

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA

Parliamentary Office

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03 September 2012

The Secretary
 Select Committee on Security and Constitutional Development
 National Council of Provinces
 Contact: 086 658 9371 / 021 403 3942
 Email: gdixon@parliament.gov.za

Mr. Gurshwyn Dixon,

RE: NUMSA SUBMISSION ON TRADITIONAL COURTS BILL [B1-2012]

The National Union of Metalworkers of South Africa (NUMSA) welcomes the opportunity to submit written comments on the Traditional Courts Bill [B1-2012] to the Select Committee on Security and Constitutional Development.

We trust that the Select Committee will grant the union a place at the public hearings that are scheduled for 18-20 September 2012 in Parliament.

Our submission is appended to this letter.

Yours sincerely

W. Aroun
 NUMSA Parliamentary Office
 Cape Town



SUBMISSION ON THE TRADITIONAL COURTS BILL

[B1-2012]

Introduction:

The National Union of Metalworkers of South Africa (NUMSA) is the second biggest affiliate of the Congress of South African Trade Unions (COSATU), with 300 401 members. Although the majority of the union's membership is urban-based, NUMSA has 14 Locals or branches that stretch into areas that fall under former homelands or Bantustans. The total membership of these branches is 46 720.

Also important to note is that although based in towns and cities, a significant number of our members have roots and links in areas where the traditional court system exists. In response to a question on whether respondents did move to a town/city from a rural town/village to find work, an independent survey of NUMSA members conducted in 2011 by the Society, Work and Development Institute (SWOP) from the University of Witwatersrand found that 33% of those surveyed had moved from the countryside to towns and cities to find work and that the majority of these respondents claimed to support a household back where they came from. Just more than half of those who took part in the research also indicated that they had family homes somewhere else than the areas where they worked.

Another reason for why our union is interested in the Traditional Courts Bill is that as the labour movement we have a wealth of experience in non-formal adjudication and in Alternative Dispute Resolution Mechanisms (ADRM)s. Having pioneered the use of mediation and arbitration as a form of non-formal adjudication, it is our belief that unions can bring this experience in the debate on the Traditional Courts Bill, particularly aspects of how formal and non-formal ways of settling disputes can co-exist.

Since establishment in 1987, NUMSA has firmly committed itself to struggle and build a united South Africa, free of oppression and economic exploitation. In its constitution, the union commits itself to "fight and oppose discrimination in all its forms within the union, the factories and in society". As a result of this commitment to equality, NUMSA fought hard after the reincorporation of Transkei, Bophutatswana, Venda and Ciskei into South Africa for harmonisation in all establishments falling under the auspices of the Metal and Engineering Industries Bargaining Council (MEIBC) and the Motor Industry Bargaining Council (MIBCO) of working conditions that existed in the Republic and those prevailing in the so-called TBVC states. As a union we were clear that in a democratic South Africa no workers should have working conditions less than those enjoyed by their counterparts in the rest of the country.

It is with the same appreciation of the need for equality that as NUMSA we argue that the Bill in its current and in its entirety should be withdrawn.

NUMSA's engagement with the Bill:

Since June 2012, NUMSA has had numerous internal discussions on the Traditional Courts Bill. The first discussion was at our 09th National Congress held in Durban in June 2012. The union's highest decision-making body with 958 delegates decided that as NUMSA we should oppose the Bill "*as it presents a serious threat to the rights of women in rural areas*". The union was also concerned about the rights of citizens living under the jurisdiction of traditional leaders. National Congress called on the union to "take active steps to ensure that their [citizens living under the jurisdiction of traditional leaders] rights are not compromised". [See **Annexure 1** for full resolution]

As mandated by National Congress, the union rolled out between mid-July and mid-August 2012, nine regional workshops for NUMSA's regional executive committees. These workshops were preceded by a national workshop with the union's regional education officers and regional legal officers in attendance. In addition to these workshops, NUMSA also convened members' forums in the following areas:

