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Submissions by Corruption Watch: Traditional and Khoi-San Leadership Bill (B 23B-2015)

Introduction

1. Corruption Watch is a non-profit civil society organisation. It is independent, and it has no political or business alignment. Corruption Watch intends to ensure that custodians of public resources act responsibly to advance the interests of the public. Its ultimate objectives include fighting the rising tide of corruption, the abuse of public funds in South Africa, and promoting transparency and accountability to protect the beneficiaries of public goods and services.

2. Corruption Watch has a vision of a corruption free South Africa, one in which educated and informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice and importantly where public and private individuals are held accountable for the abuse of public power and resources.

3. As an accredited Transparency International Chapter in South Africa, core to our mandate is the promotion of transparency and accountability within private sector and state institutions aimed at ensuring that corruption is addressed and reduced through the promotion and protection of democracy, rule of law and good governance.

4. Corruption Watch welcomes the opportunity to make submissions on the Traditional and Khoi-San Leadership Bill, (B 23B – 2015) **["the Bill"]**.

5. We note from the Preamble of the Bill that it is primarily aimed at providing for the recognition, withdrawal, functions and administration of Traditional and Khoi-San communities and leadership structures. Corruption Watch is concerned about this Bill insofar as its provisions have an effect on the ability of communities to voice their concerns within

traditional leadership structures and participate meaningfully in decision making processes which affect them, particularly mining activities which may affect their security of tenure, their social and natural environment and other socio-economic conditions.

6. During 2016 and 2017, we conducted extensive research on the vulnerabilities in the mining application process. The outcomes of the research highlighted the lack of consultation with mining affected communities as being one of the key vulnerabilities in the mining application process. Our research report which may be accessed here, noted significant abuse of power by the representatives of traditional authority structures, resulting in mining affected communities not being consulted during the mining application process. Citing the legislative review panel mandated by Parliament and chaired by former president Kgalema Motlanthe, our report noted his comments on the trend of asking traditional leaders to give the go ahead on mining projects while supposedly representing the entire community. He stated that "mining companies merely give these leaders an office or a 4x4 vehicle and they sign off."[1] A community members' direct experience supported this finding stating that, "mining companies come into our community and only engage with the chief, they don't consult any community members, and they pay him a lot of money and give him shares in the mining company, the community does not benefit from this money at all, and we only see the traditional leader and his family getting more rich."[2]

7. Currently, we are also conducting research into the management and administration of mining royalties that are paid by holders of mining rights to mine- affected communities. The first phase of the consultative aspect of the research was conducted in the North West and Limpopo Provinces between October 2017 and November 2017 and further research is still underway. During these consultations, the abuse of power involving traditional leaders was made clear on countless occasions. Community members spoke to the role of traditional leaders and members of royal families in engaging with mining companies in an illegitimate manner; concluding deals, partnerships and agreements with mining companies without consulting the mining affected communities or taking into account their interests; and ultimately failing to provide for communities to benefit from the immense mineral wealth of the region.

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1 https://www.businesslive.co.za/bd/national/2017-07-26-kgalema-motlanthe-panel-not-keen-on-laws-on-mining/

2 Corruption Watch round table discussion on Mining for Sustainable Development-transparency and accountability in the awarding of mining licenses, contracts and permits (7 February 2017)

8. It is within the context of abuse of power involving traditional leaders and the lack of consultation with mining affected communities, that we make submissions on the Bill. We respectfully submit that issues of good governance and the representation of community interests within traditional leadership structures, be more carefully considered and taken into account when establishing and providing for the composition and governance of such structures as well as the development of effective dispute resolution mechanisms.

9. We note that the Department of Mineral Resources ("DMR") has issued a "Guideline for Consultation with Communities and Interested and Affected Parties" (the "Guideline"),[3] however, it has not hindered the abuse of power by traditional leaders or addressed the failure of companies to engage with meaningful consultation with mining affected communities.

