IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: _____
SCA CASE NUMBER: 267/2004

In the matter between:

HIS MAJESTY THE KING OF abaTHEMBU
BUYELEKHAYA DALINDYEBO Applicant

and

THE STATE Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

BUYELEKHAYA DALINDYEBO

hereby declare as follows under oath:

1.

1.1. I am an adult male, a descendent of Mtirara, Ngangelizwe, Dalindyebo, Sampu, Jonguhlanga and the King of the abaThembu Nation, presently residing at Bumbane Royal Palace, Tyhalarha Farm, Mthatha, Eastern Cape.

1.2. The contents of this affidavit fall within my personal knowledge, unless otherwise indicated, and are true and correct.

1.3. I am the Applicant in this matter.

2.

The Respondent is **THE STATE,** represented by the Director of Public Prosecutions for the Eastern Cape Division, Mthatha.

NATURE OF THIS APPLICATION:

3.

This is an application in terms of Rule 19 of the Constitutional Court Rules for leave to appeal to this Honourable Court against the judgment and order by the High Court of South Africa (Eastern Cape Division, Mthatha) ("Trial Court") on the 21st of October 2009 and the subsequent partial confirmation thereof on appeal by the Supreme Court of Appeal ("SCA") on the 1st of October 2015.

4.

In terms of the judgment and sentence by the Trial Court referred to above, I was convicted of a number of criminal charges against me and sentenced to an effective sentence of 15 years imprisonment on the charges. These counts were:

4.1. Culpable homicide;

4.2. Three counts of arson;

4.3. Three counts of assault with the intention to cause grievous bodily harm;

4.4. Defeating the ends of justice;

4.5. Kidnapping.

5.

On appeal in the SCA the conviction of culpable homicide against me had been set aside as well as the sentence of 10 years imposed after the conviction on this charge. The balance of the convictions were confirmed. The practical effect to the sentence was that the effective sentence of 15 years imprisonment had been reduced to effective imprisonment of 12 years.

DOCUMENTS/INFORMATION REQUIRED IN TERMS OF RULE 19(3) OF CONSTITUTIONAL COURT RULES:

6.

With reference to the information required in terms of Rule 19(3) of the Constitutional Court Rules I wish to provide the following:

6.1. I annex hereto copies of the judgments of the Trial Court as well as the Supreme Court of Appeal hereto as **Annexures "BD1"** (conviction), "**BD2"** (sentence) and **"BD3"** (SCA judgment).

6.2. I do not intend to apply for leave or special leave to appeal to any other Court.

BACKGROUND FACTS RELEVANT TO THIS APPLICATION:

7.

I was charged in the Trial Court with 34 charges with charges ranging from murder to defeating the ends of justice.

8.

On the 21st of October 2009 I was convicted in the Trial Court on the following charges:

8.1. Culpable homicide;

8.2. Three counts of arson;

8.3. Three counts of assault with the intent to do grievous bodily harm;

8.4. Defeating the ends of justice;

8.5. One count of kidnapping.

9.

I was acquitted on the balance of the charges.

10.

I was subsequently sentenced to 15 (fifteen) years effective imprisonment by the Trial Court.

11.

The Trial Court thereafter granted me leave to appeal to the SCA on all the counts convicted on as well as the sentences imposed.

12.

On the 21st of August 2015 the appeal was heard in the SCA and on 1st of October 2015 judgment was delivered in the SCA.

13.

The appeal succeeded partially. The conviction on culpable homicide as well as the sentence on this count of 10 (ten) years imprisonment was set aside.

14.

The practical effect of the appeal was that the effective term of imprisonment was reduced to imprisonment of 12 (twelve) years.

SYNOPSIS OF THE BASIS OF THIS APPLICATION:

15.

I was at all times relevant to this case and still am the King of the abaThembu Nation in the Eastern Cape Province. During 2003 I was criminally charged of various counts relating to my conduct as King within

the area of my kingdom. The gist of these charges related to my conduct in dealing with some of my subjects who transgressed our customary law, values and belief system and way of life in various material respects.

16.

Although my position as King and certain of the powers that I have as a King was referred to in the preamble of the charge sheet and further dealt with in some respects by an expert witness relating to issues of this nature during the trial, neither the Trial Court nor the SCA considered and/or evaluated these issues and/or the impact that they may have had on this case at all when considering the case.

17.

One can come to no other conclusion that the mentioned Courts apparently did not recognise the institution of traditional leadership, indigenous law and/or customary law.

18.

I am advised that my own legal representatives at the time did not fully deal with the mentioned issues during argument before the mentioned

Honourable Courts. This was largely the cause of the ongoing disputes that I had with my legal representatives during the trial that lead to the termination of their instructions on more than one occasion. I am, however, further advised that this did not release the mentioned Courts of their obligation to apply the Constitution, Interim Constitution where applicable, relevant legislation and legal principles to the case. This I respectfully submit is particularly so under the following circumstances:

18.1. I was at various instances during the case against me unrepresented and conducted my own defence.

18.2. As already mentioned the issues that I rely on in this application were indeed referred to and the Courts were alerted to the relevant facts already in the preamble of the charge sheet against me.

