



LEGAL RESOURCES CENTRE

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Your Ref:
Our Ref: HJS/mc/

18 October 2010

The Chairperson: Ms JL Fubbs MP
Portfolio Committee for Trade & Industry
Parliament
Cape Town

Att: The Secretary
Mr. Andre Hermans
Fax: (021) 403 8705
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Dear Madam

19 October 2010: Public Hearings on the Intellectual Property Laws Amendment Bill

The Legal Resources Centre is a non-profit public interest law firm. Much of the work of our organisation is devoted to representing poor rural communities, and our comments on the Intellectual Property Laws Amendment Bill of 2010 ["IPLAB"] are on behalf of such communities. Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.¹

We also attach a longer outline of the current legal regime, and the relevance of the constitutional regime to governance systems and their impact on rural communities. The outline elaborates on our concerns with the tagging of the bill and the requirement of public participation in law reform.

The current context for law reform:

- a) The order and the judgment of the Constitutional Court declaring the Communal Land Rights Act unconstitutional have important implications for law reform. The court insisted that any new law that impacts on living customary law, must comply with section 76 of the Constitution. The provincial legislative assemblies will have to get involved and provincial hearings will have to be held on any new statute law dealing with customary law.
- b) Rural communities now have an opportunity to participate in the law making process. The Minister for Rural Development and Land Reform is preparing a new green paper policy

¹ *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The act was declared unconstitutional by the Constitutional Court in May 2010. The LRC represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act including the communities of Daggakraal, Pilane, Xalanga and others. The LRC represents numerous rural communities in land claims, including litigation in the Land Claims Court.

about rural development. Once a policy has been discussed, this may lead to new draft bills prepared by the various departments responsible for rural development and governance. A number of parliamentary committees are considering joint public participation exercises.

- c) Concern about the Intellectual Property Laws Amendment Bill that reinforce discriminatory law, is not opposition to the institution of traditional leadership, or to customary law. There is widespread acceptance of the valuable role played by customary law and the need for indigenous legal processes to be recognised and supported. Our concern relates to the distortion of customary law and inappropriate codification and recordal thereof. We are also concerned about the manner in which new laws, including the Traditional Leadership and Governance Framework Act of 2003, bolster unilateral chiefly power and undermine indigenous accountability mechanisms. The laws are criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan political system and used to justify the denial of equal citizenship to all South Africans.
- d) The resolutions of the African National Congress 52nd National Conference held in Polokwane in December 2007 are relevant to the lawmaking initiatives of the governing party in Parliament. Various resolutions under the chapter heading Rural Development, Land Reform and Agrarian Change and resolutions under Economic Transformation are relevant to the IPAB²:

“Strengthen the voice of rural South Africans, empower poor communities and build the momentum behind agrarian change and land reform by supporting the self-organisation of rural people; working together with progressive movements and organisations and building forums and structures through which rural people can articulate their demands and interests...”

“Build stronger state capacity and devote greater resources to the challenges of rural development, land reform and agrarian change...”

*“Ensure that the allocation of customary land be democratised in a manner which empowers rural women and **supports the building of democratic community structures at village level**, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued.*

“2.9 Investing in priority skills and education, including through:

- *Improving our performance in maths, science and technology.*
- *Significantly expanding the resources devoted to our capacity as a people for knowledge production and expanding the resources devoted to innovation and research, including through an innovation management framework which includes the promotion and development of indigenous knowledge.”*

² Other relevant resolutions include a) the curbing and monitoring of policing functions of the “traditional authorities” and their alignment with SAPS functions; b) “there must be an alignment of traditional courts with our new constitutional dispensation and particular attention must be paid to the incorporation and development of our indigenous law”; c) “traditional leaders should be mobilised to play a more significant role in promoting peace and stability in rural areas”.

The definition of community:

1. The Bill seeks to amend the definition of indigenous community in the Performers' Protection Act No 11 of 1967, the Copyright Act No 98 of 1978, the Trade Marks Act No 194 of 1993 and the Designs Act No 195 of 1993. The definition appears in clause 5 of the Bill and in various other places where it is used in relation to other definitions including the definition of traditional performance, traditional work, traditional intellectual property, traditional term or expression, traditional design and elsewhere. The term and its definition is thus central to the protection that the various forms of intellectual property receive. Once inserted into the abovementioned legislation the definition of indigenous community would read as follows

" 'indigenous community' means any community of people living within the borders of the Republic, or which historically lived in the geographic area located within the borders of the Republic".

