

University of the Western Cape

Faculty of Law

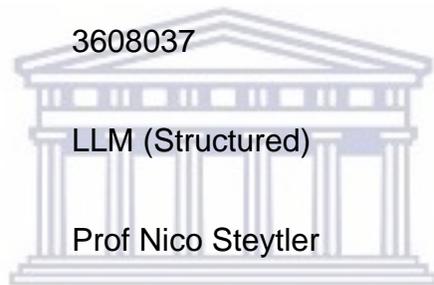
Research Paper submitted in partial fulfilment of the requirements of an LLM in Law,
State and Multilevel Government

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Mode LLM (Structured)

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Research paper topic

The role of traditional leaders in local governance: A case study of Limpopo

Key words: Traditional leaders, Constitution, Municipal Councils, Bantustans, Ghana, Limpopo, Apartheid, Municipality, Local House of Traditional Leaders and Councillors.



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Abbreviations and acronyms

CONTRALESA: Congress of Traditional Leaders of South Africa

ECTLGA: Eastern Cape Traditional Leadership Governance Act, 2005 (Act No. 4 of 2005)

KZNTLGA: KwaZulu-Natal Traditional Leadership Governance Act, 2005 (Act No. 5 of 2005)

KEEA: Komenda-Edina-Eguafo-Abrem

LHTL: Limpopo House of Traditional Leaders

LTLIA: Limpopo Traditional Leadership and Institutions Act, 2005 (Act No. 6 of 2005)

MDA: Local Government: Municipal Demarcation Act, 1998 (Act no. 27 of 1998)

MDB: Municipal Demarcation Board

MEC: Member of Executive Council

MSA: Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998)

NCOP: National Council of Provinces

NHTL: National House of Traditional Leaders

PHTL: Provincial House of Traditional Leaders

PNDC: Provisional National Defence Council

SALGA: South African Local Government Association

SPLUMA: Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013)

TKLB: Traditional Khoi-San Leadership Bill, 2015

TLGFA: Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)



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DECLARATION

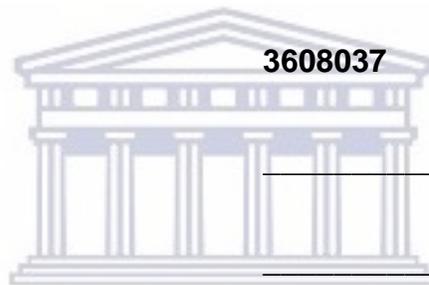
I, Mogau Petrus Sekgala, declare that 'The role of traditional leaders in local governance: A case study of Limpopo' is my own work and that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

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Dedication

This work is dedicated to my parents William and Florah Sekgala for their hard work in raising me and their support in my education. Moreover, it is dedicated to my brothers for their endless support in my education.



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I would like to thank Almighty God for giving me strength, wisdom and knowledge and for protecting me throughout my studies. Indeed it is by the grace of the Sovereign Lord that I complete my studies.

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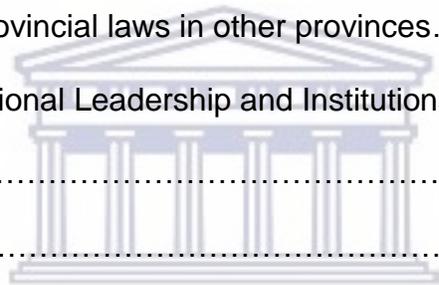
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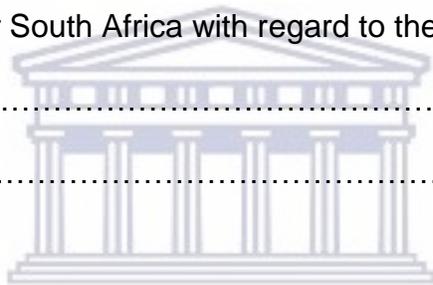
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CHAPTER ONE

INTRODUCTION

1. PROBLEM STATEMENT

Traditional leaders have existed in South Africa for a very long time. During the apartheid era they were the rulers of Bantustans or homelands. The roles of traditional leaders during the apartheid regime were, inter alia, the allocation of land, the maintenance of law and order, the provision of administrative services at local level, the administration of social welfare and the promotion of education.¹

After the end of the apartheid government, a democratic government was created with three spheres of government, namely national, provincial and local government. The delimitation of wall-to-wall municipalities in 2000 terminated the recognition of traditional authorities as local government bodies.² This was the mandate of the Constitution which provides that the local sphere of government comprises of municipalities, which must be established for the whole of the territory of the Republic of South Africa.³

The Constitution recognises the institution, status and role of traditional leadership according to the customary law.⁴ However, it does not explicitly provide for a role for traditional leaders at the local level. Instead of listing the role of traditional leaders, it prescribes that national legislation will provide a role for traditional leaders at local level.⁵ Consequently, the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (TLGFA) prescribes the role of traditional leaders in general. Furthermore, the Local Government: Municipal Structures Act, 1998 (Act No. 117 of

¹ South African History Online 'The Role of Traditional Leaders during Apartheid' (2014) available at www.sahistory.org.za/article/role-traditional-leaders-during-apartheid#sthash.4t0v7JyY.dpuf (accessed 05 June 2016).

² Steytler N & De Visser J 'Local Government' in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2008) 22-41.

³ S 151 (1) of the Constitution of the Republic of South Africa, 1996 (hereinafter Constitution).

⁴ S 211 (1) Constitution.

⁵ S 212 (1) Constitution.

1998) (MSA) gives traditional leaders seats in municipal councils but without voting rights.⁶

Despite the MSA granting a 20 per cent representation for traditional leadership in the municipal council, this did not prove enough for the traditional leaders who demanded that their functions be specifically addressed.⁷ The purpose of giving traditional leaders seats in the municipal councils is that they may participate in the matters affecting their communities in order to influence the decisions of the municipal councils. This is an important role which can influence service delivery in their communities.

However, many traditional leaders are criticising their ex officio membership in the municipal councils because they do not have voting power. It means that they can submit motions and proposal and join in the debates of the municipal councils but when it comes to the taking of decisions through voting systems they are excluded. Therefore, this participation of traditional leaders in the municipal councils is an advisory participation role which is contrary to their previous functions under the apartheid regime.

The provinces are empowered by the MSA to regulate the participation of traditional leaders in municipalities, through enacting provincial laws or regulations.⁸ However, only a few provinces have managed to enact laws on the participation of traditional leaders in the municipal councils. Limpopo province is one of the provinces which do not have regulations on the participation of traditional leaders. The municipalities may also through their rules and orders regulate the participation of traditional leaders in municipal councils,⁹ but again only few municipalities provide for how traditional leaders should participate in the municipal councils. Many municipalities in Limpopo do not explain in their rules and orders how traditional leaders should participate in the proceedings of the municipal councils. The regulations on the participation of traditional leaders in the municipal councils should help to explain how the traditional leaders are expected to participate during the meetings of the municipal councils.

⁶ S 81 MSA.

⁷ Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post –Apartheid Era* (2005) 67.

⁸ S 81 (4) MSA.

⁹ S 156 (2) Constitution.

Generally, the roles or functions of traditional leaders in the legislation have been ambiguous. And where they are not ambiguous, their roles are merely advisory. This has given traditional leaders' lobbies time to mobilise and campaign for their role to be clarified.¹⁰ The Limpopo House of Traditional Leaders has raised a concern about the ex officio membership of traditional leaders in the municipal councils. This concern is based on the lack of clarity of the role of traditional leaders in the municipal councils¹¹ and the fact that traditional leaders do not have voting rights in the meetings of the municipal councils.¹²

In some municipalities in Limpopo Province, there is poor participation of traditional leaders in the municipal councils. This means that some traditional leaders do not even attend the municipal councils' meetings, despite being identified by the MEC of Traditional and Cooperative Governance in Limpopo as ex officio members who should attend and participate in the municipal councils of their areas of jurisdiction.¹³

The National House of Traditional Leaders (NHTL) and its Mpumalanga House of Traditional Leaders indicated that municipalities should be replaced by traditional councils as service providers in their areas of control, rather than to work in parallel with the municipalities.¹⁴ They would be glad to be the only primary structure in the rural areas and perform the functions they enjoyed under apartheid.¹⁵ The NHTL also insisted that Chapter 12 of the Constitution should be amended, and that the provisions

¹⁰ Buthelezi M & Yeni Y 'Traditional Leadership in Democratic South Africa: Pitfalls and Prospects (2016) Briefing Paper available at https://www.nelsonmandela.org/uploads/.../Land_law_and_leadership_-_paper_1.pdf... (accessed 20 June 2016).

¹¹ South African Local Government Association (SALGA) 'Challenges regarding the participation of Traditional Leaders in Municipal Councils' (2013) Local Government Brief: 08/2012 available at www.salga.org.za/.../Challenges-regarding-the-participation-of-Traditional-Leaders-in... (accessed 30 May 2016).

¹² South African Government 'Premier Chupu Mathabatha: Ordinary sitting of Provincial House of Traditional Leaders' (2016) available at <http://www.gov.za/speeches/mr-chupu-mathabatha-occasion-ordinary-sitting-provincial-house-traditional-leaders-21-jul> (accessed 15 October 2016).

¹³ Makhado Local Municipality 'Minutes of the Seventy Fourth (74th) Meeting of the Makhado Municipality Which Was Held on Thursday, 29 January 2015' available at http://www.makhado.gov.za/docs/minutes/Council%20Minutes_74.pdf (accessed 13 October 2016).

¹⁴ De Wet P 'Chiefs lobby for power lost in apartheid transition' available at www.mq.co.za/article/2012-05-11-chiefs-lobby-for-power-lost-in-apartheid-transition (accessed 11 June 2016) 42.

¹⁵ Ntsebeza L 'Rural Governance and Citizenship in Post-1994 South Africa: Democracy Compromised?' in Daniel J, Southall R & Lutchman J (eds) *State of the Nation: South Africa 2004-2005* (2005) 68.

of the Constitution of Ghana, which guaranteed the existence of the institution of Traditional Leadership in that country should guide the amendment.¹⁶

The role of traditional leaders has been a burning issue in the democratic South Africa. And the traditional leaders have since the inception of a democratic regime been debating their role regardless of the provisions of a number of laws providing for their functions. In response to the outcry of traditional leaders, the government introduced the Traditional and Khoi-San Leadership Bill, 2015 (TKLB). Once the TKLB has been adopted as an Act of Parliament, it will replace the TLGFA. The TKLB aims to clarify the role of traditional leaders in the democratic South Africa. However, it remains to be seen whether the TKLB will answer the cry of traditional leaders and clarify their role in local governance.

Having seen the difficulty of making traditional leaders and the local sphere government to work together in South Africa, it is necessary to conduct comparative research in order to search for the lessons from other democratic states. Among other democratic African countries, Ghana is chosen in this research in order to see whether there can be lessons which South Africa can learn. The reason for choosing Ghana is based on its historical and present constitutional framework which acknowledges the role of traditional leaders in Ghanaian local governance.

Moreover, Ghana has been collaborating with traditional leaders for almost six decades since its independence in 1957. It is the first African country to gain independence from British colonial rule and one of the oldest democratic states in Africa. In all previous Constitutions, Ghana had given traditional leaders one-third membership in local government units. Moreover, the 1992 Ghanaian Constitution allows a President to appoint 30 per cent of members of district assemblies after consultation with traditional authorities and other interest groups within the district.¹⁷ It remains to be seen in this research whether the way Ghanaian traditional leaders participate in local governance could provide valuable lessons for South Africa.

¹⁶ De Wet (2016) 42.

¹⁷ S 270 (1) Constitution of Ghana, 1992.

2. RESEARCH QUESTIONS

The central question of this paper is –To what extent do traditional leaders play a role in local governance in South Africa? The following sub-research questions will help in answering the research question:

- (i) Do traditional leaders use available opportunities in municipal councils? Are they playing an influential role in the municipal councils? If yes, how? If not, why?
- (ii) Will the Traditional and Khoi-San Leadership Bill change the ambiguity of the role of traditional leaders in respect of local governance? Will it address the demands of traditional leaders?
- (iii) Should the current role of traditional leaders be changed? Can South Africa learn any lessons from Ghana with regard to the role of traditional leaders in local governance?

These questions will be addressed within the context of traditional leaders in Limpopo Province. The rationale for choosing Limpopo Province as a case study is that the province incorporates many traditional areas within its borders. Limpopo Province has three kings, 183 senior traditional leaders and 2118 headman. Almost all municipalities in Limpopo Province incorporate traditional areas.

3. ARGUMENT

It is apparent from the literature that traditional leaders have a pivotal governance role to play at the local level. The evidence in Limpopo Province shows that some traditional leaders do not attend the municipal councils' meetings, let alone participating in those meetings by submitting motions, proposals or debating in the meetings. The non-participation of traditional leaders in Limpopo has been associated with the following

reasons: firstly, the lack of voting rights in the municipal councils; secondly, the absence of a Limpopo provincial regulation on the participation of traditional leaders in the municipal councils; thirdly, the poor relationship between traditional leaders and the municipalities; fourthly, the lack of capacity of traditional leaders to participate in the municipal councils; and fifthly, traditional leaders may be of the view that there are other mechanisms that can be used to participate in the municipalities rather than attending the meetings of the municipal councils.

The TKLB does not change the ambiguity of the role of traditional leaders in local governance. Moreover, it does not address the demands of traditional leaders. However, the TKLB brings recognition of the Khoi-San leaders and communities. This recognition means that the Khoi-San leaders will be granted seats in municipal councils in terms of section 81 of the MSA. There is also a new development since the TKLB extends the advisory role of the Local House of Traditional Leaders to the local municipalities. The TLGFA has limited the advisory role of the Local House of Traditional Leaders to the district and metropolitan municipalities.

The Ghanaian constitutional framework for the participation of traditional leaders in local governance is different from the South African constitutional framework. In Ghana, the president appoints 30 per cent of members of the district assemblies after consultation with traditional leaders and other interest groups in the district. The traditional leaders who are appointed under this provision have voting rights in the district assemblies. The presidential appointments could be perceived as undemocratic in South Africa. Moreover, the practical implementation of the presidential appointments has not been successful since traditional leaders in most district assemblies have been under represented in the district assemblies.

4. LITERATURE SURVEY

There is some literature on the governance role of traditional leaders with references to their participation at the local level. There is, however, limited discussion on their participation in the municipal councils.

Traditional leaders and their traditional councillors, during the apartheid regime, were a form of government which was close to the people. They were the only form of local authority known to the people in the homelands or Bantustans. According to Rugege traditional leaders have been in control on the ground and are able to assess the needs of their communities, but they were previously unable to perform much to meet the needs of the community.¹⁸ Day argues that in the days of the apartheid government, traditional leaders' authoritative powers were limited and controlled to such an extent that their responsibilities did not include service delivery related matters.¹⁹ In contrast, Shabangu and Khalo assert that traditional leaders were given functions that would now be performed by municipalities in terms of section 152 of the Constitution.²⁰ Therefore it means that even service delivery matters in the homelands were left in the hands of traditional leaders.

The participatory role of traditional leaders in the municipal councils is restricted. Shabangu and Khalo noted that traditional leaders do not participate in the decision-making process of the council.²¹ They argued further that traditional leaders are only given an opportunity to express their opinions on matters affecting rural communities before decisions are taken by the municipal councils.²² However, Buthelezi argues that legislation prevents many traditional leaders from participating in, or even attending, municipal council meetings, and none of them may vote.²³ He argued further that although traditional leaders may express an opinion, the municipal councils need not to take anything they say into account when they take their decisions.²⁴

In contrast to the view of Buthelezi, Pieterse contends that even on the occasions when traditional leaders are not a democratic choice, their view is considered and their

¹⁸ Rugege S 'Traditional Leadership and Its Future Role in Local Governance' 2003 *Law, Democracy and Development* 198.

¹⁹ Day J 'The Role of Traditional Leadership in Service Delivery!' (2007) available at [www.ddp.org.za/.../The%20Role%20of%20Traditional%20Leadership%20in%20Service%](http://www.ddp.org.za/.../The%20Role%20of%20Traditional%20Leadership%20in%20Service%20) (accessed 11 June 2016).

²⁰ Shabangu MH & Khalo T 'The Role Traditional Leaders in the Improvement of the Lives of Communities in South Africa' (2008) 43 *Journal of Public Administration* 330.

²¹ Shabangu & Khalo (2008) 332.

²² Shabangu & Khalo (2008) 332.

²³ Buthelezi M 'Traditional leaders not parasites' *The Star* 15 May 2015 available at www.iol.co.za/the-star/traditional-leaders-not-parasites-1860520 (accessed 09 June 2016).

²⁴ Buthelezi (2016).

importance is recognised by the municipal councils.²⁵ He further contends that whatever statutory roles are playing by traditional leaders, successful local government in rural areas will to a large extent depends on their cooperation.²⁶

In elaborating upon the participatory role of traditional leaders at the municipal level, Mashau, Mutshaeni and Kone argue that traditional leaders must work with ward committees, Integrated Development Plan forums, community police forums, school governing bodies and all other local participatory structures which give them an opportunity to influence processes and decisions.²⁷ Moreover, Butler asserts that traditional authorities can play an effective role in strengthening local government especially by ensuring greater degree of engagement and participation at the local level.²⁸ He argues further that in so doing it is likely that traditional authorities will build their credibility with their people by been seen to be advancing local interests and pressing demands for them to be serviced by the local government.²⁹ This is a role which traditional leaders are expected to play in the municipal councils.

Despite their limited role of participation in the municipal councils, Natalini asserts that traditional leaders are appointed to the local government not merely to deal with traditional matters, but also because of their recognised ability to mobilise people and their role in creating cohesion.³⁰ Mthandeni also supports this argument by concluding that the underlying premise of the roles of traditional leaders is that they represent ethnic units and are the closest authorities to the people.³¹

²⁵ Pieterse 'Traditional Leaders Win Battle in Undecided War: African National Congress v Minister of Local Government and Housing, KwaZulu-Natal 1998 (3) SA 1 (CC)' (1999) 15 *SAJHR* 187.

²⁶ Pieterse (1998) 187.

²⁷ Mashau TS, Mutshaeni HN & Kone LF 'The Relationship between Traditional Leaders and Rural Local Municipalities in South Africa: With Special Reference to Legislations Governing Local Government' (2014) 12.2 *Studies of Tribes and Tribal* 223.

