional leadership and roles of traditional leaders. Generally, the traditional leaders play a strategic critical role through their participation in various government structures, bodies and organs of state. Therefore, the partnerships between traditional councils and organs of state, government departments, statutory bodies and municipalities must be encouraged to advance and sustain development and service delivery in their communities. However, the role they should play within the new constitutional dispensation must be consistent with the spirit of the Constitution.

### **9. Other Constitutional Provisions Impacting on Traditional Leadership**

In terms of Schedule 4 (Part A) of the Constitution, traditional leadership and indigenous law and customary law are within the concurrent domains of both the national parliament and the provincial legislatures. This constitutional arrangement provides provincial legislatures with an opportunity to enact substantive provincial legislation dealing with the roles of traditional leaders at the local level. The mechanisms or procedures for the transfer of power or role of traditional leaders are not restricted to national parliament or government only. Provincial legislatures may also enact laws affecting traditional leadership and customary law. This is permitted by the Constitution. It is for this reason among many others that section 212(2) of the Constitution provides that national or provincial legislation may provide for the establishment of the houses of traditional leaders. This constitutional provision authorises the provincial legislatures to legislate on traditional leadership matters.

For example, about 7 provinces have already passed legislation through their legislatures which regulate the institution of traditional leadership at provincial level. Section 219 of the Constitution also provides for the enactment of national legislation pertaining to the remuneration of persons holding public office. Section 219 refers, amongst others to traditional leaders. With this in mind, the national parliament enacted the Remuneration of Public Office Bearers Act<sup>98</sup>. Section 5 of the Remuneration of Public Office-Bearers Act provides for the salaries and allowances of traditional leaders to be determined by the President after consultation with the Premier concerned. Salaries of traditional leaders are determined with due regard to the roles, status, duties, functions and responsibilities of different traditional leaders.

<sup>94</sup> De Beer FC “South African Constitution, Gender Equality and Succession to Traditional Leadership: A Venda Case Study” Hinz MO (ed) in *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (in collaboration with Helgard K Patemann Lit Verlag Berlin 2006) 215.

<sup>95</sup> See also section 16 of the Framework Act which states that: (1) The houses of traditional leaders in the Republic are – (a) a national house of traditional leaders and provincial houses of traditional leaders as provided for in section 212 (2)(a) of the Constitution; and (b) local houses of the traditional leaders. The national house of traditional leaders was established in terms of the National House of Traditional Leaders Act 10 of 1997. The provincial legislatures of the North-West, Free State, Mpumalanga, KwaZulu-Natal, Limpopo, Eastern Cape and Northern Cape have promulgated various pieces legislation, which deal with the institution of traditional leadership and governance. The Gauteng province has incorporated some of the traditional authorities. However, at the time of writing this article, Gauteng province did not have the provincial legislation dealing with matters of traditional leadership. For more information regarding various pieces of the provincial legislation, see in this regard the Free State Traditional Leadership and Governance Act 8 of 2005, the Limpopo Traditional Leadership and Institutions Act 6 of 2005, the Mpumalanga Traditional Leadership and Governance Act 3 of 2005, the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005, the Traditional Leadership and Governance (Eastern Cape) Act 4 of 2005 and the Northern Cape Traditional Leadership and Governance Act 2 of 2007 and the North-West Traditional Leadership and Governance Act 5 of 2005 which was subsequently repealed and replaced by the North-West House of Traditional Leaders Act 3 of 2009.

<sup>96</sup> Khunou SF “Traditional Leadership: Constitutionalism and Democracy in South Africa” 2008 *Speculum Juris* 96.

<sup>97</sup> Act 10 of 1997.

<sup>98</sup> Act 20 of 1998.

In terms of section 239 of the Constitution, all institutions established in terms of legislation and performing public functions are deemed organs of state<sup>99</sup>. This would include traditional leadership and traditional institutions. According to Vorster, the effect of being organs of state is that traditional leadership and institutions must observe and adhere to a number of other constitutional provisions such as Chapter 3 of the Constitution.<sup>100</sup> Traditional authorities are invested with state authority in that they are statutorily and constitutionally authorised to perform certain judicial and administrative functions. It is evident that traditional authorities are not mere cultural institutions but act as organs of state endowed with limited state authority<sup>101</sup>.

Therefore, the provisions of Chapter 3 of the Constitution are applicable to the conduct of the traditional authorities when they act as organs of state. The Framework Act particularly section 5 gives impetus to Chapter 3 of the Constitution. Traditional leaders are compelled by Chapter 3 provisions as regards co-operative government and intergovernmental relations, which enjoin all government departments and organs of state to interact, consult and co-operate. Traditional leaders and traditional institutions are also compelled to comply with the principles of public administration as contained in section 195 of the Constitution.<sup>102</sup>

Chapter 2 of the Constitution embodies the Bill of Rights. This Bill of Rights is a cornerstone of democracy in South Africa and therefore binds all legislative, executive, judiciary and organs of state in terms of section 8 (1) of the Constitution. As highlighted above, the Constitution as a whole is the supreme law of the Republic and the obligations imposed by it must be fulfilled. In view of this constitutional provision, the Constitution also binds the institution of traditional leadership and institutions covered by Chapter 12 of the Constitution with regard to the performance of their administrative and judicial duties. With regard to the administrative and judicial functions of traditional authorities, it must be noted that section 33 like section 34 of the Constitution entails fundamental rights. These sections bind the institution of traditional leadership. It should be clear from the above that the utilisation of traditional courts in the settlement of disputes is not irreconcilable with the wording of section 34. Section 33 also binds the traditional authorities with regard to the performance of their administrative duties.