10. In terms of the rationale for the requirement of consultation with interested and affected parties[4] and communities,[5] the Guideline states that "*it is to provide them with the necessary information about the proposed prospecting or mining project so that they can make informed decisions, and to see whether some accommodation with them is possible insofar as interference with their rights to use the affected properties is concerned. Consultation under the Act's provisions requires engaging in good faith to attempt to reach such accommodation*." However, as indicated above, this type of consultation is often impeded by mining companies consulting only with traditional leaders, many of whom are induced into finalising deals or signing off on consultation reports, without actually consulting with communities or ensuring that their interests are taken into account.

11. We note also the role that mining companies play in evading the requirements of the Guideline and rendering the consultation process a mere tick box exercise without attempting any real

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3 See http://www.dmr.gov.za/Portals/0/consultation_guideline.pdf The Guideline aims to provide clarity on the implementation of the sections of Mineral and Petroleum Resources Development Act 28 of 2002, particularly sections 10(1)(b), 22(4)(b), 27(5)b) and 39 which all require notification and consultation with communities by the Regional Managers and applicants for rights in terms of the relevant sections of the Act.

4 Interested and affected communities include *inter alia*, host communities, land owners and traditional authorities although, as already indicated traditional authorities are often consulted as representatives of the community and other interested and affected parties, to the detriment of such communities.

5 A community is defined in the Guideline as "a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: provided that, where as a consequence of the provisions of the Act, negotiations or consultations with the community are required, the community shall include the members or part of the community, directly affected by prospecting or mining, on land occupied by such members or part of the community."

or meaningful consultation, and we are engaging with some mining companies to ensure that best practices are adopted by them and adhered to in the mining application process.

12. Recognising the significant role played by traditional leaders, we regard the current legislative amendments as being important in order to limit the scope for traditional leaders and authorities to abuse their power and to ensure that communities participate meaningfully in decisions taken on their behalf. ***We submit that this Bill should be amended to reflect sound legislative choices which take into account the impact of the abuse of power by traditional leaders and which therefore aim to prevent and address the abuse of traditional leadership at the expense of communities and their interests***. Submissions are made under the headings below:

    12.1. The governance and composition of Traditional Councils;

    12.2. Inadequate measures to ensure effective community consultation;

    12.3. Inadequate financial accountability mechanisms; and

    12.4. Inadequate Dispute Resolution Mechanisms.

<u>The Governance and Composition of Traditional Councils</u>

13. Firstly, we are very concerned about the regulation of traditional councils. In this regard, the Bill will repeal the Traditional Leadership and Governance Framework Act, 41 of 2003 ("the Framework Act"), while at the same time processes are underway to amend the Framework Act in terms of the Traditional Leadership and Governance Framework Amendment Bill [B8-2017] ("Framework Bill"). The rationale for the simultaneous processing of the Bill as well as the Framework Bill appears from the "Memorandum on the Objects of the Traditional Leadership and Governance Framework Amendment Bill, 2017" ("Memorandum on the Framework Bill") which states that there is "*uncertainty as to when the Bill will be enacted and due to the fact that there is uncertainty as to whether there is any existing statutory provision that can be used for the reconstitution of tribal authorities and traditional councils*

in 2017, it is advisable to amend the Framework Act to ensure that such enabling provisions are in place in 2017."

14. We also understand that the terms of office for the traditional councils must be aligned to the term of office of the National House of Traditional Leaders (NHTL). The term of office of the NHTL expired in August 2017, which required all tribal authorities and traditional councils to reconstituted in 2017, however the reconstitution has not occurred and the amendments to both to the Framework Act and the Bill are complicating this matter.

15. The Framework Act did not come into place in 2017 and at the moment, both the Framework Act and the Bill are at the same stage in the legislative process, being before the National Council of Provinces for consideration. ***We submit that the Framework Bill should be withdrawn and that the legislature proceed only with the processing of the Bill. We submit that further confusion will be created by providing for interim measures in terms of the Framework Bill, while final measures in terms of the Bill may come into effect at the same time as such interim measures.***

16. Secondly, it is clear from the Memorandum on the Framework Bill as well as our own community consultations, that traditional councils have been dysfunctional and/or non-functioning for many years. This has resulted from certain legislative anomalies as well as alleged administrative bungling in the North-West Province by the Office of the Premier.