²⁸ Butler M 'Traditional Authorities: Know Where to Land' (2002) Policy Paper available at www.sarpn.org/CountryPovertyPapers/SouthAfrica/.../land/traditional_authorities_2.p (accessed 12 June 2016) 42.

²⁹ Butler (2016) 42.

³⁰ Natalini L 'The Review of Political Parties at the local Government Level: A Reflection on South Africa at the time of Policy Process of Review on Decentralisation' Policy Paper (2010) 3 available at www.ai.org.za/.../No-26.-The-Role-of-Political-Parties-at-the-local-government-level... (accessed 16 June 2016).

³¹ Mthandeni ED 'Traditional Leaders and New Local Government Dispensation in South Africa' (2002) HAL Archives available at <https://halshs.archives-ouvertes.fr/halshs-00749691/document> (accessed 18 June 2016).

It is imperative to find out why traditional leaders are not participating in municipal councils. It is imperative to find out why traditional leaders are not participating in municipal councils. Knoetze have identified the following reasons for non-participation of traditional leaders in municipal councils meetings:

First, some traditional leaders perceive that they do not have an impact on the deliberations of municipal councils. Secondly, political conflicts within municipal councils do not allow for meaningful participation. Thirdly, issues of travelling to meetings and out of pocket expenses have been thorny as there seems to be differential treatment thereof between municipalities.³²

According to Lutabingwa, Sabela and Mbatha, some traditional leaders cannot read or write or speak English and this makes their effective participation in local government activities more challenging, however not impossible.³³ Furthermore they argue that for the traditional leaders to play a developmental role and improve the provision of services within their area, they need to develop the following capabilities:

First, traditional leaders lack strategic capacity to evaluate, plan and develop innovative programmes to meet local needs in their communities. Secondly, traditional leaders lack integration capacity to coordinate and integrate inputs from inside and outside their localities to ensure development outcomes. Thirdly, traditional leaders lack community orientation designed to supply user-friendly, relevant and quality services to local communities.³⁴

Another reason often cited for the non-participation of traditional leaders in municipal councils is the lack of a determination by the relevant Members of Executive Council (MECs) as to which traditional leaders must participate in the municipal councils and what roles they must play.³⁵ Moreover, it was revealed that in the cases where

³² Knoetze E 'Legislative Regulation of the Development Functions of Traditional Leadership: In Conflict or Cohesion with Municipal Councils?' (2014) 1 *Speculum Juris* 177.

³³ Lutabingwa J, Sabela T & Mbatha TS 'Traditional Leadership and Local Governments in South Africa: Shared Governance is Possible' (2006) *Politeia* 81-82.

³⁴ Lutabingwa, Sabela & Mbatha (2006) 81.

³⁵ South African Local Government Association (SALGA) 'Challenges regarding the participation of Traditional Leaders in Municipal Councils' (2013) Local Government Brief: 08/2012 available at www.salga.org.za/.../Challenges-regarding-the-participation-of-Traditional-Leaders-in... (accessed 30 May 2016).

traditional leaders participate in municipalities, concerns have been raised about the lack of clarity on their roles.³⁶

In confirming the lack of clarity on their roles, Ngamlana asserts that it appears that there is a need to introduce some regulatory framework to better clarify how municipalities are to facilitate and support the effective participation of traditional leaders in the municipal councils so that they are not subjected to the mercy of the views of the strongest voices in the municipal councils.³⁷ Whereas there is a need to clarify the role of traditional leaders, Tshitangoni and Francis argue that the role of traditional leaders is complex because they go beyond local government matters.³⁸ For that reason, they argued further that it is difficult to accurately place traditional leaders' role within a specific sphere of government.³⁹

As has been mentioned above, the role and function of traditional leaders has been a hot-potato issue in South Africa's local governance since 1994. This has been seen from the last two decades where the literature on the role and function of traditional leaders have appeared, albeit very little. The literature has not touched on the TKLB and its impact on the role of traditional leaders in local governance. Moreover, there is little literature, if any, on comparative study between South Africa and Ghana on the role of traditional leaders.

The importance of this paper lies in the fact that traditional leaders are claiming, irrespective of given the right to participate in the municipal councils, that the municipalities should be replaced by traditional councils in their areas. The Limpopo Province is chosen as a case study because almost all municipalities within its borders incorporate areas of traditional leaders. This paper is aimed at providing insight into the debate on the role of traditional leaders at the local level, an issue which is central to the current debate and current review of the role traditional leaders. The introduction of

³⁶ SALGA (2016).

³⁷ Ngamlana N 'Traditional Leadership and Local Government Interface Program' Learning Brief no.1 available at www.raith.org.za/docs/projects/Vignette-AfesisLearningBriefNo1.pdf (accessed 20 June 2016).

³⁸ Tshitangoni M & Francis J 'The Role of Traditional Leaders in Community Development within a Democratic Society: A Study of Vhembe District in Limpopo Province' The 3rd SAAPAM Limpopo Chapter Annual Conference Paper available at www.ul.netd.ac.za/bitstream/handle (accessed 15 June 2016) 419.

³⁹ Tshitangoni & Francis (2016) 419.

TKLB has also attracted attention in the debate. As the TKLB is in the process of becoming an Act of Parliament, the functions imposed by it on traditional leaders are important for scholarly analysis.

5. CHAPTER OUTLINE

This study comprises of six chapters. Chapter two provides a legislative and institutional framework for traditional leaders. The legislation to be discussed will start from the Interim Constitution in order to understand the path of the recognition of the role of traditional leaders, followed by the present Constitution and other national legislation. Chapter three examines the role of traditional leaders in municipal councils and outside municipal councils across the country but with attention been placed in Limpopo as a case study.

Chapter four will examine the effects of the Traditional and Khoi-San Leadership Bill on the role of traditional leaders. Attention will be placed to the possible changes, if any, that can be brought by the Bill regarding the role of traditional leaders. Chapter five will provide the analysis of the Ghanaian constitutional framework of the role of traditional leaders in local governance. The aim of this comparative study is to look for lessons, if any, in Ghana. Chapter six provides a conclusion based on the preceding chapters.

6. METHODOLOGY

This is a desk-top study using both primary and secondary sources. In terms of primary sources this study will refer to the Interim Constitution, Final Constitution, case law, policy documents, the minutes of municipal councils' meetings in Limpopo which are obtained on the municipalities' website, the white papers, the bill, the legislation and regulations. The secondary sources to be used are books, academic journals, newspaper articles and theses and dissertations which constitute the bulk of the sources used. Internet sites will also be used to collect relevant data and information. A legal comparative method will be applied to find some lessons, if any, especially on the

way forward of the role of traditional leaders in local governance. Ghana is chosen as a case study to see whether there can be lessons for South Africa on the role of traditional leaders in local governance. The table which shows the number of municipalities and traditional leaders in Limpopo will be presented based on the primary and secondary sources. The general experience across the country and the experience in Limpopo with regard to the participation of traditional leaders in both the municipal councils and outside municipal councils will be provided in this research, based on the minutes of the municipal councils' meetings and any other secondary sources to be obtained.



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CHAPTER TWO

THE LEGISLATIVE FRAMEWORK FOR THE ROLE OF TRADITIONAL LEADERS

1. INTRODUCTION

Before the inception of a democratic government, traditional leaders performed the local government's functions in their areas of jurisdiction. However, the creation of the municipalities and their guaranteed functions in the Interim and the Final Constitution affected the functions of traditional leaders which they had previously enjoyed under the apartheid regime. The previous functions of traditional leaders are now given to the municipalities by the Final Constitution. The evolutions of the national legislation on the roles of traditional leaders have been subjected to criticism from some traditional leaders since then.

This chapter provides an overview of the legal framework within which traditional leaders operate in the Republic of South Africa. This legal framework is meant to serve as a base for the analysis of the subsequent chapters. In what follows, the chapter seeks to review the role of traditional leaders in the Interim Constitution (1993), the Final Constitution (1996), Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998), Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) and Limpopo Traditional Leadership and Institutions Act, 2005 (Act No. 6 of 2005).

2. INTERIM CONSTITUTION

The Interim Constitution⁴⁰ commenced on 27 April 1994. Its purpose was, among others, to introduce a new Constitution for the Republic of South Africa; to provide recognition of traditional authorities and customary law; to provide ex officio membership to traditional leaders in the local government; and the establishment of

⁴⁰ The Interim Constitution of the Republic of South Africa Act, 1993 (Act No. 200 of 1993) (hereinafter the Interim Constitution).

both the Provincial Houses of Traditional Leaders and the Council of Traditional Leaders.

Therefore, the Interim Constitution provided that the traditional authority which observes the system of customary law and which was recognised by law before the coming into operation of the Interim Constitution shall continue to exercise its powers and perform its functions as provided for in the applicable legislation and customary law.⁴¹ For the purpose of this paper, attention is given to the ex officio membership which was granted to traditional leaders in their areas of jurisdiction where the local transitional councils were established. In cognizance of the fact that those traditional leaders were local rulers in the old homelands during apartheid, the Interim Constitution provided that:

The 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 referred to in Chapter 10, shall ex officio be entitled to be a member of that local government, provided that he or she has been identified in a manner and according to guidelines prescribed by the President by proclamation in the Gazette after consultation with the Council of Traditional Leaders, if then in existence, or if not, with the Houses of Traditional Leaders which have then been established, and shall be eligible to be elected to any office of such local government.⁴²

According to the above section, traditional leaders were to enjoy membership in the local councils and the rights attached to such memberships by virtue of their status. The purpose of allowing traditional leaders to be ex officio members of local government was for them to continue their governance role, albeit much more restricted, than the role they played before 1994.⁴³ Furthermore, that for the period of transition, the traditional leaders who had previously exercised the powers and performed the functions of local government would be represented in the established institutions which

⁴¹ S 181 (1) Interim Constitution.

⁴² S 182 Interim Constitution.

⁴³ *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal and Others* 1998 (4) BCLR 399 at para 19.

would be responsible for the functions of local government.⁴⁴ It is important to note that this rule applied only where local transitional councils were established. In the areas where there were no local transitional councils, the traditional leaders continued to exercise their former powers.

This position would prevail for two years until the coming into operation of the Final Constitution. The Final Constitution was adopted in 1996 and repealed the Interim Constitution.

3. THE 1996 CONSTITUTION

The 1996 Constitution provides that according to customary law, the institution, status and role of traditional leadership are recognised but subject to the Constitution.⁴⁵ Despite that the institution, status and role of traditional leadership is recognised as per customary law, the Constitution prescribes that any law or conduct must be consistent with the Constitution, otherwise such law or conduct will be reduced to nullity.⁴⁶ Moreover, the Constitution provides that an Act of Parliament may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.⁴⁷

National or provincial legislation may provide for the establishment of the houses of traditional leaders to deal with the matters of traditional leadership, the role of traditional leaders, customary law and customs of communities observing a system of customary law.⁴⁸ Moreover, an Act of Parliament may establish a council of traditional leaders.⁴⁹ Instead of stipulating the roles of traditional leaders, the Constitution has left the issue of the roles of traditional leaders to the government. Therefore the government is at liberty to provide - but within the Constitution - for the role of traditional leaders. In the

⁴⁴ *African National Congress and Another v Minister of Local Government and Housing, KwaZulu-Natal and Others* at para 19.

⁴⁵ S 211 (1) Constitution.

⁴⁶ S 2 Constitution.

⁴⁷ S 212 (1) Constitution.

⁴⁸ S 212 (2) (a) Constitution.

⁴⁹ S 212 (2) (b) Constitution.

judgment of *Certification of the Constitution of the Republic of South Africa, 1996*,⁵⁰ the Constitutional Court stated:

They [objectors of chapter 12 of the Constitution] argued that the purpose underlying a guaranteed and active role for traditional leaders in government is to ensure an appropriate place in the constitutional structure for elements of traditional forms of government that have deep historical roots in the country and that continue to have direct relevance for millions of people, particularly many living in rural areas, where the perceived reality of government is the traditional authority rather than the modern state.⁵¹

This argument shows that traditional leaders wanted to be in the forefront of local government (especially in their areas of jurisdiction located in rural local municipalities) to continue with the role they played in the Bantustans. In a developing society, such as South Africa, making the transition to democracy characterises a tension between traditional leaders and modern political participation and representation.⁵² This tension is based on the difficulty of allocating a role to traditional leader in the democratic country. Rautenbach and Bekker argue that it is not possible to allocate carte blanche roles and functions of government to traditional leaders.⁵³

It must be noted that in a liberal democracy, like that of South Africa, it is paramount that all representatives of people in government be elected by the people themselves. The core values of our democratic state is based on universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.⁵⁴

In *Certification of the Constitution of Republic of South Africa, 1996*, the Constitutional Court stated that the institution, status and role of traditional leadership are protected by means of entrenchment in the Constitution and any attempt of interference would be

⁵⁰ 1996 (4) SA 744 (CC).

⁵¹ *Certification of the Constitution of the Republic of South Africa, 1996*, para 189.

⁵² Lehman HP 'Deepening Democracy?' Demarcation, Traditional Authorities and Municipal Elections in South Africa' (2007) 44 *The Social Science Journal* 302.

⁵³ Rautenbach C & Bekker JC *Introduction to Legal Pluralism in South Africa* 3 ed (2010) 223.

⁵⁴ S 1 (d) Constitution.

subjected to the constitutional scrutiny.⁵⁵ It went further to state that the Constitutional Assembly cannot be constitutionally faulted for not addressing the complicated, varied and ever-developing specifics of how traditional leadership should function in the wider democratic society.⁵⁶ This is an acknowledgment by the Constitutional Court that the matter of the functions of traditional leaders in a democratic society is a conundrum.

4. LOCAL GOVERNMENT: MUNICIPAL DEMARCATION ACT, 1998 (ACT NO. 27 OF 1998)

The areas of traditional leaders must fall within the boundaries of the municipalities in South Africa. The reason is that the Constitution expressly provides that local government be made up of the municipalities which must be demarcated in the territory of South Africa,⁵⁷ leaving no exception for traditional areas. The Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998) (MDA) establishes the independent board called the Municipal Demarcation Board (MDB). The MDB is responsible for demarcating the municipalities throughout the Republic of South Africa. When demarcating the municipalities, the MDB must take into account the areas of traditional rural communities.⁵⁸ If the area of a traditional authority is to be affected by the demarcation proposed by MDB, the relevant Provincial House of Traditional Leaders (PHTL) must be notified of such proposal.⁵⁹ The reason for such notification is to invite the PHTL to make written submission regarding such proposal.⁶⁰ The MDA gives the PHTL a platform, however the final say on such proposal rest with MDB.

5. LOCAL GOVERNMENT: MUNICIPAL STRUCTURES ACT, 1998 (Act No. 117 OF 1998)

⁵⁵ *Certification of the Constitution of the Republic of South Africa, 1996*, para 197.

⁵⁶ *Certification of the Constitution of the Republic of South Africa, 1996*, para 197.

⁵⁷ S 151 (1) Constitution.

⁵⁸ S 25 (f) MDA.

⁵⁹ S 26 (3) (d) MDA.

⁶⁰ S 26 (3) (d) MDA.

In accordance with section 212 (1) of the 1996 Constitution which provides that the national legislation will provide the role of traditional leaders at the local level, the Local Government Municipal Structures Act, 1998 (Act No. 117 of 1998) (MSA) was passed by the Parliament. The MSA provides that traditional authorities that traditionally observe a system of customary law in the area of a municipality may participate through their leaders in the proceedings of the council of that municipality.⁶¹ The MSA also provides for the establishment of the municipalities and their municipal councils. Below is the overview of the establishment of the municipal councils and how traditional leaders are identified to participate in those municipal councils.

5.1. ESTABLISHMENT OF MUNICIPAL COUNCILS

During apartheid in South Africa there were no municipalities in the traditional leaders' areas of jurisdiction. The traditional leaders were providing the provision of services to their people. In other words, they performed the functions which are now performed by the current municipalities. The Constitution mandates for the establishment of the wall-to-wall municipalities.⁶² Murray argues that the use of local powers by traditional leaders was cast into uncertainty by the establishment of municipalities across the entire South Africa.⁶³ As things stand, all areas in South Africa are covered by municipalities, including the areas of traditional leaders. All municipalities are mandated to have municipal councils. The executive and legislative authority of a municipality is vested in its municipal council.⁶⁴ A municipal council comprises of a number of councillors determined by the Member of the Executive Council (MEC) for local government in the province concerned by notice in the provincial gazette.⁶⁵

⁶¹ S 81 (1) MSA.

⁶² S 151 (1) Constitution.

⁶³ Murray C 'South Africa's Troubled Royalty Traditional Leaders after Democracy' Law and Policy Paper 23 available at http://www.publiclaw.uct.ac.za/usr/public_law/staff/Troubled%20Royalty%20LPP%20No%2023%20Murray.pdf (accessed 10 October 2016) 13.

⁶⁴ Section 151 (2) Constitution.

⁶⁵ S 18 (3) MSA.

The councillors are elected as members of a municipal council for a period ending when the next council is declared elected.⁶⁶ And councillors who are appointed as representatives of a local council to a district council are members of such a district council for a period ending when the next local council is declared elected.⁶⁷ A municipal council's term of office is set at the period of five years.⁶⁸

Moreover, traditional leaders may participate in the municipal councils of their areas. The number of traditional leaders that may participate in the municipal council may not exceed 20 per cent of the total number of councillors in that council, but if the municipal council has fewer than 10 councillors, only one traditional leader may participate.⁶⁹ When the number of traditional leaders identified by MEC in a municipality's area of jurisdiction, exceeds 20 per cent of the total number of councillors, the MEC may determine a system for the rotation of those traditional leaders.⁷⁰

A municipal council has a right to govern on its own initiative the local government affairs of the local community subject to the national and provincial legislation.⁷¹ The affairs of local government are listed in schedules 4 part B and schedule 5 part B of the Constitution. When governing its local government affairs, a municipal council must annually review the needs of the community, its priorities to meet the needs of the community, its mechanisms for community participation, its organisational and delivery mechanisms for meeting the needs of the community.⁷² A municipal council is duty-bound to meet at least quarterly.⁷³

5.2. The process of identification of traditional leaders who participate in local councils

⁶⁶ S 26 (1) (a) MSA.