Date	Towns where workshop was held	Areas from which participants were drawn from
25 Aug	Phuthaditjhaba, Qwa-Qwa .	Bethlehem, Welkom, Warden and Harrismith.
25 Aug	Richards Bay, KZN	Empangeni, Mandeni, Sokhulu, Mbonambi and uMhlathuze
31 Aug	East London, E/Cape	King Williamstown, Mthatha, Queenstown and East London
01 Sept	Nkoanoka, Limpopo	Ga-Kgapane, Giyani, Semarela, Tzaneen, Phalaborwa, and Mokgolobotho

The targeted groups in these members' forums were NUMSA members that live in areas where the traditional court system exists. We wanted to get their experiences of the traditional court system. [See **Annexure 2** for a programme outline of these forums and **Annexure 3** for register of attendees at some of these forums]

NUMSA position on the Bill:

NUMSA's position is that the Bill must be withdrawn in its entirety. This stance is not motivated by whether we as the union see no role for traditional courts. In fact, in the meetings that we held on the Bill, some of our members spoke favourably of the traditional court system. They argued that;

- *The traditional court system is good and that it must be maintained with changes only for it to comply with Republic of South Africa's constitution.*
- *The system as it is no, is now less expensive. You do not have to go to town for a case.*
- *We must continue to live our lives the way our forefathers and mothers have lived and taught us.*
- *The leadership of chiefs was better than that of councillors.*

As a union we recognise Section 30 of the Constitution that states that all persons have the right to "participate in the cultural life of their choice" in a manner consistent with the Bill of Rights. Our objections to the Bill are based on the following:

- The real dangers of marginalisation of customary law and an entrenchment of a fragmented justice system
- The idealisation in the Bill of the traditional court system
- A feeling that the Bill is part of a drive by traditional leaders to have more power and make residents in former homelands and Bantustans second class citizens and tribal subjects
- A belief that instead of building a unified judicial system with formal and non-formal adjudication processes, the Traditional Courts Bill further fragments the justice system.

1. The Bill has the potential to “ghetto-ise” customary law:

The provisions in the Constitution such as Section 211(3) make it quite clear that customary law is one of the foundations of South Africa’s legal system. The Constitution calls on the courts to “apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.

What this means is that customary law must find its place right inside the country’s court system. The Bill as it stands; particularly the link that it makes in the section on the objectives of the proposed legislation between “enhancement of customary law” with regulation of the traditional court system, may provide an escape valve for those who refuse to see customary law as a branch of our legal system.

It is NUMSA’s contention that the net effect of the Traditional Courts Bill will be to relegate customary law to traditional courts while relieving the judicial system outlined in Section 166 of Chapter 8 of the Constitution from its obligation to affirm customary law. In 1927, when the Native Administration Act was passed to create a system of courts to hear civil disputes between Africans, movers of the then legislation trumpeted the virtues of African judicial systems to hide their segregationist policies and agenda.

We are therefore not convinced by the nice-sounding objectives stated in Sections 2 and 3 of the Bill such as:

- affirming the values of the traditional justice, based on restorative justice and reconciliation
- alignment with the Constitution
- enhancing access to justice through a provision of speedier, less formal and less expensive resolution of disputes
- preservation of African values and tradition
- promotion of nation-building.

2. The dangers of reification and idealisation of customary law:

Our starting point is that culture and customary law are not static. They spring out of a context and that they are ever-changing; incorporating changing practices and attitudes in society. With phenomena such as culture and customary there is a real danger of reification; separating them from the original context from which they emerged, occur and place them in another context that is completely devoid of the original connections. We can also idealise culture and customary where we remain silent on its oppressive and destructive aspects.

While not departing from what they identified as positive with traditional courts, NUMSA members who participated pointed to some weaknesses in the system such as;

- misappropriation of fines by chiefs or traditional leaders
- intimidation of those who because of the institution itself are not in a position to represent themselves effectively, such as women and youth
- abuses of the traditional court system by traditional leaders where individuals do not get a fair hearing when they have complaints against the chief or traditional leader
- favouritism in the system.