18.3. An expert witness on these issues in fact testified during the trial and referred to certain of the issues raised.

19.

In the above regard I am advised that the correct approach that a Court should follow when considering matters of this nature was eloquently formulated by the Honourable Chief Justice Mogoeng in the case of ***Pilane & Another v Pilane & Another:***

> *"[78] The Constitution recognises the institution of traditional leadership. Moreover, indigenous law, customary law and traditional leadership are listed as functional areas of concurrent national and provincial legislative competence and, in each, the competence is subject to the Constitution. Traditional leadership is a unique and fragile institution. If it is so be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the apartheid regime."*

20.

I am advised and respectfully submit that this application is based on and raises material constitutional issues which were not dealt with by the Trial Court or the SCA. I refer *inter alia* to the following:

20.1. I am advised and respectfully submit that the Trial Court as well as the SCA failed to consider and/or even mention the socio-judicial powers and obligations of a King and/or paramount chiefs and/or chiefs in a communal society. The mentioned Courts failed to draw any distinction between communal justice and customary law on the one hand and statutory criminality on the other hand and/or the interaction between the two systems.

20.2. No attempt was made by the mentioned Courts to consider and/or evaluate the communal and jurisprudential context within which the conduct that I was charged of occurred.

20.3. It further appears from both judgments of the mentioned Courts that they did not evaluate and/or consider the fact that my conduct occurred within the context of my power as King in a traditional system in line with our customs and customary law.

20.4. I submit that the Trial Court as well as the SCA in fact completely disregarded indigenous law, customary law and/or traditional justice despite the fact that both the Interim Constitution of the Republic of

South Africa, Act 200 of 1993 ("Interim Constitution") (section 181) as well as the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") (section 211) specifically provide that traditional authorities which observe a system of indigenous law, recognised by law immediately before the commencement of the Constitution, shall continue as such in accordance with the applicable laws and customs.

20.5. The mentioned Courts failed to recognise the institution, status and role of traditional leadership, according to customary law as is provided for in section 211 of the Constitution and also as was provided for in section 181 of the Interim Constitution.

20.6. They failed to consider the issues relating to the power and obligations of traditional authorities and institutions to observe a system of customary law as is envisaged in terms of section 211(2) of the Constitution and also with reference to section 181 of the Interim Constitution.

20.7. They failed to consider the issues relating to the responsibility of our Courts to apply customary law when that law is applicable and/or at least the consideration of issues of this nature as is envisaged by section 211(3) of the Constitution and section 181 of the Interim Constitution.

20.8. No consideration was given to the interaction between the powers of traditional leaders and the traditional judicial system as was provided for in the Transkeian Authorities Act, Act 4 of 1956 (repealed in 2005) ("TA Act"), the Black Administration Act, Act 38 of 1927 ("BA Act") and the Criminal Procedure Act, Act 51 of 1977 ("CPA") more in particular with reference to maintaining law and order, powers of arrest, powers of search and seizure, the protection of life, persons and property and their safety.

20.9. No consideration was given to the interaction between the powers of traditional leaders and the traditional system as was provided for in the Transkeian Authorities Act, Act 4 of 1956 (repealed in 2005) ("TA Act"), the Black Administration Act, Act 38 of 1927 ("BA Act") and the Criminal Procedure Act, Act 51 of 1977 ("CPA") in particular the

interaction between the powers of a King, chiefs, headmen and chief's deputies to try certain offences and impose and execute sentences imposed on their subjects.

20.10. It further appears that the mentioned Courts gave no consideration to the validity of the charges against me against the background of the relevant customary law and indigenous law or the statutes referred to above.

20.11. I am further advised and respectfully submit that the mentioned Courts failed to consider the effect of the relevant customary law and indigenous law on the elements of unlawfulness and knowledge of unlawfulness relevant to the charges against me.

21.

I am advised that the above issues were relevant and indeed very material to the adjudication of the case against me.

22.

Notwithstanding the relevance and importance of the mentioned principles neither the Trial Court nor the SCA even mentioned or referred to the relevant principles and clearly did not apply them.

23.

I am advised that the above failure by the Courts referred to constitutes material misdirections by the Courts and must have an important bearing on the question whether I indeed received a fair trial and/or whether the convictions against me should stand.

24.

The above failure is even more significant when one has regard to the charge sheet against me where these issues were in fact pertinently mentioned in the preamble to the charge sheet. An expert witness (Prof. Digby Koyana) also testified during the trial on certain of these issues but his evidence was not evaluated or even referred to by the Courts.

25.

I further submit that my right to a fair trial was also infringed in the following respects:

25.1. The failure by the Trial Court and the SCA to consider the relevant legal principles and statutory provisions relating to indigenous law, customary law and traditional leaders. Section 35(3)(l) of the Constitution provides that a person should not be convicted for an act or an omission that was no offence under either National or International Law at the time it was committed or omitted. I submit that National Law clearly includes indigenous law and customary law specifically incorporated in terms of the constitution as well as statutory provisions of the South African Law.