⁶⁷ S 26 (1) (b) MSA.

⁶⁸ S 24 (1) MSA.

⁶⁹ S 81 (2) (b) MSA.

⁷⁰ S 81 (2) (c) MSA.

⁷¹ S 151 (3) Constitution.

⁷² S 19 (2) MSA.

⁷³ S 18 (2) MSA.

Before a traditional leader participates in a municipal council, he or she must be identified by the relevant MEC.⁷⁴ In the identification process the MEC must request that the Provincial House of Traditional Leaders (PHTL) recommends, within 30 days, which leaders of that traditional authority or of those traditional authorities can be identified for the purposes of section 81 of the MSA.⁷⁵ As it is understood, the PHTL may prepare a list of traditional leaders who are to participate in a municipal council concerned and send it to the MEC, who then identifies such traditional leaders. It appears that the MEC may or may not identify such traditional leaders according to the recommendations of the PHTL. The power to identify traditional leaders rests with the MEC not the PHTL. The recommendations PHTL are not binding on the MEC as to which traditional leaders must be identified.

Moreover, if the PHTL fails to recommend traditional leaders within 30 days upon the request of the MEC, the MEC may identify the traditional leaders to participate in the municipal council and the names of those traditional leaders must be submitted to the municipal manager of that municipal council.⁷⁶ However, if there is no PHTL, the MEC must consult the traditional authority concerned before identifying any leader for the purposes of section 81 of the MSA.⁷⁷ This requires the MEC to seek advice from the traditional authority, but the MEC is not duty-bound to identify traditional leaders according to the advice of the traditional authority concerned.

It must be noted that not every traditional leader can be identified to participate in a municipal council. In order for a traditional leader to be identified, he or she must hold the supreme office of authority among all the leaders of the traditional authority and be an ordinary resident within the jurisdiction of the municipality in question.⁷⁸ The TLGFA provides a hierarchy of traditional leaders in South Africa. On the top of the hierarchy are kings and queens, followed by principal traditional leaders, followed by senior traditional leaders and occupying the last rank are the headmen or headwomen.⁷⁹ It

⁷⁴ S 81 (2) (a) MSA.

⁷⁵ Schedule 6 (1) (1) (b) MSA.

⁷⁶ Schedule 6 1 (1) (C) MSA.

⁷⁷ Schedule 6 1 (1) (d) MSA.

⁷⁸ Schedule 6 1 (2) MSA.

⁷⁹ S 8 TLGFA.

follows that this hierarchy must be followed when identifying traditional leaders who are to participate in the municipal councils. A headman cannot be identified over a senior traditional leader; a senior traditional leader cannot be identified over principal traditional leader; and a principal traditional leader cannot be identified over a king or queen.

5.3. What does participation of traditional leaders in local councils mean?

Traditional leaders are not in the municipal council to watch or monitor the proceedings of the municipal councils; they are in the municipal councils to participate by submitting motions, making proposals and asking questions.⁸⁰ It must be noted that such participation requires traditional leaders to be learned and informed of the procedures in municipal councils in order to be able to submit motions and make proposals. However, most traditional leaders do not always possess knowledge of municipal processes and protocols and they lack information on how to operate and support some of the municipal decisions and activities.⁸¹ According to Du Plessis, a function of traditional leaders at the local level is, inter alia, to ensure the proper implementation of planning and policy, particularly regarding development in their respective territories.⁸² This function can only be performed if traditional leaders attend and participate in the municipal councils. In other words, they must debate and express their views regarding development in their territories and by so doing they will be influencing the decisions of the municipal councils. Traditional leaders will have to familiarise themselves with the standing rules and orders of the municipalities in order to know the procedure for submission of motions and the making of proposals.

The participation of traditional leaders in the municipal councils may differ from municipality to municipality as to whether the traditional leaders should participate in the committee meetings or not. According to De Visser, the rules and orders of the municipalities where traditional leaders participate in their councils' meetings must

⁸⁰ Smith (2009) 124.

⁸¹ Phago KG & Netswera FG 'The Role of Traditional Leadership in a Developmental State: The Case of Greater Sekhukhune District Municipality of South Africa' (2011) 46 *Journal of Public Administration* 1030.

⁸² Du Plessis W 'The Role and Future of Traditional Leaders in South Africa' (1999) 64 (2&3) *Koers* 298

indicate how traditional leaders should participate in the municipal councils' meetings and also to clarify whether they may participate in the municipal councils' committee meetings.⁸³ In the area of a traditional authority, the municipal council must give the leader of that authority the opportunity to express a view on that matter. However, traditional leaders, although they are ex officio members of the municipal councils, have no voting rights. Rugege asserts that the voting rights in the municipal councils are the rights of the elected members of the municipal councils.⁸⁴ The traditional leaders are not democratically elected by the locals but they are identified by the MEC to occupy a certain percentage of seats in the municipal councils.

The local government intended by the Constitution requires that all members of the municipal council be elected in order to take decisions through voting in the municipal councils. The Constitution indeed excludes ex officio members of the municipal councils from taking decisions through voting in the municipal councils' meetings.⁸⁵ It provides that members of a municipal council must be elected through a system of proportional representation or both proportional representation and a ward representation.⁸⁶ Since the Constitution has given two options in which members of municipal councils are elected, South Africa has opted for a system of both proportional representation and ward representation.

According to the South Africa Local Government Association (SALGA), the participation of traditional leaders in the municipal councils is like the participation of Organised Local Government in the National Council of Provinces (NCOP); councillors participate in the NCOP as representatives of local government in order to ensure that local government views are considered in the policy and legislative process.⁸⁷

5.4. Application of the Code of Conduct on traditional leaders

⁸³ De Visser J 'Rules and Orders: The Building Blocks of Good Governance' in Mettler J, Steytler N & De Visser J (eds) *Local Government Bulletin 1999-2008* (2009) 802.

⁸⁴ Rugege (2003) 180.

⁸⁵ S 151 (1) Constitution.

⁸⁶ S 157 (2) Constitution.

⁸⁷ South African Local Government Association (2016).

All councillors who participate in the municipal councils must obey the Code of Conduct provided in schedule 1 of the MSA. The traditional leaders are not immune from the application of the Code of Conduct. Therefore, when participating in the proceedings of a municipal council, a traditional leader must obey the appropriate provisions of the Code of Conduct as set out in schedule 1 of the MSA.⁸⁸ In the case it is found that a traditional leader has breached a provision of this Code of Conduct, the municipal council may issue a formal warning to the traditional leader⁸⁹ or request the MEC for local government in the province to suspend or cancel the traditional leader's right to participate in the proceedings of the municipal council.⁹⁰

5.5. Participation of traditional leaders outside of municipal councils

A municipal council cannot take a decision on any matter which is directly affecting the territory of a traditional authority; except that the municipal council gives the leader of that authority the opportunity to express a view on that matter.⁹¹ This is a right of every traditional leader irrespective of whether that traditional leader is identified to participate in a municipal council or not. The MSA does not give discretion to the municipal councils to consult traditional leaders; in fact it commands the municipal councils to consult the traditional leaders when its decision is directly affecting their areas.⁹²

6. TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT, 2003 (ACT NO. 41 OF 2003)

6.1. Definition of traditional leader and traditional authority

'A traditional leader is any person who holds a traditional position in terms of customary law of the traditional community concerned and is recognized as such in terms of the

⁸⁸ S 81 (5) (a) MSA.

⁸⁹ Item 15 (3) (a) of schedule 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

⁹⁰ Item 15 (3) (b) of schedule 1 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

⁹¹ S 81 (3) MSA.

⁹² S 81 (3) MSA.

Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) (TLGFA).⁹³ According to Mthandani, a traditional leader is someone who, because of his birth, sits on the throne and who has been appointed to it in accordance with the customs and tradition of the community and has traditional authority over the people of that community or any person appointed by instrument and order of the government to exercise traditional authority over a traditional community or a tribe.⁹⁴

According to Smith, if there is a traditional leader but there is no traditional authority, that traditional leader cannot participate in the municipal council.⁹⁵ However, it does not necessarily mean that without traditional authority or traditional council, a traditional leader cannot participate in the municipal council. A traditional authority or traditional council consists of the number of members determined by the Premier through a formula published in the Provincial Gazette, after consultation with the provincial house, and in accordance with the guidelines issued by the Minister by notice in the Gazette.⁹⁶ In Limpopo, the number of members of a traditional council to be established by every traditional community must not exceed 30 members.⁹⁷ According to Mmusinyane, the traditional authorities can be regarded as communal structures that are capable of either perpetuating the primogeniture principle or developing community customs to bring them in line with the aspirations of the Constitution.⁹⁸ A tribal authority that has been established before the commencement of the TLGFA is deemed to be a traditional council, provided that such a tribal authority must comply with section 3(2) of the TLGFA within seven years of its commencement.⁹⁹

The words 'traditional authority', as used in the Constitution and MSA, refer to a traditional community as recognised in terms of TLGFA and to the extent recognised in the provincial legislation, such as Limpopo Traditional Leadership and Institutions Act

⁹³ S 1 TLGFA.

⁹⁴ Mthandeni ED 'Traditional Leaders and New Local Government Dispensation in South Africa' (2002) HAL Archives available at <https://halshs.archives-ouvertes.fr/halshs-00749691/document> (accessed 18 June 2016).

⁹⁵ Smith (2009) 124.

⁹⁶ S 3 (2) (a) TLGFA.

⁹⁷ S 4 (1) LTLIA.

⁹⁸ Mmusinyane B 'The Role of Traditional Authorities in Development Customary Laws in Accordance with the Constitution: *Shilubana and Others V Nwamitwa and Others* 2008 (9) BCLR 914 (CC)' (2009) 2.3 *Potchefstroom Electronic Law Journal* 137.

⁹⁹ S 28 (4) TLGFA.

(LTLIA). Whereas section 211 (2) use the words traditional authority, however in *Shilubana and Others v Nwamitwa and Others*¹⁰⁰ the Constitutional Court opted to use the words traditional community instead of traditional authority when it was referring to section 211 (2) of the Constitution.

It is therefore submitted that it is possible to have a traditional community without a traditional council; however it is not possible to have a traditional leader without a traditional community. Furthermore, it is submitted that a proper logic will be that without a traditional community, a traditional leader cannot participate in a municipal council.

6.2. The functions of traditional leaders

The TLGFA prescribes that a traditional leader performs the functions provided for in the applicable legislation and in terms of customary law and customs of the traditional community concerned.¹⁰¹ Moreover, it provides that national and provincial governments, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of matters listed in section 20 (1).¹⁰² These matters are arts and culture, land administration, agriculture, health, welfare, the administration of justice, safety and security, the registration of births, deaths and customary marriages, economic development, environment, tourism, disaster management, the management of natural resources, the dissemination of information relating to governmental policies and programmes and education.

Since municipalities have powers over municipal health services, local tourism and municipal planning over municipal land, so it is not clear what will be the relationship between the municipalities and traditional leaders, if traditional leaders are to be allocated a role from those matters. Be that as it may, if national or provincial government allocates a role to traditional leaders in terms of above list then the traditional leaders may perform such a role within the national or provincial powers. In

¹⁰⁰ 2008 (9) BCLR 914 (CC) para 73.

¹⁰¹ S 19 TLGFA.

¹⁰² S 20 (1) TLGFA.

performance of their allocated role by national or provincial government, the traditional leaders cannot trample on the functions of the municipalities as provided for in the schedules 4B and 5B of the Constitution.

The matters which are listed in section 20 (1) are wide and ambiguous and therefore without thorough elaboration on them can create a confusion. For example, agriculture and health cover a great variety of things. Therefore, it is submitted that without specification in those fields it will be an invitation of confusion. Moreover, traditional leaders are at the mercy of the national or provincial government to provide a role for them in those matters listed in section 20 (1). In other words, the national and governments have discretion to provide a role for traditional leaders within the ambit of matters listed in section 20 (1).

6.3. The functions of the Local House of Traditional Leaders

In a district municipality or a metropolitan municipality where more than one traditional council exists, a local house of traditional leaders must be established.¹⁰³ Section 17 (3) of the TLGFA provides for the functions of a local house of traditional leaders as follows:

- (a) to advise the district municipality or the metropolitan municipality in question on -
 - (i) matters pertaining to customary law, customs, traditional leadership and the traditional communities within the district municipality or the metropolitan municipality;
 - (ii) the development of planning frameworks that impact on traditional communities; or
 - (iii) the development of by-laws that impact on traditional communities;
- (b) to participate in local programmes that have the development of rural communities as an objective; or

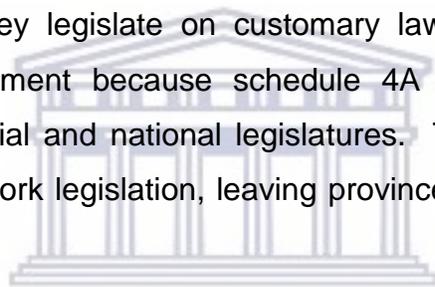
¹⁰³ S 17 (1) (a) TLGFA.

- (c) to participate in local initiatives that are aimed at monitoring, reviewing or evaluating government programmes in rural communities.

It is clear from the above functions that the local house of traditional leaders performs an advisory and supporting role to the district or metropolitan municipality. For that reason, the White Paper on Traditional Leadership and Governance made it clear that the institution of traditional leadership can play a key role in supporting government to improve the quality of lives of the people.¹⁰⁴

7. PROVINCIAL LAWS REGULATING THE ROLE OF TRADITIONAL LEADERS

The provinces are empowered by the Constitution to legislate on customary law and traditional leadership.¹⁰⁵ They legislate on customary law and traditional leadership along with national government because schedule 4A is a concurrent legislative competence of both provincial and national legislatures. The national legislature has passed a TLGFA as framework legislation, leaving provinces to enact legislation which give details to it.



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7.1. The general provincial laws in other provinces

The KwaZulu-Natal Province has passed its own legislation which regulates traditional leadership within its jurisdiction. The legislation is called KwaZulu-Natal Traditional Leadership and Governance Act, 2000 (Act No. 5 of 2000) (KZNTLGA). It prescribes that the traditional leaders which are identified by the MEC for local government in the province in terms of section 81 of the MSA must participate in the municipal councils.¹⁰⁶ This provision seems to mandate the traditional leaders to participate in the municipal councils because it uses the word 'must' not may. The KZNTLGA prescribes that in case a traditional leader fails to carry out his duties as prescribed by it, he or she must

¹⁰⁴The *White Paper on Traditional Leadership and Governance* (GN 2336 in GG 25438 of 10 September 2000) 18.

¹⁰⁵ Schedule 4A Constitution.

¹⁰⁶ S 20 (2) (d) KZNTLGA.

be investigated in terms of section 23.¹⁰⁷ If a traditional leader is found not to attend the municipal council's meetings, the Executive Council of the Province of KwaZulu-Natal, may issue a formal warning,¹⁰⁸ a suspension without remuneration but not exceeding three months,¹⁰⁹ a fine not exceeding an amount equal to three month's remuneration¹¹⁰ or a notice withdrawing recognition of that traditional leader.¹¹¹

The MSA provides that after consulting the PHTL, the MEC for local government in a province may by notice in the Provincial Gazette regulate the participation of traditional leaders in the proceedings of the municipal councils¹¹² and prescribe a role for traditional leaders in the affairs of the municipalities.¹¹³ The MEC is not obliged to regulate and prescribe a role for traditional leaders in the matters of the municipalities, but in case he or she does that, he or she must only provide a regulatory framework for participation of traditional leaders in the municipal councils and list their general role in the affairs of municipalities. In the case of *Certification of the Constitution of the Republic of South Africa*, the court defined the term 'regulate' as to imply a broad managing or controlling rather than a direct authorisation function.¹¹⁴ Steytler and De Visser describe regulation to mean a sets of frameworks within which a local autonomy can responsibly be exercised.¹¹⁵ In the absence of a provincial regulation municipalities may prescribe, in their rules and orders, how traditional leaders should participate in their councils' meetings.

According to the KwaZulu-Natal regulation on the participation of traditional leaders in the municipal councils, traditional leaders may perform official or ceremonial duties delegated them by the municipal councils¹¹⁶ and may attend and participate in the meetings of the committees of the municipal councils established in terms of sections

¹⁰⁷ S 20 (4) KZNTLGA.

¹⁰⁸ S 23 (11) (a) KZNTLGA.

¹⁰⁹ S 23 (11) (b) KZNTLGA.

¹¹⁰ S 23 (11) (c) KZNTLGA.

¹¹¹ S 23 (11) (d) KZNTLGA.

¹¹² S 81 (4) (a) MSA.

¹¹³ S 81 (4) (b) MSA.

¹¹⁴ *Certification of the Constitution of the Republic of South Africa*, 1996, para 377.

¹¹⁵ Steytler N & De Visser J *Local Government of South Africa* (2012) 15-5.

¹¹⁶ S 2 (2) (a) KwaZulu-Natal Regulations on the Participation and Role of Traditional Leaders in Municipal Councils and Municipalities, 2013 (hereafter KwaZulu-Natal Regulations).

79 and 80 of the MSA.¹¹⁷ It furthermore provides that traditional leaders may address and advise the municipal council on any matter affecting traditional leadership or the relevant traditional community;¹¹⁸ or any other matter involving traditional communities in the area of jurisdiction of the relevant municipal council.¹¹⁹

The Eastern Cape Traditional Leadership and Governance Act, 2005 (Act No. 4 of 2005) (ECTLGA) stipulates that a traditional leader performs the functions in terms of the customs and customary law of the traditional community concerned as provided in the TLGFA and in other applicable legislation.¹²⁰ Among other roles, traditional leadership must promote service delivery.¹²¹ This role requires a good relationship between a traditional leader and municipality to work together for service delivery.

7.2. Limpopo Traditional Leadership and Institutions, 2005 (Act No. 6 of 2005)

Limpopo province has enacted its own legislation which is called Limpopo Traditional Leadership and Institution Act, 2005 (Act No. 6 of 2005) (LTLIA). The LTLIA provides that it is necessary for traditional leaders within the Province to exercise their powers within a statutory framework that enhances certainty and uniformity.¹²² A traditional leader performs any function provided for in terms of customary law, or assigned to him or her in terms of any law, subject to section 20 of the TLGFA.¹²³

Section 18 (1) of the LTLIA provides the following functions of traditional leaders:

- (a) promotes the interests of the traditional community concerned;
- (b) in co-operation with the relevant municipalities and State departments, assists with the administration of the traditional community.