To back up some of these claims, a participant in the Phuthaditjhaba workshop had this to say;

The traditional adjudication divides communities in that, for instance if you happen to reside in an area dominated by a certain clan. Let us say the Mokoena clan is in majority in a particular village and the chief is a Mokoena, other clans will not be judged fairly but will always be stigmatised and viewed as if this other clan are a cause of whatever trouble is there.

The parts of the Bill that outline objectives (Section 2) and guiding principles (Section 3) should talk to these issues and state that one of the objectives of the Bill is to deal with the negative practices associated with the traditional court system.

3. The Bill as part of creeping retribalisation from above:

One message that policymakers that propagated colonialism, segregation and apartheid preached is that of the existence of different and discrete African “tribes” in South Africa. It is on the basis of this myth that reserves, homelands and Bantustans were created and millions robbed of their birthrights as part of a grand plan to bolster minority and capitalist rule in South Africa. As part of this plan, traditional leaders who opposed the homeland system were deposed or made “ordinary headmen” and puppets installed in their places.

This was not the first time that colonialists had created their “own lineage of traditional leadership”. Early on, the colonial state recognised an array of African chiefs and gave them authority as a form of indirect rule. Others were denied this role. Through being paid a salary, traditional authorities became accountable to the government and no longer to their people. Furthermore, the colonial state argued that the chiefs it recognised had the authority over their subjects and that it was through chiefs that people in these areas could have access to land.

Equally vicious was the process of creating “tribes” were people of different identities and people removed from “white South Africa” were clubbed together to establish separate ethnic groups. While an appearance was created that the political and social structures of African communities were retained in rural areas, the political and social systems that existed among African people at the point of colonial encounter became highly distorted.

It is this political trickery and social engineering that incited many of our people in the countryside to rise up and oppose the system of reserves, its administrative machinery as well as its agricultural and rehabilitation schemes. This resistance was carried over to homeland and Bantustan system where people protested among many things, abuse of power by “tribal authorities” and extortion of excessive

tribal levies. Together with other sections of the oppressed, people in the countryside demanded equal citizenship in a unitary South Africa and rejected their status as second-class citizens or tribal subjects of separate ethnic “homelands”.

Unfortunately, 18-years into democracy the map of homelands and Bantustans has not changed. Despite gallant struggles that residents of these areas waged, they are still treated as different from the rest of South Africans. But more serious is the creeping retribalisation from above; where those who live in former homelands and Bantustans are treated as not as full citizens and have laws that apply only to them.

- Whereas evidence exists that people in homelands and Bantustans were forcibly removed from land in terms of betterment schemes policy, the residents from these areas were prevented from lodging claims for restitution because the policy as stipulated in the 1997 Land White Paper states that “claims of those dispossessed under betterment policies, which involved removal and loss of land rights for millions of inhabitants of the former Bantustans, should be addressed through tenure security programmes, land administration reform and land redistribution support programmes”.
- Although the Section 25(9) of the Constitution calls on parliament to enact legislation that will ensure security to people or communities whose tenure of land is legally insecure, the relationship of residents of former homelands and Bantustans to land is still precarious. The law that was meant to remedy this – the 2004 Communal Land Rights Act (CLaRA) was declared in May 2010 as unconstitutional by the Constitutional Court.
- While calling for a unified and single tenure system in South Africa, the recently published Green Paper on Land Reform proposes to deal with communal tenure in former homelands and Bantustans separately in terms of legislation.

The Bill, if passed will be another law that will apply only to people in former homelands and Bantustans. Although Section 2 of the Traditional Leadership and Governance Framework (TLGF) Act of 2003 makes no reference to former homelands and Bantustans when recognising “traditional communities”, it is a fact that the legislation contemplated in the 2003 legislation and passed by different provinces has equated “traditional communities” with former Bantustans and homelands. By borrowing the definition of the TLGF Act, the Traditional Courts Bill effectively means that traditional courts envisaged in the proposed legislation will apply in former homelands and Bantustans.

4. The treatment of traditional courts outside of other Alternative Dispute Resolution Mechanisms (ADRM):

In South Africa, there is an array of institutions that deal with disputes outside the formal court system. Every day as unions, we are involved in negotiations that lead to collective agreements that have the force of law. We are also involved in mediation which if not successful lead to binding arbitration awards. There is also a plethora of tribunals and ombud bodies that deal with disputes that arise in society.