17. The Memorandum on the Framework Bill stated that in terms of the Framework Act, tribal authorities had to be reconstituted in terms of certain legislative requirements. It stated that "*an initial timeframe for such reconstitution was not met and in most instances, the extended timeframes were also not met. Furthermore, although there are instances where provinces attempted to reconstitute the tribal authorities, various challenges have been identified in respect of such reconstitution. In some instances – (a) tribal authorities were not reconstituted at all; (b) the reconstitution took place after the expiry of the timeframe within which it had to be done; (c) no formula was issued; (d) where a formula was issued, it was not aligned with the Minister's guidelines; and (e) certain requirements of the relevant provincial legislation was not met*."

18. It is clear that the Framework Act was not properly implemented, partially due to the lack of clarity on the manner of implementation and partially due to the tardiness of the provincial authorities. It is clear that a system of implementation has to be clear and that for the sake of uniformity and certainty, it should be regulated in terms of national regulation. This would include the determination of any formula anticipated in section 16(2)(a)(ii) of the Bill. The lack of uniformity, and in some instances direct contradiction, between the national regulation of traditional councils and the provincial regulation of traditional councils, has resulted in a chaotic process thus far, often leading to traditional councils not being established or reconstituted. This has in turn led to community voices being suppressed even further. Communities which could have elected a percentage of the members of traditional councils are heavily compromised by convoluted procedures and failures on the part of provincial governments which have lead to the non-establishment of traditional councils. ***In light of the difficulties which emerged from the implementation of the Framework Act as well as the need to ensure that communities are properly represented on functioning traditional councils, we submit that the Bill should provide for clear regulation and procedures for the establishment and/or reconstitution of traditional councils, which regulation should be in terms of national legislation, thus reducing the legislative function of provincial government.***

19. Thirdly, one of the key issues which arose during our 2017 consultations in the North West related to the composition of traditional councils which comprise 60% of members who are selected by the relevant traditional leader and 40% of members who are supposed to be elected by the community.

20. The consequence of the 60% / 40% allocation in section 16(2)(c) of the Bill is an unequal balance of power on traditional councils which poses the risk of undemocratic governance. The under-representation of elected members who represent the community affect voting power. ***We respectfully submit that 50% of members should be selected by the king or queen, principal traditional leader, traditional leader or Khoi-San leader and that such selection should be subject to the concurrence of an objective group of community members. The remaining 50% of members should be elected by the community, and traditional leaders should not gain membership of the elected members by virtue of their position.***

21. The processes for the election members by the community also need to developed and more clearly specified in order to ensure that communities are in fact provided with a fair opportunity to elect members to represent them on the Council. ***The requirement for the community to elect at least 50% of members of the council needs to be clear and the processes for such election needs to be developed and specified in clear terms.***

Inadequate measures to ensure effective community consultation

22. In terms of Section 24 of the Bill, kingship or queenship councils, principal traditional councils, traditional councils, Khoi-San councils and traditional sub-councils may enter into partnerships and agreements with each other, municipalities, government departments and any other person, body or institution. Section 24(2)(a) states that the partnership or agreement must be in writing and must be beneficial to the community represented by such council and section 24(2)(c) states that the partnership is subject to prior consultation with the relevant community.

23. While we acknowledge the inclusion of the requirement for prior consultation, we submit that the Bill does not provide adequate measures to ensure that the consultation with the community does in fact takes place and that such consultation is meaningful. This is particularly important in light of our above submissions that such councils do not adequately represent the will of the community and traditional leaders engage in consultation with mining companies on behalf of the community and conclude agreements without consulting the community or taking into account their interests.

24. The Bill is silent on the method and procedure required for the consultation. The wording makes it unclear whether consultation is required between the council and the community or the other contracting party and the community. A lack of legislative requirements allows for abuse of the process and inconsistent application of the requirement. In light of the Constitutional Courts[6] remarks regarding the importance of consultation and its purpose of providing information in order for communities to make informed decisions, we respectfully

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6 *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and* others 2011 (3 BCLR 229 (CC) para 66.

submit that it is necessary for the Bill to expound the process in greater detail and set out the practical requirements for community consultation.