¹¹⁷ S 2 (2) (b) KwaZulu-Natal Regulations.

¹¹⁸ S 2 (2) (f) (i) KwaZulu-Natal Regulations.

¹¹⁹ S 2 (2) (f) (ii) KwaZulu-Natal Regulations.

¹²⁰ S 24 (5) ECTLGA.

¹²¹ S 24 (7) (b) ECTLGFA.

¹²² Preamble of the LTLIA.

¹²³ S 18 (1) LTLIA.

- (c) actively participate in the development of the area of his or her traditional community;
- (d) at the request of any government department or the relevant municipality, make known to all residents of the traditional community concerned the provisions of any new law; and
- (e) performance of any functions allocated by any organ of State in accordance with this Act.

Traditional leaders are the heads of their traditional councils and the traditional councils should cooperate with municipalities. If the traditional council deems fit for a by-law to be passed with regard to any matter directly affecting its area, then it must submit a proposal to the municipal council of the municipality concerned in order to adopt such a by-law.¹²⁴ Attached to the proposal may be a draft of such by-law and the written reasons on why it should be adopted as a by-law.¹²⁵ The municipal council is bound to consult the traditional council before rejecting the proposal.¹²⁶

It is submitted that whether a traditional leader of that traditional council has been identified to participate in the municipal councils is irrelevant, as long as the traditional council is recognised in terms of the provision of the LTLIA. If the proposal is to be debated in the municipal councils, it is submitted that the traditional leader as the leader of the traditional council may debate in favour of such proposal in the municipal council. Even if the traditional leader has not been identified to participate in the municipal council in terms of MSA, he or she may be invited to debate such proposal since it is directly affecting his or her community. Moreover, the traditional council may enter into service delivery agreement with the municipality in terms of any applicable law.¹²⁷ This means that there ought to be a good relationship between the municipality and the traditional leader and his traditional council in order for service delivery agreement to be effective.

¹²⁴ S 10 (1) LTLIA.

¹²⁵ S 10 (2) LTLIA.

¹²⁶ S 10 (2) LTLIA.

¹²⁷ S 10 (5) LTLIA.

The government is at the forefront of allocating the functions to traditional leaders. From the foregoing functions, traditional leaders will be assisting and cooperating with government. Therefore traditional leaders play a role of advice and support to government whereas the government is the decision-maker.

8. CONCLUSION

As things stand, traditional leaders have no power to govern the affairs of their community when it conflicts with the powers of municipalities, except for land administration and the administration of customary law. The national and provincial legislation provides for the role of traditional leaders, albeit in broad terms. The fact that the role of traditional leaders is defined in broad terms is based on the difficulty of allocating functions to traditional leaders. The Constitutional Court described the process of how traditional leaders must function within democratic society as being complicated, varied and ever-developing. This has been seen from the number of laws which endeavours to provide for the role of traditional leaders. It has transpired that the role of traditional leaders was reduced to an advisory and supportive of government, especially in the local sphere. Hence, traditional leaders are criticising this role because it makes it difficult for them to influence decision-making in the local sphere of government. Instead, they want to be in charge of their areas and perform local government functions as they did in the past.

A number of laws provide for the roles of traditional leaders, albeit an advisory role. These laws include the MSA which grants traditional leaders seats in the municipal councils. As a result, the next chapter examines the general experience of the participation of traditional leaders in the municipal councils and as well as their participation outside of the municipal councils.

CHAPTER THREE

THE STATUS AND ROLE OF TRADITIONAL LEADERS AT THE LOCAL LEVEL

1. INTRODUCTION

Traditional leaders have a pivotal role to play in local governance. As the leaders of their communities, traditional leaders are respected by their people and also have influence and the ability to mobilise their people. Traditional leaders are expected to work with municipalities in order to steer service delivery and development in their areas.

The MSA has assured traditional leaders seats in the municipal councils. However, traditional leaders are criticising their ex officio status in municipal councils.¹²⁸ One of the critiques from traditional leaders is the lack of voting rights in the proceedings of the municipal councils. Therefore, it reduces the role of traditional leaders in the municipal councils to an advisory role. Whereas the MSA allocates seats in the municipal councils to traditional leaders in their areas of jurisdiction, it is not clear to some municipalities as to how traditional leaders should participate during the proceedings of the municipal councils.¹²⁹

This chapter provides a discussion on the role of traditional leaders in local governance, particularly their role when participating in the proceedings of the municipal councils with reference to Limpopo as a case study. Moreover, it seeks to review the role of traditional leaders outside the municipal councils' meetings, especially their right to be consulted by the municipalities. Lastly, it analyses the impact of the Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013) on the role of traditional leaders.

¹²⁸ South African Government (2016).

¹²⁹ South African Local Government Association (2016).

2. PARTICIPATING IN LOCAL COUNCILS

This section examines the participation of traditional leaders in the municipal councils across the country and with specific attention to Limpopo province. It furthermore examines the participation of traditional leaders outside the municipal councils' meetings, across the country and with particular attention to Limpopo since is the case of this research.

2.1. The general experience of participation of traditional leaders in local councils across the country

The establishment of local government indeed lasted for a long time and went through a preparatory stage, a transitional stage and a final stage which was put into practice in 2000.¹³⁰ The traditional leaders were not happy, first, with the demarcation process of the municipalities because they were under the impression their boundaries will be tampered with by the Municipal Demarcation Board.¹³¹ However, this was not true because traditional leaders' boundaries would have still remained intact. Secondly, traditional leaders were also worried about the issue of their representation in the municipal councils, the ambiguity of their role in the municipal councils and also their remuneration.¹³² In protesting against this process, traditional leaders in KwaZulu-Natal Province and Eastern Cape Province fought tooth and nail. In KwaZulu-Natal, 15 traditional leaders who were included within the eThekweni Municipality by the Municipal Demarcation Board refused to be part of that municipality.¹³³ It was imminent that traditional leaders would boycott the local government election in 2000.¹³⁴

At that time the number of traditional leaders who were supposed to participate in the proceedings of a municipality was limited to 10 per cent. The government responded to

¹³⁰ Steytler N 'South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions' in Bosire CM & Gikonyo W (eds) *Animating Devolution in Kenya: The Role of Judiciary* (2015) 222.

¹³¹ Beall J 'Cultural Weapons: Traditions, Inventions and the Transition to Democratic Governance in Metropolitan Durban' (2004) 43(2) *Urban Studies* 464.

¹³² Beall (2006) 464.

¹³³ Beall (2006) 464.

¹³⁴ Oomen B *Chiefs in South Africa: Law, Power & Culture in the Post –Apartheid Era* (2005) 66.

an imminent threat of boycotting elections by promising to amend the MSA so that the number of traditional leaders who are able to participate in a municipal council is 20 per cent. Eventually, the eThekweni municipality has managed to cooperate with traditional leaders and it established a programme called Amakhosi Support and Rural Development.¹³⁵ The eThekweni municipality established a committee of traditional leaders which is chaired by a councillor who negotiates with them in their areas of jurisdiction.¹³⁶ The traditional leaders who are participating in the municipal affairs are entitled to R 3 500.00 as an out-of-pocket expense.¹³⁷

Currently, eThekweni municipality has 17 traditional leaders who participate in the municipal council. These traditional leaders are divided according to the municipality's portfolio committees so that their participation in the municipal council can be meaningful.¹³⁸ The City Manager of eThekweni municipality said that the 'traditional leaders should feel at home as there will be collaboration in all the activities of the municipal council'.¹³⁹

Turning to the Eastern Cape Province, generally there is a successful participation of traditional leaders in the municipalities because they are taken into consideration when implementing the municipal programmes.¹⁴⁰ The participation of traditional leaders in the municipal councils has been used as a device to reduce conflicts surrounding the development of land in rural areas.¹⁴¹ In Mbashe local municipality, all traditional leaders are members of the municipal committees. However, according to Zingisa, councillors are not giving traditional leaders sufficient time to express their views.¹⁴² He

¹³⁵ Shembe S *Role of Traditional Leadership in Service Delivery: A Case study of eThekweni Municipality* (unpublished LLM thesis, University of KwaZulu-Natal, 2014) 52.

¹³⁶ Beall (2006) 464.

¹³⁷ Shembe (2014) 52.

¹³⁸ eThekweni Municipality's Communications Unit 'eThekweni Works With Traditional Leaders' available at http://www.durban.gov.za/Resource_Centre/Press_Releases/Pages/EThekweni-Works-With-Traditional-Leaders.aspx (accessed 22 November 2016).

¹³⁹ eThekweni Municipal Communication Unit (2016).

¹⁴⁰ Knoetze E 'Legislative Regulation of the Developmental Functions of Traditional Leadership – In Conflict or Cohesion with Municipal Councils?' (2014) 28 (1) *Speculum Juris* 117.

¹⁴¹ Knoetze (2014) 117.

¹⁴² Zingisa BA *The Role of Traditional Leaders in Enhancing Service Delivery in Mbashe Local Municipality* (unpublished Master's thesis, Nelson Mandela Metropolitan University, 2013) 77.

argued that the traditional leaders and councillors do not comprehend their role in the municipal councils.

In Mpumalanga province, Ehlanzeni and Gert Sibande District Municipalities the traditional leaders are participating in the local councils' meetings.¹⁴³ This is contrary to what is happening in Nkangala District Municipality where traditional leaders are not participating in the local municipal councils' meetings.¹⁴⁴ A reason for traditional leaders' non-participation in the local councils' meetings is because they are of the view that their participation is irrelevant and as such their role in the municipal councils' meetings would be to agree with decisions of the municipal councils.¹⁴⁵ This is because they do not have the power to vote in the municipal councils' meetings.

The lack of voting rights in the municipal councils has impacted on the participation of traditional leaders. The role traditional leaders in the municipal councils can be termed as a role without power. According to Shabangu and Khalo, what can be drawn from traditional leaders' lack of voting rights in the municipal council is that traditional leaders possess no power to oppose municipal councils' decisions on matters affecting their areas.¹⁴⁶ The lack of voting rights of traditional leaders has reduced their participation to advisory, the implication of which is that traditional leaders are not part of decision-makers in the municipal council. Nekhavhambe argues that the lack of voting in the local councils' meetings has led many traditional leaders to feel unhappy about their membership in the municipal councils.¹⁴⁷

Furthermore, Nzimande asserts that the traditional leaders may thus participate in the municipal councils' meetings; however their participation does not have any binding

¹⁴³ Masuku MB 'Policy and Budget Speech

Vote 4: Department of Cooperative Governance and Traditional Affairs' (2011) Speech presented in the Mpumalanga Provincial Legislature by MEC of Cooperative Governance and Traditional Affairs in Mpumalanga available at <http://www.mpumalanga.gov.za/media/speeches/cogta/26052011.htm> (accessed 09 December 2016).

¹⁴⁴ Masuku (2011).

¹⁴⁵ Masuku (2011).

¹⁴⁶ Shabangu MH & Khalo T 'The Role of Traditional Leaders in the Improvement of the Lives of Communities in South Africa (2008) 43 *Journal of Public Administration* 333.

¹⁴⁷ Nekhavhambe MM 'The Role of Municipal Councillors and Traditional Leaders in Service Delivery: The Case of Thulamela Local Municipality' (2014) 49(4) *Journal of Public Administration* 1148.

influence.¹⁴⁸ The advisory role which is supposed to be played by traditional leaders has been a thorn in their side since the advent of democracy in South Africa. Consequently, it has opened a room of tensions between traditional leaders and the elected leaders and consequently, led to the non-attendance of the municipal councils' meetings by traditional leaders.¹⁴⁹ Seeing it differently, Rugege argues that considering that traditional leaders are awarded 20 per cent of seats in the municipal councils it creates no damage to grant them voting rights in order for them to feel that they are part of the municipal councils.¹⁵⁰

It is submitted that the role of an advisor (which is the role played by traditional leaders) is to recommend and not to dictate through voting what decision must be taken. After all, traditional leaders are not prohibited to be elected to the municipal councils. They may contest election as independent ward candidates or party nominated ward candidates and if elected, they become members of the municipal councils with voting rights. Moreover, if a political party which competes for proportional representation seats in the municipal council puts a traditional leader on its party list; such a traditional leader may be elected as a PR councillor with a voting right.

However, if traditional leaders are elected as PR councillors or party ward councillors to the municipal councils, it will be questionable as to whether such traditional leaders represent the interests of their traditional communities or that of their parties which they are associated with. The LTLIA prescribes that the functions of a traditional leader is, inter alia, to advance the interests of his traditional community.¹⁵¹ For that reason, there may be a possibility of a conflict of interests between the interest of the traditional community and that of a party which the traditional leader would be elected on its name in the municipal council. It is therefore submitted that traditional leaders should be encouraged to participate in local government elections as independent ward

¹⁴⁸ Nzimande T *The Legacy of Prince Mangosuthu Buthelezi: In the Struggle for Liberation in South Africa* (2012) 20.

¹⁴⁹ Ndletyana M 'A Report on the Public Hearings on the Discussion Document on the Traditional Leadership and Institution' (2000) available at <http://pmq-assets.s3-website-eu-west-1.amazonaws.com/docs/2000/appendices/000620TradLeaders.htm> (accessed 05 October 2016).

¹⁵⁰ Rugege (2003) 198.

¹⁵¹ S 18 (1) (a) LTLIA.

councillors or PR councillors. This appears to be a way forward for the traditional leaders to take decisions, through voting, in the municipal councils.

2.2. The experience of participation of traditional leaders in local councils in Limpopo

The Limpopo province is the most northerly province of South Africa which is mostly occupied by traditional communities. In 2011 local government elections, Limpopo had five district municipalities and 25 local municipalities. However, before 2016 local government election, Limpopo experienced a redetermination of wards and municipal boundaries. Some of the changes are these: In Vhembe district a new municipality was established to encompass Malamulele and Vuwani; Fetakgomo municipality was amalgamated with Greater Tubatse municipality in Sekhukhune district; in the Waterberg district, Mokgophong municipality was amalgamated with Modimolle municipality; Mutale municipality was disestablished, with its parts incorporated into Thulamela and Musina municipalities in Vhembe district; in Capricorn district, Aganang municipality was disestablished and its parts incorporated in Blouberg, Molemole and Polokwane municipalities. Table 1 below indicates the current district and local municipalities in Limpopo Province.

Table 1: Municipalities in Limpopo and the number of councillors and traditional leaders

Names of municipalities	Number of councillors	Number of traditional leaders
1. Capricorn district municipality	56	9
(a) Polokwane Municipality	90	6
(b) Blouberg Municipality	44	1
(c) Lepelle-Nkumbi Municipality	60	6

(d) Molemole Municipality	32	2
2. Mopani District Municipality	56	10
(a) Ba-Palaborwa Municipality	37	5
(b) Maruleng Municipality	27	3
(c) Greater Tzaneen Municipality	69	5
(d) Greater Giyani local Municipality	62	10
(e) Greater Letaba Municipality	60	10
3. Sekhukhune District Municipality	51	7
(a) Makhuduthamaga Municipality	62	10
(b) Fetakgomo-Greater Tubatse Municipality	77	12
(c) Elias Motsoaledi Municipality	61	4
(d) Ephraim Mogale Municipality	32	2
4. Vhembe District Municipality	60	11
(a) Musina Municipality	24	5
(b) Thulamela Municipality	81	7
(c) Makhado	75	12

Municipality		
(d) Collins Chabane Municipality	71	14
5. Waterberg District Municipality	21	3
(a) Thabazimbi Municipality	23	No traditional leader
(b) Lephalale Municipality	26	2
(c) Mogalakwena Municipality	64	7
(d) Bela-Bela Municipality	17	1
(e) Mokgophong-Modimolle Municipality	28	No traditional leader

Source: Local Government: Municipal Structures Act (1998) regulations in Provincial Notice 111 OF 2016; Local Government: Municipal Structures Act (1998) regulations in General Notice 323 PG 2599 of 28 September 2015; Municipal Demarcation Board 'Limpopo Councillors, Wards and Variances for the 2016 Elections'¹⁵².

Traditional leaders are given seats in almost all municipalities in Limpopo, except for municipalities where there are no traditional leaders. Only two local municipalities in the Waterberg district have no traditional leaders participating in their municipal councils. These municipalities are Thabazimbi Local Municipality and newly amalgamated Mokgophong-Modimolle Municipality.

¹⁵² Municipal Demarcation Board 'Limpopo Councillors, Wards and Variances for the 2016 Elections' available at <http://www.demarcation.org.za/index.php/ward-delimitation/2010-wards/2014-2015/introduction/ward-size-tables/12301-wardsize2016limpopo/file> (accessed 13 October 2016).

In order to examine whether traditional leaders are attending the local councils' meetings, one has to examine the minutes of the local councils meetings. However, many municipalities in Limpopo do not put their minutes of the meetings on their websites and this makes it difficult to examine as many municipalities as possible. When I requested the minutes of the meetings from the municipalities I was told that the municipalities cannot provide me with the minutes because there are no resolutions from municipal councils granting permission for minutes to be made public. Moreover, for me to attend municipal councils meetings was also impossible as I am based in University of the Western Cape and travelling to Limpopo to attend such meetings would require a budget which is not available. Despite all these difficulties, the author managed to examine four local municipalities minutes discussed below, since the minutes of their meetings were on the municipalities' websites.

In Makhado Local Municipality, the participation of traditional leaders in municipal council has not been satisfactory. In respect of the council meeting held on 29 January 2015, only one traditional leader attended that council meeting, whereas other 13 traditional leaders failed to attend without leave of absence from that council meeting.¹⁵³ This is contrary to the standing rules of orders for Makhado Local Municipality, since it requires that the applications for leave of absence from any council or committee meeting must be submitted to the Speaker or the chairperson in writing and signed by the member applying for leave.¹⁵⁴ On 30 March 2015, out of 14 traditional leaders, none was present in that council's meeting.¹⁵⁵ The third meeting of council was held on 4 August 2015 and all traditional leaders were absent from the council meeting without leave of absence.¹⁵⁶ The last meetings of the council in 2015 were held on 8 October and 12 November respectively, once again traditional leaders were absent without

¹⁵³ Makhado Local Municipality 'Minutes of the Seventy Fourth (74th) Meeting of the Makhado Municipality Which Was Held on Thursday, 29 January 2015' available at http://www.makhado.gov.za/docs/minutes/Council%20Minutes_74.pdf (accessed 13 October 2016).

