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08 February 2012

To: The NCOP

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Greetings,

**R: SUBMISSION ON THE TRADITIONAL COURTS BILL BY MAHUNTSI TRADITIONAL COMMUNITY (ROTTERDAM VILLAGE – LIMPOPO PROVINCE)**

This is a collective decision taken by the Mahuntsi Traditional Community under Hosi Mahuntsi T.M at Rotterdam village. Hosi Mahuntsi and his people lived in the farm Aangenaam Uitzitch, presently known as Muwaweni, since the late 1800 alongside Pedi and Venda-speaking communities. Hosi Mahuntsi also had his subjects living in neighbouring farms, Paardekraal, Bontfontein, Vaalwater, Soetfontein, Crystalwater and Zeekoeiewater. Since that time, Hosi Mahuntsi has been a traditional leader as he could lead and manage his people through customary law and practice. Hosi Mahuntsi had since to date has 13 indunas.

We view the National Council of Provinces' continuation with the Traditional Courts Bill as challenging and noted the following:

1. Throughout the bill there is reference to customary law and customary practices but there is nothing in the definition section of the bill defining customary law or customary practices. There is an assumption that the presiding officer, the so called 'senior traditional leader' shall remain an expert on customary law and customary practices and this implies the enhancement of the traditional versions of authoritarian and patriarchal customary law.

2. Apartheid legislation has imposed on us a community authority against our will and has had devastating effects on our security of tenure and property rights. The bill as it stands relies substantially on the Traditional Leadership and Governance Framework Act in order to define a traditional community, a traditional council and traditional leader. We have noted with dismay that the TLGFA automatically recognizes a tribal authority, which was appointed in terms of the previous Apartheid legislation. The question shall be, 'Where are the findings of the Ralushai and Nhlapo Commissions?', which we believe would have addressed the issue and put it to rest.
3. The bill as a complimentary of the TLGFA and subsequent pieces of legislation enacted, by providing traditional leaders who are recognized by the state with significant powers over people living within their jurisdictional boundaries. Communities that follow their own systems of land administration, customary law and practices; and mechanism will automatically fall under the jurisdiction of the traditional court and traditional leader in their area even if they per se do not recognize the traditional leader. And, so by doing, it contradicts the separation of powers as required by the Constitution. The bill also contradicts customary law practice where traditional courts are structures in which the general community can participate and assist in dispute resolution.
4. The bill enables the traditional court to summon individuals who have opposed it and strip those individuals of their customary entitlements or to order them to perform "some form of service without remuneration for the benefit of the community under the supervision or control of a specified person or group of persons identified by the traditional court" (s10(2)(g)). These might include land rights or community membership. It also presents an unjustified threat to rural people's security of tenure.
5. There is an intrinsic connection between who is consulted when legislation is drafted and whom it benefits. When the bill was being considered in 2008 rural people were not consulted about the empowered traditional councils to administer and control their land. The principle of "People shall govern" never exists, hence the apartheid era is coming back and with a full basket of benefits to the 'already recognized' traditional leaders by the apartheid government. The procedural issue decided by the Constitutional Court means that in the future Parliament will have to effectively involve the provinces in deliberations on legislation that has a impact on customary law. Today's judgment quotes the court's prior judgment in *Doctors for Life* and reiterates that: "Our Constitution manifestly contemplated public participation in the legislative and other processes of the National Council of Provinces, including those of its committee.

6. The implications of the Bill for women are serious. The Bill gives male traditional leaders so much power that it will further perpetuate gender inequality. Traditional leaders will have wide powers to impose their interpretations of customary law upon women, which are likely to include traditional patriarchal views about women's lack of capacity to own and inherit property. They will also be denied access to decision-making roles in the traditional courts, as only traditional leaders, typically men, can be presiding officers. This is a contradiction of the Constitution with regard to Women's Property Rights under Customary Law.
7. Section 9(3)(b) of the bill does not permit legal representation in a traditional court, and yet the Traditional court may make an order in terms of section 10 and in more particular in terms of section 10(2) make an order in the form of a sanction against the person found guilty of a criminal act without legal representation.
8. Sections 9(4)(a); 9(4)(b); 9(4)(b)(i) and 9(4)(b)(ii) of the bill state that where two or more systems of customary law are applicable to a dispute before a traditional court, the court must apply a system of law that the parties expressly agree should apply and in the absence of an agreement, traditional court must decide which system of law to apply in accordance with the guidelines: that the system of customary law applicable in the area of jurisdiction of the court should take precedence over any other system of customary law; or the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection. On this note we submit that this shall be very problematic and will prejudice our community because when there is no agreement on which system of customary law is applicable the traditional leader is given the discretion to decide which system of law is applicable in the area of jurisdiction of the court.

## **RECOMMENDATIONS**

Having noted some of the Bill's flaws above, we believe the following recommendations should be followed for the benefit of the communities and people affected by the Bill:

1. The legislative process must make it possible for ordinary rural people, in particular women, to be heard, and not privilege traditional leaders.

2. To give effect to the constitutional imperatives of tenure security and participation, we call on parliament to take pro-active steps to ensure that this time around the rural people whose land rights and tenure security is at issue are properly consulted and can engage effectively with the legislative process.
3. We call on the National Council of Provinces not to further reintroduce the Traditional Courts Bill.

Mr Baloyi Mafemani Shadrack

On behalf of the Mahunsi Traditional Community

Dated: 08 February 2012

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