

TWELVE

A long walk for traditional leadership in South Africa

NKOSI MWELO NONKONYANA
(ZANEMVULA!)

Introduction

I have been involved in the struggle for the restoration of pride and dignity in the institution of traditional leadership in South Africa from an early stage. It began from about 1975, when I was a student at Jongilizwe College, the college for the sons of traditional leaders in Tsolo, located in what was then the Transkei bantustan.

I then went to the University of Fort Hare and studied law. The degree, which was then known as a Bachelor of Juris, included a course in African law.

To further my studies, I enrolled at the University of South Africa, where I obtained a Bachelor of Laws (LLB), conducting research in African law. My dissertation critically evaluated the then repugnancy clause¹ (see II of Native/African Administration Act No. 38 of 1927).

I was among the traditional leaders instrumental in the formation of a national organisation of traditional leaders known as the Congress of Traditional Leaders of South Africa (Contralesa), having

taken over *ubukhosi* (chieftainship) from my late father and mentor Nkosi David Malayipheli Nonkonyana (Bambilizwe!) in 1988.

Institution of traditional leadership

The institution of traditional leadership in South Africa is the only institution that is indigenous, original and entrenched in our beloved country. It encompasses all families, represented by a head of the family, who is more often than not an elderly male person. He has an overall responsibility to ensure that family norms and values are observed by all the members. The members share a common family and clan name although they may have different houses. The family unit is fundamental in the institution, which is why we have influenced current government policy to recognise royal families as basic structures responsible for appointing and disciplining traditional leaders.

Furthermore, disputes between members of the family must be considered first by the family, with the head of the family presiding over such disputes to enhance unity and cohesion within the family, and to instil family values.

The family is entitled to a residential site on which to build a home that should have a yard for family gatherings that is big enough to accommodate a bundle of firewood (*igoqo*) and other necessities for the family, as well as stock kraals (for sheep, goats and cattle).

Together, the families constitute what we term a traditional locality (*isigodi*), which is preferably led by a head of a family who needs to command respect from members of such a community. The person is given a title of being a sub-headman (*usibonda/induna/ibhodi/unozithetyana*) who must pay respect, on behalf of the community concerned, to the head of the various other communities forming a traditional community area (*ilali*). The headman may be a traditional leader junior to a senior traditional leader of the same clan. However, in South Africa, the colonial and apartheid regimes introduced a headmanship system and also established tribal (now traditional) authorities. Included within the areas of jurisdiction of traditional authorities, set by apartheid and colonial administrations, are families

from other clans, which gradually regained independence when they claimed to have their own cultural norms and values.

There are heads of clans who have to administer the affairs of their clan, in accordance with the cultural norms and values of the clan concerned. These persons are referred to as senior traditional leaders (*amakhosi/dikgosi/iinkosi/marena*). These senior traditional leaders generally head the traditional authorities envisaged in the Constitution of the Republic of South Africa and are often referred to as 'traditional councils' in national and provincial legislations. In terms of our culture and custom, members of the council that advise the head of a clan are heads of traditional communities within that clan. Also part of the advisory council are selected wise men/women in the community who have been identified as custodians of the culture and customs of the traditional community concerned.

The heads of various clans constitute a kingship/queenship. The king/queen is advised by a council composed of all the heads of the clans and councillors who are selected in accordance with tradition and culture and on the basis of experience and wisdom to advise the king/queen in the execution of his /her duties. The councillors must be persons of good character.

The king/queen, like all other traditional leaders, must uphold the view of his/her council and, in case of divergent views must guide the council to reach decisions by consensus. These decisions are based on general meetings of various clans. The king/queen then pronounces the decision/s of the council and his/her pronouncements are binding and cannot be challenged. Amazulu put this in their language as follows: '*umlomo weNkosi awuqambi manga*', meaning, 'what is said by a royal leader is the whole truth and nothing but the truth'.

Participation of traditional leaders in the struggle for freedom

When the colonialists came to South Africa in 1652, Africans were living happily in the country, enjoying freedom under a traditional leadership system that was based on the will of the people. Under this system,

land was administered in the interests of those who were not living (ancestors), those who were living and of future generations to come.

Before the colonialists took over the land and imposed their system of governance, which ironically has been embraced by all democratic governments in Africa, traditional leaders and their communities led wars of resistance. They paid supreme sacrifices as many were brutally killed.

The struggle for freedom was initiated and led by our forebears and the generals in charge of *imikhosi yesizwe* (commandos). When traditional leaders and the people were united, the enemy (colonialists) realised that it could not succeed and had to develop false propaganda. They denounced our institution of traditional leadership, arguing that it was undemocratic. Colonial leaders also promoted a divide and rule policy with respect to traditional communities. Precisely because our forebears fought on tribal lines, Africans were divided, and after some limited successes they were defeated.

Establishment of the liberation movement

Traditional leaders realised the need to be united in order to defeat the apartheid regime. They participated in the formation of a liberation movement, the African National Congress (ANC), that was constituted on 8 January 1912 and that governs South Africa today.