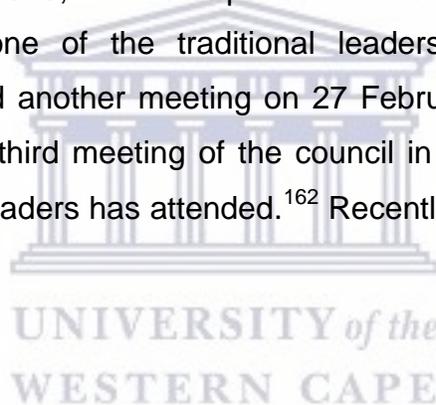
¹⁵⁴ Rule 21 (1) of the Makhado Local Municipality Standing Rules of Order for the Meetings of the Council and All Its Committees.

¹⁵⁵ Makhado Local Municipality 'Minutes of the Ninety Seventh (97th) Special Council Meeting of the Makhado Municipality Which Was Held on Thursday, 29 January 2015' available at http://www.makhado.gov.za/docs/minutes/SpecialCouncilMinutes_97.pdf (accessed 12 October 2016).

¹⁵⁶ Makhado Local Municipality 'Minutes of the Seventy Sixth (76th) Meeting of the Makhado Municipality Which Was Scheduled for 29 July 2015 Then Postponed and Held on 4 August 2015 available at [http://www.makhado.gov.za/docs/minutes/Council%20Minutes_76\(web\).pdf](http://www.makhado.gov.za/docs/minutes/Council%20Minutes_76(web).pdf) (accessed 12 October 2016).

lodging a notification of a leave of absence.¹⁵⁷ All municipal council's meetings held in 2016 thus far, no traditional leader has attended them. It seems like this non-participation will continue until the municipality addresses it by enquiring from traditional leaders about their non-participation. The municipality should also encourage traditional leaders to use this opportunity of attending and participating in the municipal council meetings.

In Aganang Local Municipality,¹⁵⁸ just like in Makhado Local Municipality, the attendance of traditional leaders in its council meetings was not satisfactory. On 31 May 2012, the municipal council held its meeting for the approval of the Integrated Development Plan and Medium Term Revenue and Expenditure Framework for 2012/13 – 2014/15. Only one of the three traditional leaders was present during that meeting.¹⁵⁹ On 30 January 2015, the municipal council held its meeting for adoption of its draft annual report, none of the traditional leaders was present during that meeting.¹⁶⁰ The council held another meeting on 27 February 2015 and no traditional leader was present.¹⁶¹ The third meeting of the council in 2015 was held on 12 June and none of the traditional leaders has attended.¹⁶² Recently, the municipal council held



¹⁵⁷ Makhado Local Municipality 'Minutes of the Seventy Sixth (76th) Meeting of the Makhado Municipality Which Was 8 October 2015 available at http://www.makhado.gov.za/docs/minutes/Council%20Minutes_77.pdf (12 October 2016).

¹⁵⁸ This municipality was disestablished by Municipal Demarcation Board before 2016 local government elections.

¹⁵⁹ Aganang Local Municipality 'Council Resolution No: 01/31/05/2012 Adoption of IDP and Budget for the 2012/13– 2014/15 MTREF Period' available at http://www.aqanang.gov.za/docs/idp_budget/Council%20Resolution.pdf (accessed 10 November 2016).

¹⁶⁰ Aganang Local Municipality 'Council Resolution No: 01/30/01/2015 Adoption of Draft Annual Report 2013/14 Financial Year' available at http://www.aqanang.gov.za/docs/idp_budget/Council%20Resolution%20Draft%20Annual%20Report%202013-14.pdf (accessed 10 November 2016).

¹⁶¹ Aganang local municipality 'Council Resolution No: 01/27/02/2015 Approval of Second Budget Adjustment 2014/15 Financial Year' available at http://www.aqanang.gov.za/docs/idp_budget/Approval%20of%20second%20budget%20adjustment%2020415.pdf (accessed 10 November 2016).

¹⁶² Aganang Local Municipality 'Council Resolution No: 01/12/06/2015 Adoption of MPAC Oversight and Annual Report 2013/14 Financial Year' available at http://www.aqanang.gov.za/docs/idp_budget/Adoption%20of%20mpac%20oversight%20and%20annual%20report%20201314.pdf (accessed 10 November 2016).

its meeting on 31 March 2016 and as usual no traditional leader was present during that meeting.¹⁶³

The two case studies of Makhado and Aganang Local Municipalities indicate lack of participation of traditional leaders in municipal councils. If they do not attend and participate in the council meetings, it would be difficult to express their views and influence the decisions of the council. It is not clear why traditional leaders in these municipalities are not taking up their seats in the municipal councils. It is therefore submitted that municipalities need to engage with traditional leaders and encourage them to take up their seats.

Based on the writings of the scholars and the concerns of traditional leaders, there may be few reasons why traditional leaders are not attending councils' meetings in Limpopo and across the country. First, traditional leaders have ever since been complaining about their ex officio membership in the municipal councils because they are prohibited from voting in the municipal councils' meetings.¹⁶⁴ The prohibition on voting makes it difficult, if not impossible, for traditional leaders to influence the decision of the municipal councils. In other words, the ex officio membership hinders them from playing a significant role in local governance.

Secondly, Limpopo province does not have regulations on the participation of traditional leaders in municipal councils. The MSA gives the provinces power to regulate the participation of traditional leaders in municipal councils.¹⁶⁵ The regulations are to guide traditional leaders and municipalities as to how traditional leaders should participate in the municipal councils. However, municipalities are also responsible to regulate the participation of traditional leaders in the municipal councils by their rules and orders.¹⁶⁶

¹⁶³ Aganang Local Municipality 'Council Resolution No: 02/31/03/2016 Adoption of MPAC Oversight and Annual Report 2014/15 Financial Year' available at http://www.aganang.gov.za/docs/idp_budget/Resolution%20Adoption%20of%20MPAC%20Oversight%20Report%20under%20Resolutions.pdf (accessed 10 November 2016).

¹⁶⁴ South African Government 'Premier Chupu Mathabatha: Ordinary sitting of Provincial House of Traditional Leaders' (2016) available at <http://www.gov.za/speeches/mr-chupu-mathabatha-occasion-ordinary-sitting-provincial-house-traditional-leaders-21-jul> (accessed 15 October 2016).

¹⁶⁵ S 81 (4) MSA.

¹⁶⁶ De Visser (2009) 802.

Thirdly, it is a common knowledge that poor relationship between the municipalities and the traditional leaders may lead to tension and tension lead to non-participation of traditional leaders in the municipal councils' meetings. A municipality must strive to build a good relationship with traditional leaders. This includes treating traditional leaders with respect during the municipal councils' meetings, holding regular meetings with traditional leaders outside municipal councils' meetings and consulting them from time to time on issues of developmental activities and other service delivery matters. It is submitted that such effort will make traditional leaders feel welcomed and respected in the municipality.

Fourthly, a lack of capacity of traditional leaders to participate in the municipal councils may be the reason for non-participation.¹⁶⁷ There is no municipality in Limpopo which takes traditional leaders for training after being identified by the MEC for local government to participate in the proceedings of municipal councils. Some traditional leaders are still illiterate; therefore understanding the procedures of participation in the municipal councils may be difficult. The issue of training must not be limited to traditional leaders who are illiterate, but even for traditional leaders who are literate, they still need training about the procedures and processes of the municipal councils so that their participation is not in vain.

Fifthly, it is submitted that the traditional leaders may be of the opinion that there are other mechanisms of participation which can be used rather than attending the local councils' meetings. These mechanisms are the participation through Local Houses of Traditional Leaders¹⁶⁸ and the mayor-traditional leaders' forums or meetings. The role of the Local House of Traditional Leaders is to advise the municipalities with regard to matters that affect the traditional areas and other matters relating to development of their areas,¹⁶⁹ just to name but a few. Instead of attending the municipal councils meetings as ex officio members, they can still participate through their institutions; after all they do not have voting rights. They are playing an advisory role which is also played by their Local Houses of Traditional Leaders. The mayor-traditional leaders' forums

¹⁶⁷ Lutabingwa, Sabela & Mbatha (2006) 81-82.

¹⁶⁸ S 17 TLGFA.

¹⁶⁹ S 17 (3) TLFGA.

have proved to be a successful tool in Musina and Mogalakwena Local Municipalities.¹⁷⁰ The mayor visits traditional leaders to engage them with regard to decisions of the municipality and the service delivery matters in their areas, one may then wonder as to why they should attend the municipal councils' meetings, if the mayor comes to them regarding the municipal matters affecting their areas.¹⁷¹

In Greater Tubatse Local Municipality, the attendance of traditional leaders is better than in Makhado and Aganang Local Municipalities. On 12 September 2012, the Greater Tubatse Local Municipality held its first special council meeting and out of seven traditional leaders, five traditional leaders managed to attend that meeting.¹⁷² With the second special council meeting which was held on 5 October 2012, all traditional leaders were present.¹⁷³ The third special council meeting was held on 19 November 2012 and five traditional leaders were present.¹⁷⁴

However, it was already stated that participation is more than simply attending a council meeting. It therefore includes asking of questions and submission of motions and proposals.¹⁷⁵ It is clear from the above minutes of the municipal council's meetings of the Greater Tubatse Local Municipality that none of the traditional leaders asked a question, let alone submitted motions and proposals. It points back to the lack of capacity by traditional leaders who participate in municipal councils. It is submitted that

¹⁷⁰ Musina Local Municipality 'Mayor discusses service delivery with local traditional leaders' (2016) available at <http://www.musina.gov.za/index.php/34-latest-news/391-mayor-discuss-service-delivery-with-local-traditional-leaders> (Accessed 07 October 2016). See also Mogalakwena Local Municipality 'Local Traditional Leaders Pleased to Meet with the Mayor' website news available at <http://www.mogalakwena.gov.za/docs/LOCAL%20TRADITIONAL%20LEADERS%20PLEASED%20TO%20MEET%20WITH%20THE%20MAYOR.pdf> (accessed 9 December 2016) 1.

¹⁷¹ Musina Local Municipality (2016). See also Mogalakwena Local Municipality (2016).

¹⁷² The Greater Tubatse Local Municipality 'Minutes of the First Special Council Meeting held on 12 September 2012' available at <http://www.tubatse.gov.za/docs/notices/Minutes%20of%20the%20First%20Special%20Council%20Meeting%20held%20on%2012%20September%202012.pdf> (accessed 10 November 2016).

¹⁷³ The Greater Tubatse Local Municipality 'Minutes of the Second Special Council Meeting held on 05 October 2012' available at <http://www.tubatse.gov.za/docs/notices/Minutes%20of%20the%20Second%20Special%20Council%20Meeting%20held%20on%2005%20October%202012.pdf> (accessed 10 November 2016).

¹⁷⁴ The Greater Tubatse Local Municipality 'Minutes of the Third Special Council Meeting held on 19 November 2012' available at <http://www.tubatse.gov.za/docs/notices/Minutes%20of%20the%20Third%20Special%20Council%20Meeting%20held%20on%2019%20November%202012.pdf> (accessed 10 November 2016).

¹⁷⁵ Smith (2009) 124.

the municipality must budget for the training of traditional leaders about the procedure of municipal councils; otherwise the attendance of traditional leaders in the municipalities will be like that of the guests of the municipalities who attend to listen to the debates of the councillors.

Since the establishment of the Musina Local Municipality, there were no traditional leaders within its borders to participate in the proceedings of the council or its committees. Currently, Musina Local Municipality has five traditional leaders who can participate in its council meetings. This results from the new demarcation and disestablishment of the Mutale Local Municipality by Municipal Demarcation Board, which resulted in Musina Local Municipality incorporating 50 villages.¹⁷⁶ One of the five traditional leaders who will be participating in the council meetings, Chief Vuzidzhena Nethengwe stated, 'they are taking the allocation of seats for traditional leaders very seriously and this is the first step in building a sound relationship between traditional leaders and the municipality'.¹⁷⁷ Chief Thovhele Manenzhe also stated that as one of the senior traditional leaders allocated a seat in the municipal council this means that he will use the platform to contribute to the efficiency of service delivery.¹⁷⁸

Municipalities should play an important role in clarifying how traditional leaders should participate in their councils. Moreover, a province should regulate the role and participation of traditional leaders in municipal councils. The regulations should be able to explain what does the participation of traditional leaders in municipal councils mean, how should traditional leaders participate in municipal councils and what is the general role of traditional leaders within the municipality. Thus far there are no regulations by the MEC for local government in Limpopo which regulate the role and the participation of traditional leaders in the meetings of the municipal councils.

The absence of those regulations has led to the Limpopo House of Traditional leaders asking for clarity from the Premier of Limpopo on their participation in the municipal

¹⁷⁶ Musina Local Municipality 'Senior traditional leaders allocated seats in municipal council' website news (2016) available at <http://www.musina.gov.za/index.php/34-latest-news/422-senior-traditional-leaders-allocated-seats-in-municipal-council> (15 November 2016).

¹⁷⁷ Musina Local Municipality (15 November 2016).

¹⁷⁸ Musina Local Municipality (15 November 2016).

councils since their role is not clearly defined.¹⁷⁹ The Limpopo House of Traditional Leaders also complained about the ex officio status (membership without a voting right) that does not make traditional leaders effective in the municipal councils.¹⁸⁰ The Premier's response was that the National Department of Cooperative Governance and Traditional Affairs have formulated guidelines to assist in this regard and the guidelines shall be made available to provinces for implementation.¹⁸¹ However, the guideline from National Department of Cooperative Governance and Traditional Affairs has been long overdue. Since 2014 the then Minister of Cooperative Governance and Traditional Affairs Pravin Gordhan has promised that the guideline will be ready as soon as possible,¹⁸² however after two years no regulation is available yet. It remains to be seen whether such regulation will solve the demands of traditional leaders in this regard.

3. THE RIGHT OF TRADITIONAL LEADERS TO BE CONSULTED OUTSIDE OF MUNICIPAL COUNCILS

3.1. The national experience on the consultation of traditional leaders

Traditional leaders have an inherent right to be consulted by a municipality before any activities take place within their areas.¹⁸³ Even if a traditional leader is not an ex officio member of a municipal council, he or she must still be consulted before a municipality takes a decision which affects his or her community. According to Phago and Netswera, municipalities only involve traditional leaders when decisions which affect their communities are already taken.¹⁸⁴ The traditional leaders are also concerned about ward councillors who do not consult or involve them in the provision of municipal

¹⁷⁹ South African Government (2016).

¹⁸⁰ South African Government (2016).

¹⁸¹ South African Government (2016).

¹⁸² Sabinet Law 'Role of Traditional Leaders to be Ironed Out' (2014) available at <http://www.sabinetlaw.co.za/arts-and-culture/articles/role-traditional-leaders-be-ironed-out> (accessed 15 October 2016).

¹⁸³ S 81 (3) MSA.

¹⁸⁴ Phago KG & Netswera FG 'The Role of Traditional Leadership in a Developmental State: The Case of Greater Sekhukhune District Municipality of South Africa' 43(6) (2011) *Journal of Public Administration* 1030.

services.¹⁸⁵ Traditional leaders also alleged that councillors only consult them when they experience problems with the community so that they can assist in resolving those problems.¹⁸⁶

According to Pycroft, the traditional leaders should not be seen as ordinary citizens within a democratic system, however they should be seen as an interest group deserving of being consulted with regard to the activities of the municipalities.¹⁸⁷ Mabutla argues that traditional leaders should be involved in the municipal processes since they are the sole trustees of the trust land.¹⁸⁸

In uMfolozi Local Municipality in KwaZulu-Natal province, traditional leaders are consulted about development activities which are to take place in their areas of jurisdiction.¹⁸⁹ For that reason, such development activities in traditional areas are undertaken by the municipality without hindrance from the traditional leaders.¹⁹⁰

3.2. The experience in Limpopo on the consultation of traditional leaders

Traditional leaders in Thulamela Local Municipality always complain about a lack of consultation concerning the site allocation for residential areas or business purposes.¹⁹¹ This is manifested in the case of *Thulamela Local Municipality and Another v Tshivhase and Others*¹⁹² where Chief Tshivhase and the council launched an application seeking to have reviewed and set aside the decisions by the municipality to alienate the properties. Among their grounds of review was that the decisions of the municipality to

¹⁸⁵ Mhlanga F An Assessment of the Relationship between Traditional Leaders and Ward Councillors and its Impact on Service Delivery: A Case Study of Mnquma Local Municipality of Amathole District Municipality (unpublished Master's thesis, University of Fort Hare, 2012) 35.

¹⁸⁶ Mhlanga (2012) 35.

¹⁸⁷ Pycroft C 'Addressing Rural Poverty: Restructuring Rural Local Government' in Parnell S, Pieterse E, Swilling M, et al (eds) *Democratising Local Government: The South African Experiment* (2007) 121.

¹⁸⁸ Mabutla FG 'The Fate of Traditional Leaders in Post-Apartheid South Africa' Conference Paper (2001) available at <http://www.ecu.edu/african/sersas/papers/MabutlaFG.pdf> (accessed 10 November 2016).

¹⁸⁹ Lutabingwa, Sebala & Mbata (2006) 83.

¹⁹⁰ Lutabingwa, Sebala & Mbata (2006) 83.

¹⁹¹ Tshamano HS & Mahosi TN 'The Challenges Facing Traditional Versus Municipal Authorities in the Thulamela Local Municipality of the Vhembe District of Limpopo Province' (2002) *The Journal of African & Asian Local Government Studies* 144.

¹⁹² Unreported case no 78/2014 (30 March 2015).

sell the property were taken without the consultation or authorisation of Chief Tshivhase and his traditional council.¹⁹³ The Supreme Court of Appeal stated that when chief Tshivhase and his traditional council launched the main application, the transfer of the properties or the rights to Valuline had long been completed.¹⁹⁴ It went further to state that it can barely help chief Tshivhase and the council to challenge the administrative decisions that preceded the registration and transfer of the property into the name of Valuline.¹⁹⁵

Although the court did not entertain a review of the decision of the municipality, however this is a clear example of failure by the municipality to consult traditional leaders when taking decisions which affect their areas. Should Chief Tshivhase and his traditional council have managed to approach the court before the property or the rights were transferred to the Valuline (the buyer); the court would have reviewed the decisions of the municipality. Traditional leaders have a right to be consulted before any decision is taken on matters which affect their area, therefore failure by a municipality to consult them will invite litigations.