2. Our concern with the definition of indigenous community is that it characterises a community spatially and in terms of a fixed geographical area rather than referring to the social boundaries of the community. This approach is not followed in the Restitution of Land Rights Act and other land reform legislation where recognition is given to the social aspects of the concept of community.
3. The main purpose of the Bill is to provide mechanisms to protect the different species of "traditional intellectual property".³ The Bill affects indigenous law and its subjects. Any reference to traditional knowledge and indigenous communities must take into account customary law, which in turn defines community membership. We elaborate on this argument in the attached memorandum.
4. We, hesitantly so in the light of our concerns about public participation below, propose and would like to motivate that any definition of community should refer to a group of persons with shared rules of
 - a) access to,
 - b) use of, or
 - c) benefit from
 a resource or property rights held in common by the group or part of a group.

The appropriate constitutional procedure in respect of this Bill

5. We believe that the appropriate procedure in respect of this Bill should be as prescribed in section 76 of the Constitution. The bill must be dealt with in accordance with the procedure established under section 76 if it falls within a functional area listed in Schedule 4 of the Constitution. One such area listed in Schedule 4 is indigenous law and customary law, which the bill affects in substantial measure in that new arrangements are imposed onto relations that are currently dealt with under customary law.
6. Section 76 requires that each provincial legislature, after discussing a bill, instructs its delegates on how to vote in the NCOP by the conferral of a voting mandate on the delegation. The section also envisages the relevant provincial assembly committee holds hearings in the province to encourage and gather submissions and comments on new legislation to inform the eventual position of the legislation.

³ Memorandum on the Objects of the Intellectual Property Laws Amendment Bill, 2010. para 2.1 (a).

Public Participation in terms of the relevant provisions of the Constitution

7. Further, committees are required to follow proper public participation processes as envisaged in Section 59 of the Constitution. More particularly, and following the judgments of the Constitutional Court in the DFL and Matatiele matters, we wish to bring the following to your attention:
- a) It is not sufficient for the legislature to merely allow public participation. It has a positive obligation to take active steps to fulfill public participation;
 - b) There must be information available to the public about the bill, the bill's purpose, who it will affect and how it will work. This should be done in an information and awareness programme that must reach people in the rural areas that will be affected by a change in law in a meaningful manner;
 - c) The public must get notice and enough time to prepare and participate in the process;
 - d) Consultation processes must be appropriate taking into account the nature of the law and the people that will be affected.
11. We wish to motivate to your committee that it should thus take steps to change the tagging of the bill in order to allow it to be dealt with under the correct and more appropriate procedure.
12. We also wish to prompt the committee to take steps to insure that a meaningful programme of public participation is followed.

The Constitution as the source of traditional leadership

13. The Constitution provides for traditional leaders in chapter 12:

211 Recognition

- (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.*

212 Role of traditional leaders

- (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 the customs of communities observing a system of customary law-*
 - (a) *national or provincial legislation may provide for the establishment of houses of traditional leaders; and*
 - (b) *national legislation may establish a council of traditional leaders.*

- 14 Section 211(1) protects the "institution, status and role of traditional leadership, according to customary law" – and not a statutory distortion of such customary law.⁴

⁴ In *Shilubana v Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45: 'As has been repeatedly emphasised

Customary law is thus the principal source of recognition of traditional leadership in terms of the Constitution – and subject to the Constitution.

15 Section 212(2) provides for the only basis for the conferral of any new statutory role upon traditional leaders outside of residual customary law role recognised in section 211.

16 It should be noted that the Constitutional Court has held that the 'role' of traditional leaders envisaged by section 212(2) of the Constitution does not include the governmental role they played under Apartheid – and therefore national legislation providing for these roles may not include governmental 'powers and functions' awarded to the traditional leaders in terms of apartheid legislation.⁵

18 In summary, any authority that traditional leaders have must be grounded in customary law.

Thank you for the opportunity to address your committee.

Yours faithfully



LEGAL RESOURCES CENTRE

Per: Henk Smith and Anjuli Maistry

by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated'.

⁵ The Constitutional Court held: "Had the framers intended to guarantee and require express institutionalisation of governmental powers and functions for traditional leaders, they could easily have included the words 'powers and functions' in the first sentence of the CPXIII. The non-derogation provision in CP XVII would represent a surprisingly oblique way of achieving what the framers of the [constitutional principles] could have done directly. ..."