25. The only mechanism in place to ensure compliance with the consultation requirement is ratification by the Premier. ***We suggest that the Bill be amended to include clear guidelines for ratification by the Premier, with such guidelines emphasising the need to verify that community consultation was done freely and that prior and informed consent was obtained. We also suggest that in order to ensure transparency and reduce the opportunity for influence or bias that such ratification take place not only by the Premier but by a select committee within Provincial government comprising members of provincial government as well as from the House of Traditional Leaders.***

Inadequate financial accountability mechanisms

26. The Bill makes provision for traditional councils, traditional sub-councils and Khoi-San councils to give an account of their activities and finances to their communities once a year. We acknowledge this commitment to accountability and transparency but respectfully submit that these mechanisms are not sufficient. It must be noted that the Bill does not specify how kingship or queenship councils or principal traditional councils should account to their communities and also does not require members of these councils to reveal their interests in companies which do business with the council or with juristic entities established in the name of the council. ***There is therefore limited scope for communities or NGO's to interrogate the relationships between council members and companies which do business with the council or are seeking mining application approval or consent from the council***.

27. The research conducted by Corruption Watch found that the intended trickling down of funds and benefits designated to the communities does not take place. Further problems identified were a lack of accountability in the management of Community Trust Funds and a failure to disclose any information regarding community assets or financial records.

28. In light of this, ***we suggest that the processes be developed in order to govern the nature and scope of the accountability which is required from councils. We also suggest that council members be required to declare their interests and that guidelines be developed in order to deal with conflicts of interests***.

29. In light of the fact that the Bill does not attach a sanction to the non-compliance of the requirement to account to the community, nor does it require the oversight of the Premier, there is no recourse for the community members to raise their concerns or to report instances of fraud or maladministration. We therefore suggest the inclusion of dispute resolution mechanisms in relation to these provisions as well as whistle-blower reporting mechanisms that adequately protect those who make reports from any reprisal.

30. We also suggest the inclusion of oversight mechanisms which could involve the Premier or the committee referred to in paragraph 25 above.

Dispute Resolution Mechanisms

31. The Commission on Traditional Leadership Disputes and Claims The CTLDC established by section 22 of the Framework Act shall, notwithstanding the repeal of that Act by this Act, continues to function in accordance with the provisions of sections 21 to 26A of the Framework Act until the expiry of its term of office, subject to section 25(4)(b) of the Framework Act. Any dispute or claim that has not been disposed of by the CTLDC by the expiry of its term of office must be dealt with in accordance with the provisions of section 59 of this Act or any relevant provisions provided for in provincial legislation. Depending on the nature of the dispute, in terms of section 59(2) the President or the Premier must cause an investigation to be conducted by an investigative committee designated by him or her. The disestablishment of the CTLDC and its replacement with dispute mechanisms which require the executive branch to intervene in order to resolve certain disputes removes certain elements of independence and objectivity which the CTLDC ensured. In addition, section 59(2)(a) doesn't specify the composition of the investigative committee or the qualifications of the persons who should comprise the investigative committee. ***We submit that the CTLDC should continue to resolve disputes as it did in terms of the provisions of section 21 to 26A of the Framework Act.***

32. In terms of the withdrawal of recognition of kingship or queenship, principal traditional community, traditional community, headmanship or headwomanship, in terms of section 4(1) of the Bill, any request for withdrawal may only be considered if it is accompanied by a resolution of each traditional council of such traditional communities and the grounds on which the request is based.

33. ***In the event that members of the community or individual traditional councils have legitimate reasons for requesting the withdrawal of recognition of the abovementioned traditional leaders, there should be mechanisms for making such requests and providing information to support the grounds on which the request is based.*** If traditional leaders abuse their significant positions of leadership and enter into partnerships or agreements without consulting communities or abuse their positions of authority and leadership in order to gain benefit at the expense of communities, these issues should be taken into account when considering the withdrawal of recognition.

34. ***We further submit that the Bill is silent on mechanisms for community members to dispute council membership and accordingly the Bill allows no recourse for an abuse of process. This should be dealt with in terms of the relevant provisions of the CTLDC or the committee we have suggested in paragraph 25.***

35. We hope our submissions are useful to the Committee and kindly note our request to participate in the parliamentary hearings and to make oral submissions before the Committee.

Submitted by Corruption Watch on 8 June 2018
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