According to the study conducted by Selepe, the Greater Letaba Local Municipality does not properly consult traditional leaders.¹⁹⁶ She shows that the municipality does not consult traditional leaders with regard to Limpopo provincial grants which have been given to municipalities to fund activities in the traditional areas.¹⁹⁷ It could be argued that the failure by the municipality to consult with traditional leaders will destroy their relationship and creates tensions between them.

There are other municipalities which engage traditional leaders when they are about to take decisions that affect their community. In Musina Local Municipality, traditional leaders were indebted to the then Mayor Mhloti Muhlope for consulting them when the

¹⁹³ *Thulamela Local Municipality and Another v Tshivhase and Others* para 3.

¹⁹⁴ *Thulamela Local Municipality and Another v Tshivhase and Others* para 8.

¹⁹⁵ *Thulamela Local Municipality and Another v Tshivhase and Others* para 8.

¹⁹⁶ Selepe MM *The Role of Traditional Leaders in the Promotion of Municipal Service Delivery in South Africa* (unpublished Doctoral thesis, University of Pretoria, 2009) 176.

¹⁹⁷ Selepe (2009) 176.

municipality took important decisions in regard to service delivery.¹⁹⁸ One of the traditional leaders within Musina Local Municipality, Chief Shandukani Malise stated that the regular meetings with the Mayor were a significant mechanism for service delivery in the villages within Musina Local Municipality.¹⁹⁹

In Mogalakwena Local Municipality, a mayor addressed traditional leaders during the mayor-traditional leaders meeting and stated that it is imperative for a municipality to consult traditional leaders separately since they are in a better position to be aware of the service delivery challenges in their areas.²⁰⁰ The traditional leaders were happy about the promises made by the mayor to consult them when the municipality take decisions in relation to service delivery.²⁰¹

The meetings with traditional leaders outside of municipal councils' meetings help to build good relationships between the municipalities and traditional leaders.²⁰² It seems like most traditional leaders value the meetings outside of the municipal councils because they are able to express themselves, especially when they meet with a mayor.²⁰³ Another perception may be that since a mayor is a prominent politician within municipality, therefore meeting with him or her signifies the level of respect and attention given to traditional leaders.

The communication between traditional leaders and the municipalities is important for the delivery of service in traditional areas. In Greater Tubatse Local Municipality, Roka Motshana Traditional Council wrote a letter in 2012 to the municipal council to inquire why Motshana and other villages in Ward 16 were not electrified and energised according to the agreement signed between the municipality and the Department of

¹⁹⁸ Musina Local Municipality 'Mayor discusses service delivery with local traditional leaders' (2016) available at <http://www.musina.gov.za/index.php/34-latest-news/391-mayor-discuss-service-delivery-with-local-traditional-leaders> (Accessed 07 October 2016).

¹⁹⁹ Musina Local Municipality (2016).

²⁰⁰ Mogalakwena Local Municipality 'Local Traditional Leaders Pleased to Meet with the Mayor' website news available at <http://www.mogalakwena.gov.za/docs/LOCAL%20TRADITIONAL%20LEADERS%20PLEASED%20TO%20MEET%20WITH%20THE%20MAYOR.pdf> (accessed 9 December 2016) 1.

²⁰¹ Mogalakwena Local Municipality (2016) 1.

²⁰² Mogalakwena Local Municipality (2016) 1. See also Musina Local Municipality (2016).

²⁰³ Musina Local Municipality (2016).

Energy.²⁰⁴ The traditional leader of Motshana was not identified to participate in the municipal council of Greater Tubatse Local Municipality at that time but he managed, together with his traditional council, to inquire formally about the electrification of his village by writing a letter to the council.

When traditional leaders are consulted by a municipality about a decision which is to affect their area, they will feel a sense of being considered in the decision-making process of a municipality. This practice will reduce the tensions between the traditional leaders and municipal councillors. It must be noted that after a municipality consulted the traditional leaders, its decision should at least accommodate the views or if not, it is advisable for a municipality to explain to them why their views may not be accommodated.

4. PARTICIPATING IN LAND USE PLANNING

The right to allocate land for residential purposes in traditional areas is regarded as one of the core roles of traditional authority.²⁰⁵ Traditional leaders had the powers to determine who should be allocated land, and even determining where people should live.²⁰⁶ In the traditional leaders' areas of their jurisdiction, the land allocation is influenced by the views of members of the traditional community.²⁰⁷ Customarily, the land belongs to the traditional community and the traditional leader allocates it in the interests of the traditional community.

The emergence of the Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013) (SPLUMA) has suppressed the role of traditional leaders with regard to the allocation of land. However, SPLUMA prescribes that after public consultation; a

²⁰⁴ The Greater Tubatse Local Municipality 'Oversight Report for 2012/12 Financial Year: Council Resolution SA21/2013' (2013) available at <http://www.tubatse.gov.za/docs/notices/Oversight%20Report%20for%202011-12%20Financial%20Year%20Council%20Resolution%20SA21-2013%2030%20April%202013.pdf> (accessed 08 October 2016).

²⁰⁵ Nel V 'Spluma, Zoning and Effective Land Use Management in South Africa' (2016) 27 *Urban Forum* 81.

²⁰⁶ Musitha ME *The Role of Traditional Authority in Integrated Development Planning Policy Implementation With Reference to Limpopo Province* (unpublished PHD thesis, University of Pretoria, 2012) 44.

²⁰⁷ Mabutla (2001).

municipality must adopt and approve a single land use scheme for its entire area within five years from the commencement of the SPLUMA.²⁰⁸ Traditional leaders' areas are not excluded because they fall within the jurisdiction of municipalities.

Moreover, a municipality, when performing its duties in terms of the land use management, must allow for the participation of a traditional council in terms of section 81 of the MSA and relevant provisions of the TLGFA.²⁰⁹ However, it was already established that their participation has been reduced to an advisory role. A land use scheme adopted by a municipality in terms of section 24 (1) of the SPLUMA must, inter alia, include provisions that permit the incremental introduction of land use management and regulation in areas under traditional leadership, rural areas, informal settlements, slums and areas not previously subject to a land use scheme.²¹⁰ Land use purposes include, inter alia, agricultural purposes, community purposes and residential purposes.²¹¹

An adopted and approved land use scheme has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme.²¹² Traditional leaders fall within the ambit of the definition of the organs of state. The Constitution defines the organ of state as, apart from departments of state or administration in the three spheres of government, any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution or any legislation to the exclusion of a court of law or a judicial officer.²¹³

Since the emergence of SPLUMA, traditional leaders have been fighting tooth and nail against its operation. According to Nel, many traditional leaders perceive the imposition of land use management schemes and land use decisions by the municipality as required by the SPLUMA as intruding or usurping their traditional authority.²¹⁴ The

²⁰⁸ S 24 (1) SPLUMA.

²⁰⁹ S 23 (2) SPLUMA.

²¹⁰ S 24 (2) (c) SPLUMA.

²¹¹ Schedule 2 item 1 SPLUMA.

²¹² S 26 (1) (a) SPLUMA.

²¹³ S 239 Constitution.

²¹⁴ Nel (2016) 81.

Congress of Traditional Leaders of South Africa (CONTRALESA) stated that a number of pieces of legislation passed by the government, such as the SPLUMA and the Communal Tenure Policy, were used to dismiss the traditional leaders' authority in the ownership of communal land in rural areas.²¹⁵ Moreover, the Limpopo House of Traditional Leaders (LHTL) through its deputy chairperson has stated that the SPLUMA is unfair towards the traditional leaders as it takes away their power to handle land allocations.²¹⁶

5. CONCLUSION

The MSA has provided seats to traditional leaders to participate in the proceedings of the municipal councils. However, the participation of traditional leaders in the municipal councils' meetings is not satisfactory. In Makhado Local Municipality, traditional leaders who were identified for participation in the municipal councils' meetings are not attending such meetings. Furthermore, traditional leaders in Aganang Local Municipality were not attending the municipal council's meetings. The reasons for non-attendance are the lack of voting rights of traditional leaders in the municipal councils; the traditional leaders' lack of capacity to participate in the municipal councils; the poor relations between traditional leaders and municipalities; the absence of provincial regulations on the participation of traditional leaders in the municipal councils; and that traditional leaders may be of the opinion that there are other mechanisms to be used rather than attending the municipal councils' meetings, such as Local House of Traditional Leaders and the mayor-traditional leaders' forum.

The provinces are also allowed to provide a guideline on how traditional leaders should participate in the municipal council. However, Limpopo province has no regulations to guide traditional leaders and municipalities regarding how the former should participate in the municipal councils' meetings. Municipal councillors should allow traditional

²¹⁵ Charter L 'No such thing as communal land' (2016) available at <http://www.dispatchlive.co.za/news/2016/05/02/no-such-thing-as-communal-land/> (accessed 13 October 2016).

²¹⁶ Capricorn Voice 'Traditional Leaders Strongly Oppose New Land Use Act' (2016) available at <http://capricornreview.co.za/100725/eric-chauke-voices-his-concern-over-spluma/> (13 October 2016).

leaders to express their views and where possible allow traditional leaders to use council resources when preparing for their participation in the municipal councils. Moreover, a municipality should be able to engage traditional leaders even outside municipal council meetings in order to develop cooperation. In Thulamela Local Municipality, it transpired that the municipality's consultation with traditional leaders is poor. A lack of consultation of traditional leaders can lead to tensions and litigations against a municipality. The MSA grants a right to any traditional leader whose area of jurisdiction is to be affected by the decision of the municipal council to be consulted irrespective of whether s/he is identified to participate in the municipal council. However, a right to be consulted is not a right to make a decision. The right to make a decision is the right of a municipal council. The right to be consulted offers traditional leaders an opportunity to express their views.

The emergence of the SPLUMA brought a radical impact on the role of traditional leaders to allocate land. The SPLUMA mandates every municipality to adopt a single land use scheme which also applies to areas of traditional leaders. The traditional leaders can no longer allocate their land as they wish since the power to allocate land will vest in the municipality. However, the SPLUMA, just like the MSA, affords traditional leaders a right to be consulted when a municipality is performing its functions in terms of a land use scheme.

In the midst of challenges of non-participation of traditional leaders in the municipal councils, the attention is now on the Traditional and Khoi-San Leadership Bill which is pending in the National Assembly's Portfolio Committee. The next chapter examines this Bill to see whether it will address the challenges of traditional leaders in local governance and as well as their demands.

CHAPTER FOUR

THE EXAMINATION OF THE TRADITIONAL AND KHOI-SAN LEADERSHIP BILL WITH REFERENCE TO THE ROLE OF TRADITIONAL LEADERS

1. INTRODUCTION

Generally, the Constitution recognises the role of traditional leaders in South Africa but it does not spell out their role in local governance. Instead, it provides that an Act of Parliament may provide for the role of traditional leaders. There are number of laws which provide for the role of traditional leaders, albeit an advisory role. This advisory role is rejected by many traditional leaders and they want to take part in decision-making, especially the right to vote in the local council meetings.

The traditional leaders continued to raise their voice regarding the clarity of their role in local governance. The debate on the role of traditional leaders in local governance has also gained momentum when Khoi-San communities and leaders call for their recognition. In 2012, the President of the Republic of South Africa, in his State of the Nation Address, announced that the government will table the Bill in Parliament which will provide for the recognition of the Khoi-San communities, their leadership and structures.²¹⁷ Finally, the Traditional and Khoi-San Leadership Bill (TKLB) was introduced in Parliament in 2015 and by 2016 the TKLB is before the National Assembly Portfolio Committee. Once the TKLB is passed as an Act of Parliament, it will repeal the TLGFA.

This chapter examines the role of traditional leaders as provided in TKLB. First, it examines the relevance of the recognition of Khoi-San communities and their leaders in the local sphere of government. Secondly, it examines whether the TKLB addresses the demands of traditional leaders. Thirdly, it analyses a change that TKLB makes in the role of the Local House of Traditional Leaders in advising municipalities.

²¹⁷ Zuma JG 'State of the Nation Address of 2012' available at <http://www.thepresidency.gov.za/pebble.asp?reid=6381> (accessed 08 November 2016).

2. THE RECOGNITION OF KHOI-SAN LEADERS AND THEIR COMMUNITIES

A major change which will be brought by TLKB when it becomes an Act of Parliament is the recognition of Khoi-San communities and their leaders. The TKLB has afforded the Khoi-San communities and their leaders recognition just like the recognition given to traditional communities and their leaders. The recognition of Khoi-San communities and their leaders means that the Khoi-San leaders will be given seats in the municipalities of their jurisdiction to represent their communities in terms of section 81 of the MSA. In order to be given a seat as a Khoi-San leader in a municipal council, first, one has to be recognised as a Khoi-San leader in terms of section 10 of the TKLB. Secondly, a Khoi-San leader will then have to be identified by the MEC of local government in the province of that municipality in terms of section 81 (2) (a) of the MSA. Thirdly, the Khoi-San leader must be an ordinary resident within the jurisdiction of that municipality.

The TKLB thus extends the role of traditional leaders' participation to a province which previously had no traditional leaders. Currently, eight provinces have traditional leaders in South Africa. Most Khoi-San leaders and their communities are found in the Western Cape and Northern Cape Provinces. Whereas the Northern Cape is having few traditional leaders within its borders, the TKLB through its recognition of Khoi-San leaders will add to the list of traditional leaders in that province. The Western Cape did not have any recognised traditional leaders within its borders; however the recognition of Khoi-San leaders will result in Western Cape having traditional leaders within its borders. When the TKLB becomes an Act of Parliament, all provinces in South Africa will have traditional leaders participating in their municipalities.

3. IS THERE ANY CLARITY ON THE ROLE OF TRADITIONAL LEADERS IN MUNICIPALITIES?

Both TLGFA and TKLB do not spell out or enumerate the roles and functions of traditional leaders in the municipalities. The roles which were previously performed by traditional leaders are now given by the Constitution to democratically elected spheres

of government, especially the local sphere of government. For that reason, traditional leaders will still perform an advisory role in almost all functions accorded to them by the laws.

It is therefore submitted that the TKLB will not address the demands of traditional leaders, since they want to be involved in the decision-making role. The traditional leaders call for the amendment of the Constitution in order to replace the municipalities by traditional councils in the traditional areas is unanswered by the TKLB.

It appears that amending the Constitution to allow traditional councils to replace municipalities in the areas of traditional leaders will be against the spirit of the Constitution. In the case of *Certification of the Constitution of the Republic of South Africa, 1996*, the Constitutional Court clearly stated that had the drafters of the Constitution meant to guarantee and institutionalise governmental powers and functions for traditional leaders, they should have incorporated the words “powers and functions” in the Constitutional Principle XIII.²¹⁸ The Constitutional Principle XIII provides that the institution, status and role of traditional leadership, as per customary law, shall be recognised and protected in the Constitution.²¹⁹ It is therefore submitted that the governmental powers are reserved for democratically elected government and granting traditional leaders governmental powers will trample on the intention of having democratically elected government at the local level.

What can be done is to make partnerships between municipalities and traditional councils work effectively. The TLGFA provides for the partnership between municipalities and traditional councils.²²⁰ It also makes provision for the traditional council to enter into a service delivery agreement with a municipality as provided for in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) or any other relevant legislation.²²¹ The TLKB does repeat the words of the TLGFA on the partnership of traditional councils and the municipalities. The municipalities should be in

²¹⁸ *Certification of the Constitution of the Republic of South Africa, 1996*, para 190.

²¹⁹ Schedule 4 Interim Constitution.

²²⁰ S 5 (1) & (2) TLGFA.

²²¹ S 5 (4) TLGFA.

the forefront in forging partnerships and initiating service delivery agreements with traditional leaders or traditional councils. This is another mechanism of making traditional councils feel in charge of the service delivery in their areas of jurisdiction.

4. ARE THERE ANY CHANGES ON THE ROLE OF THE LOCAL HOUSE OF TRADITIONAL LEADERS IN LOCAL GOVERNANCE?

The functions of the Local House of Traditional Leaders is to advise the district and metropolitan municipalities with regard to customary matters, development of the traditional communities and development of by-laws which impact traditional communities.²²² The TLGFA has omitted local municipality in its wording, stipulating that the Local House of Traditional Leaders is to advise district or metropolitan municipalities. With the emergence of the TKLB there is a new development in this regard. In cognizance of the omission of 'local municipality' in the TLGFA, the TKLB provides that the function of the Local House of Traditional Leaders is to advise the local municipality, district municipality or the metropolitan municipality with regard to the matters of customary law and development of the traditional communities.²²³ The TKLB has rectified the omission of 'local municipality' in the wording of TLGFA, therefore extending an advisory role of the Local House of Traditional Leaders to local municipalities, along with districts and metropolitan municipalities.

5. CONCLUSION

There are many similarities between the provisions of TLGFA and TKLB with regard to the roles of traditional leaders. Unfortunately, the TKLB does not clarify or spell out the roles of traditional leaders in relation to municipalities. The TKLB repeats the words of the TLGFA by stipulating that traditional leaders perform the functions in terms of customary law and customs and applicable legislation. Traditional leaders' calls for the

²²² S 17 (3) TLGFA.

²²³ S 50 (6) (a) TKLB.

traditional councils to replace municipalities in their areas will meet constitutional challenges. The proposed amendment of the Constitution to allow traditional councils to replace municipalities in their areas will be against the spirit of the Constitution because governmental powers are for democratically elected governments.

It seems like the debate on the role of traditional leaders is not yet over because it is apparent that the TKLB does not address the demands of traditional leaders. This debate will continue as long as traditional leaders are keen to perform the functions they were performing during apartheid. However, with the Constitution allocating most of their previous functions to the municipalities, a call for a constitutional amendment will not be answered. Moreover, with the local government elections starting to be exciting and competitive, the call for replacement of the municipalities in the traditional areas will be like barking at the moon.