The original constitution of the ANC recognises traditional leaders as the authentic leaders of the people and grants them status as leaders within the ANC. The leaders of the ANC knew that they would lead well, given that they were answerable to royalty, in the same way that political parties in England are answerable to the British monarch.

Participation of traditional leaders in the multiparty negotiating forum

By the early 1990s the apartheid regime had released Nelson Mandela and other political leaders and agreed to hold constitutional talks

to bring about freedom in South Africa. This was a result of the intensification of the armed struggle by liberation forces, especially Umkhonto weSizwe (MK) and the Azanian People's Liberation Army (APLA); the mobilisation of masses inside the country determined to make South Africa ungovernable and the condemnation of the apartheid regime by the international community, due in part to the struggles of those in exile.

Strangely enough, traditional leaders were not part of the initial talks in what was known as the Convention for a Democratic South Africa (CODESA). While we were making submissions to the Rev. Mohapi Commission, the talks in both CODESA I and CODESA II collapsed. In our submission to the Mohapi Commission, we made the point that freedom in South Africa was taken away from traditional leadership by violent colonial rule and a racist apartheid regime, and argued that logic dictated that we should be allowed to participate in the talks. Furthermore, we contended that governments would come and go, but the institution of traditional leadership would exist forever. As a direct result of our compelling case, we were admitted to take part in the constitutional negotiating forum known as World Trade Centre talks. After our involvement in the constitutional talks, we were part of a forum that successfully adopted constitutional principles binding on the Constitutional Assembly in drafting and adopting a constitution for the new democratic South Africa.

Traditional leaders participated side by side with the ANC in the constitutional negotiations that brought about a new democratic state. Among the constitutional principles that were agreed upon to guide the Constitutional Assembly were the following:

The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in a constitution' (see Constitutional Principle X111).

At each level of government, there should be democratic representation. This principle should not derogate from the provisions of principle X111 (see Constitutional Principle XV11).

Adoption of the Constitution of the Republic of South Africa

The Constitutional Assembly that was mandated to draft and adopt the final Constitution of South Africa should have been guided by the constitutional principles that were agreed upon at the negotiating forum known as World Trade Centre talks. These talks took place after CODESA I and II, which had not included traditional leaders, had failed.

Traditional leaders of South Africa were not part of the proceedings of the Constitutional Assembly, which considered and adopted the final Constitution on 8 May 1996. Hence, it is not surprising that – with respect – the Assembly failed to make provisions in the Constitution for the powers and functions necessary for the institution of traditional leadership.

Chapter 12 – the shortest chapter – of the Constitution provides for the recognition of traditional leadership in South Africa in the following terms:

CHAPTER 12

Traditional Leaders

Recognition

- 211 (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 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.

Role of traditional leaders

- 212 (1) National legislation may provide for a role for traditional leadership as an institution at local level on

- matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law
 - (a) National or provincial legislation may provide for establishment of houses of traditional leaders; and
 - (b) National legislation may establish a Council [now National House] of Traditional Leaders.

Contralesa, aggrieved by the apparent possibility of the obliteration of the powers and functions of traditional leadership in South Africa, objected to the certification of the Constitution by the Constitutional Court on various grounds, which included the following:

- a. Imposition of foreign norms and values at the expense of entrenched African norms and values;
- b. Recognition of municipal councils and the extension of their areas of jurisdiction to include traditional communities under the jurisdiction of traditional authorities in South Africa (so called 'wall-to-wall municipal jurisdiction');
- c. A Eurocentric constitution that embraces foreign systems of governance that have been inherited from violent and illegitimate colonial and apartheid regimes, which took over from African traditional systems of governance;
- d. No express recognition of our traditional courts, despite express recognition of courts established by illegitimate regimes that promoted a foreign Roman Dutch legal system at the expense of an African legal system.

In response to our objections to the certification of the final Constitution, the Constitutional Court, which was composed of justices who obtained legal qualifications and practiced under a foreign Roman Dutch legal system (so called common law of South Africa), held thus:

[197] In our view, therefore, the NT complies with CP X111 by giving express guarantees of the continued existence of

traditional leadership and the survival of an evolving customary law. The institution, status and role of traditional leadership are hereby protected. They are protected by means of entrenchment in the NT and any attempt at interference would be subject to constitutional scrutiny. The CA cannot be faulted for leaving the complicated, varied and ever-developing specifics of how such leadership function in the wider democratic society, and how customary law should develop and be interpreted, to future social evaluation, legislative deliberation and judicial interpretation.

Our attempts to interdict first local government elections

Contralesa instituted a legal action in the Mthatha High Court in the Eastern Cape to interdict the holding of local government elections in traditional communities. The application was dismissed on technicalities, including that Nkosi Gwadiso, who was secretary of Contralesa, had no power to institute the application for and on behalf of the organisation (see *Contralesa vs Minister for Local Government, Eastern Cape and other 1996(2) 57 898(TK)*).

The legal action was based on what traditional leaders believed was an intention, on behalf of the institution of local government, to remove the powers and functions of traditional institutions and bestow them instead on municipalities. This intention was inferred from the fact that local government structures were established in traditional communities, and their powers and functions are clearly set out in the Constitution. We argued without success that there could not be two bulls in one kraal. The traditional institutions were and still are unfairly discriminated against, as government merely provides for them to be advisors in the House of Traditional Leaders and curious onlookers in municipal councils.