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<sup>99</sup> Section 239 of the 1996 Constitution contains a more detailed definition of the term “organ of state” than the Interim Constitution. Section 239 states that an “organ of state” means (a) any department of state or administration in the national, provincial or local sphere of government or (b) any other functionary or institution (i) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.

<sup>100</sup> Vorster LP “The Institution of Traditional Leadership” in Bekker JC *et al* Introduction to Legal Pluralism in South Africa (LexisNexis Butterworths South Africa 2002)136. For more information regarding the principles of co-operative government see, section 41 (1) of the 1996 Constitution deals with the principles of co-operative government and intergovernmental relations as follows: all spheres of government and all organs of state within each sphere must – (a) preserve the peace, national unity and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic; (c) provide effective, transparent, accountable and coherent government for the Republic as a whole; (d) be loyal to the Constitution, the Republic and its people; (e) respect the constitutional status, institutions, powers and functions of government in the other spheres; (f) not assume any power or function except those conferred on them in terms of the Constitution; (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity or government in another sphere; and (h) co-operate with one another in mutual trust and good faith by-(i) fostering friendly relations (ii) assisting and supporting one another (iii) informing one another of, and consulting one another on, matters of common interest; (iv) co-ordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.

<sup>101</sup> This approach is in line with the decision of the Bophuthatswana Supreme Court in *Baloro v University of Bophuthatswana* 1995 (4) SA 197 (BSC). In that case, the court decided that it is essential that the term organ of state be given an extended meaning to include *inter alia* statutory bodies, parastatals, bodies or institution established by statute but managed and maintained privately, such as universities, Law Societies and South African Medical and Dental Council, all bodies supported by the state and operating in close co-operation with structures of state authority or certain private bodies or institution fulfilling certain key functions under the supervision of organs of state. See in this regard TARG Report Development Management: The Administrative and Legal Position of Traditional Authorities in South Africa and their Contribution to the Implementation of the Reconstruction and Development Vol. VII (Potchefstroom 1996) 60.

<sup>102</sup> Chapter 10 of the Constitution. This Chapter deals with basic values and principles governing public administration. Section 195 of the Constitution states that: (1) public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: (a) A high standard of professional ethics must be promoted and maintained; (b) Efficient, economic and effective use of resources must be promoted; (c) Public administration must be development-orientated; (d) Services must be provided impartially, fairly, equitably and without bias; (e) People’s needs must be responded to and the public must be encouraged to participate in policy-making; (f) Public administration must be accountable; (g) Transparency must be fostered by providing the public with timely, accessible and accurate information; (h) Good human-resource management and career-development practices, to maximize human potential must be cultivated; (i) public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress imbalances of the past to achieve broad representation. (2) The above principles apply to: (a) administration in every sphere of government; (b) organs of states and (c) public enterprises. The institution of traditional leadership performs public functions. Therefore, the institution must adhere to basic values and principles governing public administration.

As a result, section 33 of the Constitution directs them to ensure that their administrative functions are discharged with due regard to representation, participatory democracy, accountability and transparency.

### **10. Conclusion**

It is evident from the preceding discussion that the basis for the establishment of the self-governing territories was to ensure that traditional leaders and traditional communities live in the Bantustans and ran their own affairs without any shares in the greater South Africa. As a result, the traditional leaders were responsible for day-to-day administration of the affairs of the traditional communities in those territories. However, the apartheid government in order to sustain the legitimacy of the Bantustan policy used some of the traditional leaders of the self-governing territories. Of primary importance from the above is the fact that the legitimacy and independence of the institution of traditional leadership were greatly undermined by the colonial, apartheid and Bantustan authorities. As a result, the institution of traditional leadership lost a great deal of veneration in the eyes of their traditional communities.

With the advent of constitutional democracy in South Africa, the institution is required to re-define itself within the framework of democratic dispensation. This constitutional mandate also enjoins the traditional leaders in the former self-governing territories of South Africa to comply and fulfil the constitutional requirements. More especially the Constitution specifically acknowledges the institution of traditional leadership and its place and role in the system of democratic governance. The 1996 Constitution envisages the type of traditional leadership that would fit in the whole scheme of constitutional dispensation. Therefore, the institution of traditional leadership cannot be expected to lack behind the constitutional demands and changes. The institution of traditional leadership, which is by its nature custom-based, is expected in terms of the Constitution to exist side by side with the democratic institutions, municipalities and various organs of state. Whether the institution that was dented by various pieces of legislation and politics of colonialism, apartheid and self-governing territories would adapt and fit perfectly in the scheme of the new constitutional dispensation is a development to be seen.