This country has a history of street committees who are involved in settling disputes in different neighbourhoods. Even within African communities there is a string of other structures ranging from extended family dispute resolving mechanisms to clan societies that intervene when members have problems. So why this infatuation with traditional courts outside many of the bodies that exist?

Throughout our workshops we were struck by absence of knowledge about the Bill amongst our members. Not a single person in the members' forums had participated in the public hearings or was aware the provincial mandates taken by their legislatures to the National Council of Provinces.

In all our interactions with members it has become abundantly clear that the drivers behind the Bill are traditional leaders and not ordinary people.

5. Other concerns expressed:

Participants in our workshops expressed other concerns with the Bill. These are some of their concerns:

- Too much power given to traditional leaders in the Bill.
- The Bill must not only apply in traditional communities but must be applied equally across the board; meaning one law, one nation.
- Find a way where the best practices of the formal judicial system can be applied to the traditional court system such as legal representation.
- The procedure to be followed in cases where the complainants are not happy or have complaints of incapacity, gross incompetency or misconduct must directed to the magistrates or an independent committee and not the Minister.
- The Bill is discriminatory in the sense that it does not give the complainant who resides within the jurisdiction of traditional court an option to proceed with their case at the Magistrate Court.
- Opposition to the provisions that prosecutors may upon analysing cases, may refer matters back to the traditional court as this will be open for abuse by the prosecutors and other officials. Cases which do not fall within the jurisdiction of the Traditional Court must be adjudicated at the Magistrate Court.

Conclusion:

"If we were to abandon the traditional court system then it means that we are succumbing to Western influence and its prescription".

"If the Bill is introduced I will rather move out of that area where it is applicable to areas where it is not applicable".

"If the Bill is in conflict with the constitution of the country then it is a recipe for disaster. Therefore everything must be done in order for the Bill to comply with constitution".

As earlier indicated the views of our members are mixed. While others supported aspects of the Bill, concerns were raised. As NUMSA, we do not think that these mixed feelings are confined to our members only. We think that such sentiments exist in broader society.

It is for this reason that we think that the Bill should be withdrawn entirely and look at process broadly looks at;

- how to build a unified judicial system were formal and non-formal ways of resolving disputes co-exist
- not only at traditional courts but at all non-formal tribunals that exist in South Africa.

Annexure 1

NUMSA 09th National Congress Resolution on the Traditional Courts Bill

Noting:

1. The Traditional Courts Bill gives powers to traditional leaders to decide on matters arising out of civil and criminal disputes that fall within the jurisdiction of these leaders
2. That Cosatu CEC held on the 28-30 May 2012 resolved to oppose the Bill *as it presents a serious threat to the rights of women in rural areas* and wants to have discussions with government on the *Bill*.

Resolve:

1. That this 9th National Congress of NUMSA supports the decision taken by COSATU at its CEC meeting to oppose the Traditional Courts Bill
2. That in calling for the transformation of the judiciary, the union needs to pay particular attention to the rights of citizens living under the jurisdiction of traditional leaders and take active steps to ensure that their rights are not compromised
3. That in its post congress discussion on the transformation of the judiciary the union must include a discussion on the Traditional Courts Bill and emerge with a clearer position as to how to engage government on the matter.

[Moved: W. Cape]

[Seconded: Mpumalanga, Ekurhuleni, JCB, KZN, Hlanganani, EC, Sedibeng, NC]

Annexure 2
Traditional Courts Bill:
What are your experiences?