Municipal councilors are well resourced and remunerated (more so than traditional leaders). The tension between traditional leaders and municipal councilors has been fueled by this, hence the development of our areas remains a pipe dream.

Engagement with government

The Coalition of Traditional Leaders of South Africa, composed of Contralesa, the National House of Traditional Leaders, Provincial Houses and the Royal Bafokeng Nation, submitted various memoranda to government in 2000. These initiatives culminated in a meeting with President Mbeki on 23 August 2000, during which traditional leaders requested that he respond to them in writing. Indeed he responded on 28 August 2000 and concluded:

The challenge we are faced with at this moment in time is to find a way of stabilising our system of governance in the rural areas by creating a climate within which the institution of traditional leadership and elected institutions of government can coexist. This is a challenging time, but it is achievable.

In tackling the enormous challenges facing us, government, traditional leaders and other stakeholders must jointly promote the common ideal of nation building in our country. Government is committed to promoting development throughout South Africa. We will, together with you, continue to work out mechanisms which will ensure the attainment of these ideals.

We pursued our discussions with government. On Saturday 30 September 2000, an agreement was reached between the government and ourselves. It was mutually decided that a joint Technical Committee would be created to determine, *inter alia*, whether the establishment of municipalities in traditional authority areas would diminish or obliterate the powers and functions of traditional leadership in South Africa.

The Joint Technical Committee on Traditional Leadership terms of reference were agreed as follows:

1. Will the establishment of new municipalities, immediately after the elections, result in the powers of traditional leaders being diminished in any way? If so, in what way;
2. If the powers of traditional leaders will be diminished, what should be done to remedy the situation?

The Joint Technical Committee was composed of the following members: on the part of government, Messrs. Z. Titus, R. K. Sizani, T. F. Seboka, S. Louw and M. C. Deliwe, and on the part of traditional leaders, Nkosi M. B. Mzimela (now deceased, Morena M. F. Mopeli, Hosi Mhinga, Nkosi P. Holomisa, Nkosi M. Nonkonyana, Messrs. J. Sutherland, S. Phiri, Adv M. Motshekga and Dr M. Ambrosini (now late).

On 4 October 2000, a report of the Joint Technical Committee on Traditional Leadership was submitted at a meeting between ourselves and government. The Committee found that ‘... the establishment of such municipalities would substantially diminish the local government functions of traditional authorities’.

The report was considered at a meeting between the government and traditional leaders and it was agreed that provision should have been made for the powers and functions of traditional leadership to be upheld in tandem with those granted to municipalities. This would have created a situation in which the two structures could have worked together to improve the quality of life of South Africans in accordance with the principle of cooperative governance provided for in our Constitution of the Republic.

The then deputy president of the Republic of South Africa, Jacob Zuma, was mandated to process the legislation necessary to give effect to the agreement between traditional leaders and government. To date this has not been done, notwithstanding several requests from us.

Contralesa resolved to engage the ruling party (ANC) directly

The ANC established another Joint Task Team under the leadership of Dr Z Mkhize who is presently, in 2018, our minister of Cooperative Governance and Traditional Affairs. The Task Team agreed to address the concerns of traditional leaders and to convene a national conference, which was held at Birchwood Conference Centre and was attended by all stakeholders.

The conference deliberated on the issues affecting the institution

of traditional leadership, and agreed once more to address them by amending the Constitution and other legislation to give effect to the resolutions adopted there.

During the debate on the speech delivered by President CM Ramaphosa in March 2018, we reminded him to honour several agreements with traditional leaders and urged him that this should be done before national elections in 2019. Some of members of Contralesa, aggrieved about the apparent breach of the agreement between the organisation and the ANC government, even threatened to form a political party to participate in the elections. To date, no bill has been presented to cabinet and publicised to give effect to our agreement.

It seems unlikely that there is any political will to address our concerns. In fact, government continues to implement the Spatial Planning and Land Use Management Act (SPLUMA) No. 16 of 2013 in our traditional communities, and is dragging its feet to pass the Traditional Courts Bill. Instead, it has prioritised an amendment of the Constitution to enable government to expropriate land, hopefully not the 13 per cent fought for and occupied by traditional communities, without compensation. To add salt to the wound, former president Motlanthe, when addressing the ANC land summit this year, referred to traditional leaders as ‘village tin-pot dictators’ whose land must be taken away from them and administered by government structures.

Conclusion

It seems to me that the government is playing mind games with traditional leaders, as the necessary re-instatement of the pride and dignity of the institution of traditional leadership in South Africa seems to be perpetually delayed.

Be that as it may, I remain optimistic that the government will realise its mistake of not giving powers and functions to the institution of traditional leaders, and restore these powers to facilitate the promotion of African norms and values.

We hope that South Africa will recognise African systems of

governance and allow these to take their rightful place among systems of governance in the world.

Notes

- 1 The 'repugnancy' clause is a proviso to the general recognition of customary law, laying down certain requirements with which customary law must comply.