A notable point which will be brought by the TKLB is that the local houses of traditional leaders will advise the local municipalities, along with district and metropolitan municipalities. As things stand, the TLGFA allows local houses of traditional leaders to advise district and metropolitan municipalities to the exclusion of local municipalities. Furthermore, the TKLB brings recognition of Khoi-San communities and their leaders. The recognition of Khoi-San communities and their leaders will entitle Khoi-San leaders to be given seats in their municipalities.

The TKLB will not address the demands of traditional leaders in the local sphere of government. Looking at the alternative ways of harmonizing traditional leaders and local government, the next chapter examines the Ghanaian constitutional framework of the role of traditional leaders in local government in order find an alternative solution for South Africa.

CHAPTER FIVE

ALTERNATIVE WAYS OF DEALING WITH TRADITIONAL LEADERS IN A CONSTITUTIONAL DEMOCRATIC STATE: THE CASE OF GHANA

1. INTRODUCTION

Ghanaian traditional leadership existed before and during colonial rule and continued to exist after independence. For that reason, the traditional leaders continued to be an authority in the negotiation between the government and communities.²²⁴ Traditional leaders, under the colonial period, exercised power and influence in spiritual and secular matters in their territorial areas. Moreover, traditional leaders became agents of the colonial regime in the areas of local government. The colonial regime recognised traditional leaders and perceived them to be powerful at the local level; as a result the colonial regime used traditional leaders to meet their intention through the system of indirect rule.²²⁵ The system of indirect rule allowed traditional leaders to perform administrative and adjudicative roles by means of different forms of legislative and institutional support from the colonial government.²²⁶

After the end of colonial rule, Ghana proceeded with colonial administrative boundaries and the traditional leaders maintained their role and power at the local level particularly in rural areas.²²⁷ The independence Constitution of 1957 was the first Constitution of Ghana. After the promulgation of the 1957 Constitution, Ghana experienced a military coup which caused the evolution of the constitutions. The 1957 Constitution did not survive for more than a decade until 1966 when the civilian government was overthrown by the military. The 1969 Constitution represented the Second Republic Constitution of

²²⁴ Augustine M 'The Role of Traditional Leaders in Post Independence Countries Botswana, Ghana and Zimbabwe' First Brief (2006) available at <http://hsf.org.za/resource-centre/hsf-briefs/the-role-of-traditional-leaders-in-post-independence-countries-botswana-ghana-and-zimbabwe> (accessed 12 November 2016).

²²⁵ Dawda TD & Dapilah F 'Challenges of the Collaboration between Formal Local Government Actors and the Chieftaincy Institution in Ghana: Lessons from the Sissala East District of the Upper West Region of Ghana' (2013) 3(12) *International Journal of Humanities and Social Science* 239.

²²⁶ Mahama C 'Local Government and Traditional Authorities in Ghana: Towards a More Productive Relationship' (2009) 4 *Commonwealth Journal of Local Governance* 9.

²²⁷ Augustine (2016).

Ghana. The Second Republic was overthrown by a military coup in 1972 but a Constitution was drafted in 1979 which repealed the 1969 Constitution. The 1979 Constitution ushered the Third Republic in Ghana. The civilian government did not survive for more than three years and it was overthrown by a military coup in 1981. The above Constitutions recognised the role of traditional leaders in local governance.

The 1992 Constitution of the Republic of Ghana represents the Fourth Republic Constitution. It recognises only the institution of chieftaincy; however it does not explicitly provide for traditional leaders' membership in district assemblies.

This chapter examines the general recognition of traditional leaders in Ghana and the role of traditional leaders in local government, more specifically in the district assemblies and regional coordinating councils.

2. THE RECOGNITION OF TRADITIONAL LEADERS

2.1. The role of traditional leaders during the pre-colonial era and in the colonial era

Before the colonial period, traditional leadership was the absolute form of government exercising legislative, executive, judicial, religious and military powers.²²⁸ The supremacy of traditional leaders differs according to their rankings or according to the hierarchy. The paramount chief is the commander-in-chief and has the ultimate power over other traditional leaders and over the affairs of the community. The divisional traditional leaders or headmen were bound to report on the matters of the community annually to the paramount chiefs.²²⁹

With the advent of the British colonial system, traditional leaders continued with their role but the colonial regime placed them in charge of local administration through

²²⁸ Owusu-Mensah I 'Politics, Chieftaincy and Customary Law in Ghana's Fourth Republic' (2014) 6(7) *The Journal of Pan African Studies* 263.

²²⁹ Owusu-Mensah (2014) 263.

indirect rule.²³⁰ The purpose of indirect rule was to allow the traditional leaders to exercise direct administrative control over their people, with the overall objective of minimising opposition of British rule by the locals.²³¹ In the district level, there was a native administration which consisted of traditional leaders headed by the paramount chief.²³²

2.2. The role of traditional leaders during independence

After the end of British colonial rule, Ghana gained independence in 1957 and adopted its Constitution. The 1957 independence Constitution marked the first Constitution of Ghana. The institution of traditional leaders was recognised according to customary law and customs under the 1957 Constitution. In the local government units, traditional leaders were given one-third membership. That was the continuation of the 1951 Municipal Councils Ordinance which gave traditional leaders one-third of seats in local government units.

However, the promulgation of the Local Government Act, 1961 (Act No. 54 of 1961) was a hard pill to swallow for traditional leaders since it did away with one-third membership of traditional leaders in local government units. From that period, the role of traditional leaders was detracted by other independence laws enacted under President Kwame Nkrumah's watch.²³³

Kwame Nkrumah's regime was overthrown by the military in 1966. A Constitution was drafted under the military regime in 1969 to repeal the 1957 Constitution. The 1969 Constitution recognised the institution of traditional leaders and revived the one-third membership of traditional leaders in district councils. The 1969 Constitution is often referred to as the Constitution of the Second Republic of Ghana. The Regional House of

²³⁰ Edu-Afful F *Traditional Authorities and Governance: A Case Study of Komenda Traditional Area* (unpublished master's thesis, University of Cape Coast, 2010) 38.

²³¹ Edu-Afful (2010) 38.

²³² Edu-Afful (2010) 38.

²³³ Mahama (2009)10.

Chiefs was to elect two traditional leaders from the house to be members in regional councils.²³⁴

The 1969 Constitution lasted for a decade and was repealed by the 1979 Constitution which was drafted under a military regime. The 1979 Constitution marked the Third Republic Constitution of Ghana. The 1979 Constitution recognised the institution of traditional leaders and continued to reserve a one-third membership in local government structures to traditional leaders. The local government structures which traditional leaders were granted membership to were local councils, district councils and regional councils.²³⁵

The Third Republic was overthrown in 1981 by the Provisional National Defence Council (PNDC). The PNDC terminated the local government structures and established the management committees system throughout the Republic of Ghana.²³⁶ Consequently, the traditional leaders lost their one-third membership in local government units. Furthermore, in 1988 the PNDC initiated a programme of decentralised local government in Ghana. The PNDC enacted Local Government Law, 1998 (Act No. 207 of 1988) which restructured and established the decentralised local government in Ghana.

The district assemblies were created with two-third of the members being elected and one-third of the members being appointed by the PNDC after consultation with different interest groups and traditional leaders.²³⁷ This practice was also endorsed by a multi-party government and ultimately it was enshrined in the 1992 Constitution.

2.3. The role of traditional leaders under the 1992 Constitution

The 1992 Constitution of Ghana was drafted under the military regime called PNDC and it came into force in 1993. The 1992 Constitution of Ghana stipulates that the institution

²³⁴ Ray DI 'Ghana: Traditional Leadership and Rural Local Governance' in Reddy PS & Ray DI (eds) *Grassroots Governance? Chiefs in Africa and the Afro-Caribbean* (2003) 105.

²³⁵ Ray (2003) 105.

²³⁶ Ray (2003) 105.

²³⁷ Ray (2003) 106.

of chieftaincy and its traditional councils as instituted by customary law and its usage is assured.²³⁸ It must be noted that the institution of chieftaincy and its traditional councils as instituted by customary law and usages is guaranteed but subject to the Constitution. The Ghanaian Constitution expressly provides that the Constitution is the apex law of Ghana and any other law, including customary law, inconsistent with the Constitution should be invalid to the extent of its inconsistency.²³⁹

Parliament is prohibited from enacting any law which grants any person or authority the right to grant or withdraw recognition to or from a traditional leader.²⁴⁰ Moreover, Parliament should refrain from enacting laws which diminishes or deviates from the honour and dignity of the institution of chieftaincy.²⁴¹ However, Parliament may enact a law if that law, in terms of customary law and usage, provides for the determination by a traditional council, a Regional House of Chiefs or a Chieftaincy Committee of any of them, of the validity of the nomination, election, selection, installation or deposition of a person as a chief.²⁴² Furthermore, Parliament is permitted to enact a law if that law provides for a traditional council or a Regional House of Chiefs or the National House of Chiefs to establish and operate a procedure for the registration of chiefs and the public notification in the Gazette or otherwise of the status of persons as chiefs in Ghana.²⁴³ Therefore, the power to determine the legality of the succession of traditional leaders and their status is vested in the National House of Chiefs, the Regional Houses of Chiefs and the Local Traditional Councils as the case may be.²⁴⁴

In Ghana, traditional leaders are prohibited from taking part in party politics. However, should a traditional leader decide to participate in party politics, he or she must quit the

²³⁸ S 270 (1) Ghanaian Constitution.

²³⁹ S 1(2) Ghanaian Constitution.

²⁴⁰ S 270 (2) (a) Ghanaian Constitution.

²⁴¹ S 270 (2) (b) Ghanaian Constitution.

²⁴² S 270 (3) (a) Ghanaian Constitution.

²⁴³ S 270 (3) (b) Ghanaian Constitution.

²⁴⁴ Ray DI 'Divided Sovereignty: Traditional Authority and The State in Ghana' 1996 *Journal of Legal Pluralism* 190.

chieftaincy position or renounce his or her throne.²⁴⁵ Be that as it may, a traditional leader may be appointed to any public office for which he or she is qualified.²⁴⁶

3. THE CURRENT ROLE OF TRADITIONAL LEADERS IN LOCAL GOVERNMENT

The 1992 Constitution provides that Ghana has a decentralised system of local government and administration.²⁴⁷ It furthermore provides that local government is divided into the districts which existed immediately before the coming into operation of the Constitution.²⁴⁸

The contemporary local government of Ghana is made up of three categories, namely metropolitan, municipal and district assemblies. These three categories have the same composition and functions; the only difference is the numbers of the population within them. The metropolitan assembly must have a minimum population of 250,000²⁴⁹, the municipal assemblies should have a minimum population of 95,000²⁵⁰ and the district assembly should have a minimum population of 75,000.²⁵¹ For the purpose of this paper, reference to district assemblies shall include metropolitan and municipal assemblies. In Ghana, each district must have a district assembly which is the highest political authority in the district, and shall have deliberative, legislative and executive powers.²⁵² The Minister is mandated to establish an assembly for each district, municipality and metropolitan which must constitute the highest political authority in the district.²⁵³

The 1992 Constitution of Ghana and the Local Government Act, 1993 (Act No. 462 of 1993) (LGA) provides that 30 per cent of the members of the district assembly are

²⁴⁵ S 276 (1) Ghanaian Constitution.

²⁴⁶ S 276 (2) Ghanaian Constitution.

²⁴⁷ S 240 (1) Ghanaian Constitution.

²⁴⁸ S 241 (1) Ghanaian Constitution.

²⁴⁹ S 1 (4) (a) (iii) LGA.

²⁵⁰ S (1) (4) (a) (ii) LGA.

²⁵¹ S (1) (4) (a) (i) LGA.

²⁵² S 241 (3) Ghanaian Constitution.

²⁵³ S 3 (1) LGA.

appointed by the President after consultation with traditional authorities and other interest groups in the district.²⁵⁴ If thirty per cent may comprise traditional leaders and interest groups, then how many traditional leaders may be appointed? That is why Boulton argues that representation of the traditional authority in the local government is presently limited to an equivocal appointment of one third in the district assemblies by the President.²⁵⁵

Kassey asserts that before the Fourth Republic traditional leaders were appointed as members of the assemblies in order to combine the system of traditional leaders and a system of local government.²⁵⁶ He argues further that now traditional leaders share the privilege of being appointed to the assemblies with other interest groups.²⁵⁷ Sakyi argues that the Constitution and Local Government Act made a serious omission when they omitted to make a provision for traditional leaders to be ex-officio members of the district assemblies.²⁵⁸

In explaining the rationale for 30 per cent appointment in the district assemblies; Guri argues that a reason for appointment of the 30 per cent of the district assemblies' members is to ensure the participation of the professionally qualified locals in the development of their local governments.²⁵⁹ Another reason furnished by Guri is that the 30 per cent appointment is to ensure that professionally qualified locals are not impeded by cost and partisan politics from participating in the district assemblies.²⁶⁰

It is submitted that Kassey argued correctly because the Ghanaian Constitution mandates the President to consult with traditional leaders and other interest groups

²⁵⁴ S 242 (d) Ghanaian Constitution.

²⁵⁵ Boulton T 'Interactions Between The Local Government And The Traditional Authorities' (2004) African Diaspora ISPs Paper 63 available at http://digitalcollections.sit.edu/african_diaspora_isp/63 (accessed on 20 November 2016) 14.

²⁵⁶ Kassey KD 'Traditional Leadership Factor in Modern Local Government System in Ghana: Policy Implementation, Role Conflict and Marginalization' (2006) 26(1) *Journal of Science and Technology* 71.

²⁵⁷ Kassey (2006) 17.

²⁵⁸ Sakyi EK "Gone but not Forgotten': Chieftaincy, Accountability and State Audit in Ghana, 1993-99' (2003) 7(1) *African Sociological Review* 136.

²⁵⁹ Guri BY 'Traditional Authorities and Governance Processes in Ghana' Conference Paper 2014 available at <http://crossculturalfoundation.or.ug/wp-content/uploads/Culture-in-Governance-Learning-from-Ghana-and-Southafrica.pdf> (accessed on 11 November 2016) 21.

²⁶⁰ Guri (2014) 21.

when appointing 30 per cent to the district assemblies. The fact that a President has to consult with traditional authorities and other interest groups reflects that the people to be appointed must represent the traditional authorities and other groups. If not, then why would the President have to consult them, otherwise such provision would not make sense.

However, Owusu asserts that traditional leaders who are appointed to be members of district assemblies do not represent the institution of chieftaincy, however they are in the district assemblies to execute different roles just like other members of the district assembly.²⁶¹ In reality the 30 per cent appointed members are, most of the time, partisan.²⁶²

The argument of the Provisional National Defence Council (PNDC) for the repeal of one-third membership in the district assemblies for the traditional leaders was that representation of traditional leaders in district assemblies would be undemocratic and anti-revolutionary.²⁶³

In contrast, Dawda and Dampilah argue that in the decentralised local government, traditional leaders are expected to support and advise local government actors so that the lives of their people can be improved.²⁶⁴ Moreover, they assert that the system of local government is an association of formal government actors and the traditional leaders and their people.²⁶⁵ The role of traditional leaders in local governance in Ghana cannot be overemphasised. For that reason, Issifu asserts that traditional leaders are significant actors in the local development initiatives.²⁶⁶ Furthermore, he argues that

²⁶¹ Owusu G 'The Implications of Traditional and Modern Governance for Decentralisation in Ghana' Trial Lecture for the PhD-degree (2005) available at <http://www.svt.ntnu.no/geo/Doklager/Acta/TrialLectureOwusu.pdf> (accessed 11 November 2016) 19.

²⁶² Mobility Foundation Ghana 'Institutionalising Traditional Authorities Participation in Local Governance in Ghana' Position Paper 1 (2014) available at <http://mobilityghana.org/wp/wp-content/uploads/2014/01/mobility-foundation-position-paper-on-institutionalising-traditional-authorities-participation-in-local-governance-in-ghana-.pdf> (accessed 20 November 2016) 4.

²⁶³ Sakyi (2003) 135.

²⁶⁴ Dawda & Dampilah (2013) 240.

²⁶⁵ Dawda & Dampilah (2013)240.

²⁶⁶ Issifu AK 'An Analysis of Conflicts in Ghana: The Case of Dagbon Chieftaincy' (2015) 8(6) *The Journal of Pan African Studies* 29.

some traditional leaders have created educational scholarship schemes, built health centres and schools and provided water supply systems for their communities.²⁶⁷

Some Ghanaian scholars argued that there is no institutional representation of traditional leaders in the district assemblies. One of them is Mahama who asserts that the Constitution and the Local Government Act have not made a provision for institutional representation of traditional leaders in the district assembly or to indicate what type of partnership shall exist between the district assemblies and the traditional authorities.²⁶⁸ In strengthening Mahama's argument, Ayee argues that a perfunctory evaluation of the contemporary circumstances confirmed that there is no formalised and planned arrangement that encourages a relationship with, and involvement of traditional institutions in local governance.²⁶⁹

In contrast, Crook argues that formal representation of traditional leaders in their capacity as traditional leaders of their communities will definitely result in awkward conflict over resources.²⁷⁰ Furthermore, he argued that traditional leaders should either be totally excluded from the district assemblies or the current system should be retained, in order to appoint some in the one-third government appointees list in their individual capacity as the respected opinion leaders or elder statesmen for the whole district.²⁷¹

Apart from district assemblies in Ghana, the Constitution and Local Government Act mandates for the establishment of a regional coordinating council for each region. In the regional coordinating council, traditional leaders are also represented. Among other members of regional coordinating councils, there shall be two traditional leaders from the Regional House of Chiefs.²⁷² These two traditional leaders shall be elected by

²⁶⁷ Issifu (2015) 29.

²⁶⁸ Mahama (2009) 14.

²⁶⁹ Ayee JRA 'Traditional Leadership and Local Governance in Africa: The Ghanaian Experience' conference paper (2007) available at www.ddp.org.za/programme-events/international-events/2007/Prof.%20J.%20Ayee.doc (accessed 31 October 2016) 8.

²⁷⁰ Crook R 'The Role of Traditional Institutions in Political Change and Development' Policy Brief (2005) available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/1967.pdf> (accessed on 14 November 2016) 4.

²⁷¹ Crook (2005) 5.