Political Discussion Pack
Aug-Sept 2012

Programme

Time	Topic/Activity	Methodology
	Introduction & background	Short presentation using the Introduction on p.3 of this pack.
	Discussion on the objectives of the PDF	Buzz groups using Worksheet 1 on p.4 and Handout 1 from <i>City Press</i> .
	Background to the Bill	Presentation by facilitator using pp.5-7.
	Checking on who has the experience of the traditional court system and diving participants into two groups	Plenary activity using Worksheet 2 in p.8.
	Groupwork	Using Worksheets 3 & 4.
	Reportbacks from groups	Plenary
BREAK		
	30-minute 3 rd Degree DVD on the Traditional Courts Bill	Viewing in plenary
	Should NUMSA support the Traditional Courts?	Plenary discussion
	What has Cosatu and Numsa said on the Traditional Courts Bill?	Short presentation using Handout 1
	What should NUMSA say in its submission on the Traditional Courts Bill? Which comrade do you nominate for representing you in parliament?	Plenary discussion
End of discussion		

Annexure 3

Attendance register

Traditional Courts Bill Workshop

Tzaneen – 01 September 2012

No	Name and Surname	Area	Contact
1	Martha Mashaba	Phalaborwa	0726410069
2	VIOLET NKUNA	Phalaborwa	0724340542
3	Elus MAKHODU	SEMARELA	0760249575
4	Mark Malatji	TZANEEN	0826449051
5	Louis Molele	Semarela	0836881959
6	Daniel Nhlama	Tzaneen	0766278999
7	Evelyn Mahale	Tzaneen	078 321 2285
8	Jemiden Mongi	Tzaneen	082 68 20874
9	James Mongi	TZANEEN	0722371520
10	Markis Maitso	TZANEEN	0722083331
11	Mamobela Mosibudi	Ga-kgapane	013 7016010
12	Rosemary Zeldah	Ga-kgapane	078 6742184
13	Beneilwe Leshabane	Mogalebootho	013 702 4022
14	Jeanette Letsie	Semarela	0782919733
15	Floria Pilusa	Semarela	0720636481
16	Phakiso Tshogo	Semarela	079 192 7995
17	EVANS SEKRA	TZANEEN	0711534181
18	Phillip PILUSA	TZANEEN	0767352289
19	Kedibone Folele	Semarela	072 105 0425
20	FANNY SELOWA	TZANEEN	0781488792
21	Norman SHIBURI	TZANEEN	0781455942
22	Agnes MILINDZO	Giyani	0729968237
23	Mabunda EMMAN	GIYAMI	0738583835
24	Mabunda Enny	GIYAMI	0732259551
25	Mabunda SYLVA	GIYANI	078477 4033
26	Mabunda MISOLA	GIYANI	073 427 4244
27	Mabunda NOPEA	GIYANI	071 5659 149.
28	Mabunda OLIVIA	GIYANI	076 850 2655
29	Mabunda LUNGHIIP	GIYANI	078 1566 537
30	Mabunda NOMSA	GIYANI	072 7845 399
31	Mashimbye VIRGINIA	GIYANI	083 997 8022
32	Sefalafala EVA	GA-KGAPANE	073 584 2048
33	Kamohope DOLLY	GA-KGAPANE	072 5766198
34	Mahlaka KATE	GA-KGAPANE	0731369623
35	Motolla MAHLADI	GA-KGAPANE	

Attendance register
Traditional Courts Bill Workshop
Tzaneen – 01 September 2012


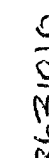

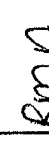

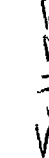

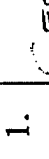

No	Name and Surname	Area	Contact
1	Daniel ALUSA	TZANEEN	083 999 6399
2	ITHOMI MONTYEMOGONWE	TZANEEN	073 307 5906
3	Stella Mambanda	GINYANI	073 901 7188
4	SHILWA MHLONDA	GIYANI	070 1819 060
5	Mercy MUCHABI	GIYANI	0710618375
6	Mkhensani muchabi	GIYANI	073 2049 559
7	Makrinda Irene	GIYANI	0710001312
8	makaringe mithavini	GIYANI	0836657943
9	mabunela maria	Phalaborwa	083 190 41 6187443
10	Philliah Mathele Malatji	Phalaborwa	083 734 0943
11	David Mafuyeka	Tzaneen	0836710768
12	Elvis malatji	Tzaneen	0768821796
13	Gerude Madimeng	Tzaneen	0764240452
14	Josphinah Matsiso	Tzaneen	0732511652
15	Daniel Sekobela	Tzaneen	0723873025
16	M H OS Mampang	RFC/INTERPRETER	078631668
17	Bethuel MOKGATHI		
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TRADITIONAL COURTS BILL