²⁷² S 255 (1) (c) Ghanaian Constitution.

fellow traditional leaders in the Regional House of Chiefs to represent them in the regional coordinating council.²⁷³

The regional coordinating council is the overseer or supervisor of the district assemblies within its region and its decisions ultimately affect district assemblies which incorporates the traditional areas. The functions of a regional coordinating council are to supervise, co-ordinate and evaluate the district assemblies' performance in the region;²⁷⁴ to oversee the use of finance allocated to the district assemblies by government agency;²⁷⁵ to evaluate and co-ordinate public services in the region;²⁷⁶ and any other function to be assigned by the law.²⁷⁷ Neither the Constitution nor the Local Government Act prohibits such traditional leaders from voting in the regional coordinating council meetings. Without an express provision, such traditional leaders are members of the regional coordinating council with voting rights.

4. TRADITIONAL LEADERS AND DISTRICT ASSEMBLIES IN PRACTICE

In 2004 Boulton examined the implementation of 30 per cent representation in practice, especially in Komenda-Edina-Eguafo-Abrem (KEEA) district assembly. He found that there were 52 total members of the KEEA district assembly and one-third of the membership was supposed to be 17.²⁷⁸ Nevertheless, there were four representatives of the traditional authority, one from each traditional area in the district.²⁷⁹ Boulton then argued that not even a quarter of the one-third appointed membership was granted to the traditional authorities.²⁸⁰

²⁷³ S 141 (1) (c) LGA.

²⁷⁴ S 142 (1) (a) LGA.

²⁷⁵ S 142 (1) (b) LGA.

²⁷⁶ S 142 (1) (c) LGA.

²⁷⁷ S 142 (1) (d) LGA.

²⁷⁸ Boulton (2004) 14.

²⁷⁹ Boulton (2004) 14.

²⁸⁰ Boulton (2004) 14.

In Ashanti region, there are only 70 traditional leaders from 1101 members of the assemblies and thus makes six per cent representation of traditional leaders.²⁸¹ This is not even half of the 30 per cent which the president must appoint to the assemblies. Kessy argued that this small percentage of traditional leaders in district assemblies hinders traditional leaders from presenting policy alternatives to the assemblies.²⁸²

In Adaklu-Anyigbe District Assembly, people of the Adaklu traditional area had registered concern about the limited participation of traditional leaders in the creation of districts in Ghana.²⁸³

It transpired that there is poor representation of traditional leaders in some of the district assemblies. According to the study conducted by Dawda and Dapilah, almost all traditional leaders in Sissala East District are of the opinion that the district assemblies were forced on the traditional administration because they were not consulted before the President appoints 30 per cent members of the district assemblies.²⁸⁴ The study further shows that the traditional leaders regard the district assemblies as a threat to the traditional governance system since the district assemblies were seen to be taking over the functions of traditional authorities in the traditional areas.²⁸⁵

5. IS THERE ANY LESSON FOR SOUTH AFRICA WITH REGARD TO THE ROLE OF TRADITIONAL LEADERS IN LOCAL GOVERNANCE?

It seems like there is hardly a lesson for South Africa, because South African local government and Ghanaian local government are different. The Ghanaian local government members are partly elected by the locals and appointed by the president after consultation with traditional leaders and other interest groups. The PNDC abolished the one-third of traditional leaders in the local government units based on its argument that the membership of traditional leaders was undemocratic but it brought

²⁸¹ Kessey KD 'Traditional Leadership Factor in Modern Local Government System in Ghana: Policy Implementation, Role Conflict and Marginalisation' (2006) 26 *Journal of Science and Technology* 83.

²⁸² Kessey (2006) 83.

²⁸³ Kessey (2006) 83.

²⁸⁴ Dawda & Dapilah (2013) 244.

²⁸⁵ Dawda & Dapilah (2013) 244.

another undemocratic membership through government appointees that were subsequently provided for in the 1992 Constitution.

The practice of appointment of members of district assemblies by the President has experienced challenges where traditional leaders were under represented in the district assemblies. This was worse because in other district assemblies traditional leaders do not constitute half of the 30 per cent of government appointees.

In Ghana the government appointees in local government are full members of the district assemblies with voting rights. The traditional leaders who are appointed by the President will enjoy voting rights in district assemblies and this equates them with other members who are elected by the locals. This is a big compromise of democracy in local governance.

The South African local government is purely elected by the locals and there is no room for non-elected members to take decisions through voting in the municipal councils. In the Interim Constitution, the traditional leaders were members of transitional local councils in their areas of jurisdiction with a voting right. This was left out in the 1996 Final Constitution, because it was undemocratic for traditional leaders to be full members of the municipal councils with voting rights without being elected by the people. The Constitution will not permit traditional leaders in the South Africa's local governance to go beyond what they are offered by the MSA. The participation of traditional leaders without voting rights in South Africa is there for a purpose. The purpose is that the democratic local government members must be elected through a system of ward and proportional representation by the people and not be appointed by the President or anyone for that matter.

6. CONCLUSION

In Ghanaian local government, traditional leaders share 30 per cent of the membership of the district assemblies with other interest groups within the jurisdiction of the district assemblies. Before appointing, the President must consult with traditional authorities

and other interest groups in that district. Many scholars argue that this provision is vague because it does not provide as to how many traditional leaders may be appointed in the district assemblies. The practical implementation of presidential appointments resulted in under representation of traditional leaders in district assemblies. The evidence shows that the representation of traditional leaders in other district assemblies is not even half of the 30 per cent.

One-third membership of traditional leaders in the district councils was rejected by the PNDC due to its undemocratic nature. However, the introduction of government appointees seems not to differ with the one-third membership which was given to traditional leaders in the district councils. The presidential appointment of members of local government in a democratic country seems to compromise democracy. The intention of democracy is that people elect their own representatives through appropriate electoral systems. It is clear that once the president appoints 30 per cent of the members of district assemblies will be full members with voting right, and this equates them with the 70 per cent elected members. If people are to enjoy democracy, no toleration of undemocratic nature should be allowed in a country. This requires that all members of local government be elected in order to exercise governmental power.

In the performance of their functions, the district assemblies are supervised by the regional coordinating councils. Each region has its own regional coordinating councils to see the effective performance of the district assemblies. The traditional leaders are also members of the regional coordinating councils. Each Regional House of Chiefs elects two traditional leaders from the house to be members of regional coordinating councils within their region.

CHAPTER SIX

CONCLUSIONS

1. INTRODUCTION

The paper is focused on the role and participation of traditional leaders in local governance, more particularly their ex officio membership in the municipal councils and their participation outside of municipal councils' meetings. The paper used the case study of Limpopo to examine the participation of traditional leaders in the municipal councils' meetings and their participation outside of the meetings of municipal councils. Limpopo was chosen to be a case study because almost all municipalities in Limpopo have traditional leaders who are identified to participate in municipal councils.

The legal framework on the role of traditional leaders was set out to pave a way for the analysis of the participation of traditional leaders in and out of the municipal councils' meetings. In analysing their participation in the municipal councils, the paper examined some minutes of the meetings of the municipal councils in Limpopo province. The paper was also limited by a lack of access to the minutes of the meetings of the municipal councils in Limpopo. The paper also examined the participation of traditional leaders outside of the meetings of the municipal councils, with reference to Limpopo. Below is the summary on the legislative framework of traditional leaders, the findings on the participation of traditional leaders in and out of the municipal councils' meetings, the reflection on the TKLB on the role of traditional leaders in local governance and the findings on the Ghanaian constitutional framework for the participation of traditional leaders in local governance.

2. THE LEGISLATIVE FRAMEWORK

In a democratic South Africa, the role of traditional leaders in local governance has been reduced to an advisory role. In the past, traditional leaders performed the functions of local government in their areas, now their role is to advice and support the

municipalities operating within their areas of jurisdiction. This is evident from the evolution of the legislative framework of the role of traditional leaders in South Africa.

The Interim Constitution provided that in the traditional areas where local transitional councils were established, the traditional leaders of those areas should be ex officio members of such local councils. This gave traditional leaders an opportunity to be part of those councils and fully participate with voting rights. In the areas of traditional leaders where the local transitional councils were not established, traditional leaders of those areas were allowed to continue to perform their role as if they were local government provided that it was in the interest of people located in those traditional areas.²⁸⁶ Since the name Interim Constitution speaks for itself, these were interim provisions pending the Final Constitution. The Final Constitution has omitted the provision which gives traditional leaders ex officio membership in local councils. It provides for the recognition of traditional leaders and then left it to Parliament to enact legislation which will provide for the role of traditional leaders at the local level. This was the beginning of the debate on the role of traditional leaders in local governance. The traditional leaders were since then vocal that the traditional councils should replace the municipalities in their areas of jurisdiction.

The MSA grants traditional leaders ex officio membership in the municipal councils but with no voting rights. The lack of voting rights in the municipal councils' meetings has been an issue which impacts on the participation of traditional leaders. The traditional leaders can submit motions, proposals and be part of the debates in the municipal councils but the decision-making power is reserved for democratically elected members of the municipal councils.

The TLGFA provides that the Local House of Traditional Leaders may advise the district or metropolitan municipalities with regard to the issues of customary law and customs, development planning which impacts on traditional areas and developments of by-laws which affect traditional communities. This role is clearly advisory since district or metropolitan municipalities retain power to decide after receiving advice from the Local

²⁸⁶ S 2 (1) Local Government Transition Act, 1993 (Act No. 209 of 1993).

House of Traditional Leaders. The TLGFA is a framework legislation relying on provincial legislation to give details to it and provides for the role of traditional leaders. However, the LTLIA do not provide much difference with regard to the role of traditional leaders in local governance rather than, in most cases, repeating the words of the TLGFA with regard to the role of traditional leaders at the local level.

3. PARTICIPATION OF TRADITIONAL LEADERS IN MUNICIPAL COUNCILS

The legislative framework has given traditional leaders seats in the municipal councils as ex officio members. The big question is that are they attending the local councils meetings in order to use their ex officio membership to influence the decisions of the municipalities? This study used the Limpopo Province as a case study to examine their attendance in the municipal councils' meetings. The reason for choosing Limpopo as a case study is that almost all municipalities in Limpopo have traditional leaders who have been identified to attend and participate in those municipal councils meetings. However, it must be noted that this research is limited by a lack of access to the minutes of municipal councils meetings on the municipalities' websites because only few upload the minutes of their meetings.

Despite this limitation, four municipalities were examined in order to assess the attendance of traditional leaders in those municipalities. The paper found that traditional leaders in Makhado Local Municipality under the district of Vhembe are not attending and participating in the municipal council's meetings. In all the 2015 meetings of its municipal council, only one traditional leader has attended the municipal council meeting once, whereas with the 2016 municipal council's meetings none of the traditional leaders attended. This is a poor attendance of the municipal council's meetings by traditional leaders.

Makhado Local Municipality is not the only municipality where traditional leaders are not attending the municipal councils' meetings. Aganang Local Municipality²⁸⁷ has the

²⁸⁷ This municipality has been disestablished towards 2016 local government election by Municipal Demarcation Board. See table 1 in chapter three of this study.

record of poor attendance of the municipal council's meetings by traditional leaders. Since 2015 traditional leaders were not attending the municipal council's meetings in Aganang Local Municipality.

The reasons for non-attendance and non-participation of traditional leaders in the meetings of the local councils are, first, the lack of voting rights in the municipal councils. This is the main concern of traditional leaders in South Africa, since they are of the opinion that this membership makes it difficult for them to influence decision of the municipalities.

Secondly, the absence of regulations on the participation of traditional leaders in the municipal councils by Limpopo province also contributed to uncertainty as to how traditional leaders should participate in the municipal councils. Traditional leaders have raised the issue of a lack of clarity on their role in the municipal councils, whereas it is clear that they may submit motions, make proposals and join the debates in the municipal councils but without voting.

Thirdly, the poor relationships between a municipality and traditional leaders often lead to traditional leaders not attending and participating in the municipal councils' meetings. Municipalities must strive to build a solid relationship with traditional leaders and encourage them to participate in the municipal councils.

Fourthly, the lack of capacity of traditional leaders to participate in the municipal councils' meetings may lead to traditional leaders not participating in the municipal councils. It is a common cause that without the knowledge of the processes and the procedures for participation in the municipal councils, meaningful participation will be a daydream.

Fifthly, traditional leaders may be of the view that there are other avenues of participating in the municipalities rather than attending the municipal councils' meetings. It may be through the Local House of Traditional Leaders and the quarterly meetings between the traditional leaders and the mayor in their areas.

4. THE RIGHT OF TRADITIONAL LEADERS TO BE CONSULTED OUTSIDE OF MUNICIPAL COUNCILS

The municipality has a duty to consult traditional leaders when it is about to take a decision which affects their community. However, there have been signs of crying from traditional leaders that municipalities do not consult them when they take their decisions. In Limpopo, Thulamela Local Municipality has been found to be one of the municipalities which do not meaningfully consult traditional leaders. This is evident from the case of *Thulamela Local Municipality and Another v Tshivhase and Others* where Chief Tshivhase and his traditional council launched an application seeking to review and set aside the decisions taken by the municipality to alienate properties on the basis of, inter alia, the lack of consultation. The failure of a municipality to consult traditional leaders about its decisions which will affect their communities will invite litigation against it which could have been avoided through consultation. It must be noted that the municipalities must not just consult for the sake of following procedures and thereafter take decisions which go against the views of traditional leaders but it must be able to reflect the views of traditional leaders in their decisions. This will make traditional leaders value the purpose of being consulted by municipalities. This practice will also reduce the on-going tension between municipalities and traditional leaders.

The mayor-traditional leaders' forums in both Musina and Mogalakwena Local Municipalities in Limpopo have been a successful devise of consulting traditional leaders. The traditional leaders in both municipalities have been praising these kinds of meetings and thanking the municipalities for engaging with them when they are about take decisions which affect traditional areas. This is a useful platform where traditional leaders are able to engage with a mayor about the challenges they are facing in their areas. The mayor-traditional leaders' forums strengthen the relationship between the municipalities and traditional leaders. It is advisable for other municipalities to use the mayor-traditional leader's forums since it has been appreciated by traditional leaders in both Musina and Mogalakwena Local Municipalities.

5. THE TRADITIONAL AND KHOI-SAN LEADERSHIP BILL, 2015

The TKLB is currently before the National Assembly's Portfolio Committee. Once the TKLB is passed as an Act of Parliament, it will repeal the TLGFA. A question is whether this Bill will address demands of traditional leaders in local governance? It has been argued that the TKLB will not address the demands of traditional leaders because it does not spell out the role of traditional leaders in local governance. There is nothing in the TKLB which addresses the ex officio membership of traditional leaders in the municipal councils. The traditional leaders will continue with their non-voting membership in the municipal councils. Furthermore, there is no clarity in the TKLB with regard to the role of traditional leaders in local governance in general.

At worst, traditional leaders demanded that municipalities be replaced with traditional councils in their areas of jurisdiction. The practicability of this demand seems to meet a constitutional challenge because the Constitution mandates that there be wall-to-wall municipalities throughout the Republic of South Africa. Therefore, the replacement of municipalities by traditional councils in their areas will be unconstitutional.

It is then advisable for the municipalities to develop partnerships with traditional councils and consider entering into service delivery agreements. The service delivery agreement will make traditional councils provide services in their areas of jurisdiction and by so doing they will feel in charge of their areas.

The TKLB has managed to recognise Khoi-San leaders and their communities. The recognition of Khoi-San leaders means that they will be granted seats in the municipal councils just like the current traditional leaders. Therefore, section 81 of the MSA will apply to Khoi-San leaders. It remains to be seen if Khoi-San leaders will utilise this opportunity by attending and participating in the municipal councils' meetings.

6. THE GHANAIAN CONSTITUTIONAL FRAMEWORK ON THE ROLE OF TRADITIONAL LEADERS

Ghana has a decentralised local government comprising of district assemblies. The district assemblies are the highest political authority with legislative and executive powers. The 1992 Ghanaian Constitution mandates the President of Ghana to appoint 30 per cent of members of the district assembly after having consulted traditional authorities and other interests in the district. Some Ghanaian commentators have criticised this provision for not being able to guarantee automatic membership of the traditional leaders in the district assemblies. It must be noted that this provision implicitly intended that 30 per cent of the presidential appointees may comprise of traditional leaders and members of the interest groups, otherwise it would not be necessary for the President to consult traditional authorities and interest groups before appointing that 30 per cent.

What is not clear from this provision is how traditional leaders and other interest groups share this 30 per cent. The overall conclusion on this provision is that traditional leaders and interest groups may share this thirty per cent, perhaps even on equal basis. However, the practical implementation of this provision has caused the under-representation of traditional leaders in the district assemblies. The KEEA district assembly, Adaklu-Anyigbe district assembly, Sissala district assembly and district assembly in Ashanti region show the failure of the implementation of the presidential appointments where traditional leaders were hardly represented. In the above district assemblies, the number of traditional leaders is not even half of the 30 per cent of the presidential appointees.

The district assemblies perform their functions and exercise their powers under the supervision of the regional coordinating councils. There must be a regional coordinating council in each region. In the composition of the regional coordinating councils, there must be two traditional leaders who are appointed by the Regional House of Chiefs from its members to represent traditional leaders in the regional coordinating councils. This is a clear provision because the Ghanaian Constitution unequivocally states the number of traditional leaders and where these traditional leaders should be appointed from and by whom.

The bottom line is that the Ghanaian Constitution grants traditional leaders membership in both district assemblies and regional coordinating councils with voting rights. Should the voting right which is attached to the membership of traditional leaders in Ghana be a lesson for South Africa? It is clear from chapter three that the traditional leaders' membership in the municipal councils without voting rights has been a hard pill to swallow for many South African traditional leaders. Rugege has since proposed considering a 20 per cent membership of the traditional leaders in the municipal councils; it would not do harm to allow them to vote in the meetings of the municipal councils. However, the local government in South Africa is purely elected by locals and there is no room for presidential appointment of members of the municipal councils. However, the MSA grants traditional leaders seats in the municipal council as ex officio members after being identified by the MEC for local government in the provinces. It appears that traditional leaders as ex officio members of the municipal councils must not vote in the meetings for two reasons. First, they are not elected by the locals as required by the section 157 (2) of the Constitution. Secondly, local sphere of government, must be democratic not partly democratic. This is one of the core values of the democracy in South Africa as enshrined in section 1 (d) of the Constitution. In South Africa, the presidential appointment of members in the municipal councils and their concomitant right to vote will be undemocratic and consequently unconstitutional.

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