FRIDAY 31 AUGUST 2012

A T T E N D A N C E R E G I S T E R

NO.	NAME AND SURNAME	DESIGNATION	CONTACT NUMBER	FAX NUMBER	E-MAIL ADDRESS	SIGNATURE
1.	CECILY SCHEEPERS	RMA	0413631010	0865141395	Cecilyse@noms.co.za	
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6.	MONICA OUKAMU	K.W.T	0835207835	-	-	
7.	NONCENDO SPEELMAN	P.E	0845224953	-	-	
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9.	KHAYA SWAYI	E.L	0721117010	0865043024	Kswayi@gmail.com	
10.	ZODWA BIYANA	EL	0836020303	-	Zodwabiyana@hotmail.com	N. Buyana

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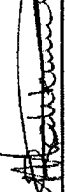





TRADITIONAL COURTS BILL

FRIDAY 31 AUGUST 2012

A T T E N D A N C E R E G I S T E R

NO.	NAME AND SURNAME	DESIGNATION	CONTACT NUMBER	FAX NUMBER	E-MAIL ADDRESS	SIGNATURE
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4.	THEMBELE FILITA	Q.T	0718261337			
5.	Zandi Dumezweni	Q.T	0797564138			
6.	SANDILE BUSAKWE	Q.T	0843823880			
7.	Khaliphile W. Gwadana	Mthatha	0836770785	047-5310489		
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9.	MPHIRELELI NTABA	MTIHTHA	0720597810			
10.	NomTswana do Teme		0833737210			


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TRADITIONAL COURTS BILL
FRIDAY 31 AUGUST 2012
A T T E N D A N C E R E G I S T E R

NO.	NAME AND SURNAME	DESIGNATION	CONTACT NUMBER	FAX NUMBER	E-MAIL ADDRESS	SIGNATURE
1.	ZONSWA MAFISHOBENI	MTRM	0730576563	074892302	N/A	
2.	SERAPATE Molosi	MTHATHA	0834708634		N/A	
3.	PATRICK Tsewu	EL	0735245148		N/A	
4.	NGEDO JAWOBS	UTH	0731551977	041994552	jawob66@unisa.ac.za	
5.	ZAKENGA Motikina	UTH	0736635901		N/A	
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10.	JULIET BLOAUS	P.G	073170962			

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TRADITIONAL COURTS BILL
FRIDAY 31 AUGUST 2012

A T T E N D A N C E R E G I S T E R

NO.	NAME AND SURNAME	DESIGNATION	CONTACT NUMBER	FAX NUMBER	E-MAIL ADDRESS	SIGNATURE
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2.	ZONNIE MABHISI	RLO		041363038		
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ATTENDANCE REGISTER FOR THE TRADITIONAL COURTS BILL WORKSHOP TO BE HELD ON THE 25 AUGUST 2012
VENUE: NEHAWU REGIONAL OFFICE BOARDROOM IN QWA - QWA

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3. E. M. MBELE	078784 4650	
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5. M. S. SHABARA	0786352165	
6. E. L. MAONE	071412 4696	
7. T. S. MBELE	072 9525911	
8. S. S. WILLIAMS	076 9234378	
9. KELE JOHANNES	084 4991988	
10. M. P. MOKAKA	073 860 7430	

11.	The Christian Motung	07322917692	
12.	MOKOENY PERSON	0737948185	
13.	LEBAKENG SELLO	082 7010810	
14.	Mozibuko Molele	012 062-5939	
15.	Mesha L JOSEPH	0731092684	
16.	SHADBECK MOLOI	0783157121	
17.	SHALE DINGANE	071 9879 681	
18.	CITY Radebe	0767151209	
19.	Mtsepe Kay	079733 7268	
20.	MZIZI Malesamoi	071 9679 746	
21.	MOLOI .J. Bopane	0733407463	
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23.	Eyas MENDUSAZI	078 22966759	
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