25.2. Section 35(3)(d) of the Constitution provides that an accused has a fundamental right to a fair trial against him or her and this right include the right that the trial should begin and be concluded without unreasonable delay. It is common cause that the conduct relevant to the charge sheet of which I am charged occurred more than 20 years ago. I will deal in more detail hereinafter with this issue.

25.3. The conduct of the Trial Judge during the trial created the impression that he did not act fair towards me. By way of example I can refer to the improper pressure that he applied on me (when I was unrepresented) in order to make admissions at the commencement of the case in order to assist the State to prove their case. I will deal in more detail with this issue hereinafter. The Trial Judge further participated in the trial to the extent that it appeared that he was indeed attempted to assist the prosecution.

MATERIAL FACTS RELEVANT TO THIS APPLICATION:

26.

The following facts material to this application were common cause in my trial:

26.1. I was at all relevant times the King of the abaThembu Nation.

26.2. The conduct relevant to the charges against me occurred within the area of my jurisdiction as King.

26.3. All the people concerned were subjects of my kingdom and fell under my jurisdiction and power as their King.

26.4. I acted at all material times in my capacity as King and the conduct related to the exercise of duties and power as King. There may have been a view by the prosecution that I exceeded my powers in the above regard but the facts were that for instance relating to the assault charges that my subjects brought the three persons accused of contravening our customary laws before me after they "arrested" them.

26.5. I was the head of the tribal authority and institution in my capacity as King. In this regard I can mention that I was at all relevant times and still am the most senior leader of the AbaThembu Nation.

27.

In the above regard I can refer to the following relating to the charges that I was convicted on:

27.1. With reference to the charges of arson against me I testified that the burning down of a hut after an eviction by the communal tribunal was part of our customary accepted practices when one is no more allowed to reside within a particular traditional community following his/her defines of the King's authority including the customary system of governance:

> ***"MR GAGELA:*** *You have said you informed Mrs Sonteya that that the articles inside that house should be removed, and that the intention was to burn the thatch grass and the roof. Why specifically did you mention the thatch grass to be burnt down?*
>
> ***ACCUSED:*** *My Lord according to custom when a person is evicted from his or her homestead, he or she is given an opportunity to take out the window, and doorframes. To remove any other household articles to a place of safety my Lord."*

27.2. With reference to the assault charges it was common cause that the community brought the young men before me in my capacity as King and highest judicial authority within the kingdom. These people

were arrested by the traditional communities for *inter alia* kissing a married woman in front of her paralysed husband as well as charges relating to housebreaking and rape. I then further acted in my capacity as King and in accordance with the powers that I had as the highest judicial authority within my kingdom.

27.3. With reference to the charges of defeating the ends of justice it related to my alleged requests to state witnesses to withdraw the charges of arson against me. From the judgment in the Trial Court itself it, however, appears that it was actually headmen within the kingdom of my traditional institution that requested the subsequent state witness to withdraw the charges of arson against me and also to request his brother to do the same. Apart from the fact that I denied that I instructed and/or requested the specific headmen to make the mentioned requests I submit that the Trial Court and the SCA failed to appreciate that this request was based on our customs and customary law. It was regarded by the relevant headmen as inconceivable that charges of arson could be laid against me as the King under the relevant circumstances. I refer the Honourable

Court to paragraph [67] of the judgment of the Trial Court in this regard:

> *"[67] Some time later Wayiya was approached by a headman called Mncedi Nyoka. Nyoka suggested to Wayiya that the charges of arson against the accused relating to the burning of Stokwana's hut should be withdrawn. He, Nyoka, said to Wayiya:* 'how could we lay charges against the King in his area?'"

It is significant that the State never called any of the relevant witnesses including Nyoka to explain why he in fact approached the State witness to withdraw the charges. It is also significant that no witnesses were called to testify regarding the subsequent withdrawal of the charges and the reasons for such withdrawal. The facts were that the relevant witnesses withdrew the charges and stated under oath that they were not improperly influenced by anybody to withdraw the charges. This issue was never explained.

LEGAL FRAMEWORK RELATING TO POWER OF KING AND HIS POSITION RELATING TO THE APPLICATION OF CUSTOMARY LAW:

28.

Presently the recognition of the institution, status and role of traditional leadership and customary law is dealt with in section 211 of the Constitution. For the convenience of the Honourable Court I quote section 211 of the Constitution:

> ***"211 Recognition***
>
> *(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.*
>
> *(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.*
>
> *(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."*

29.

It is also necessary to refer the Honourable Court to section 181 of the Interim Constitution that dealt with the recognition of traditional authorities and indigenous law. It is necessary to bring under the Honourable Court's attention the fact that the conduct complained of in the charge sheet occurred during 1995 and therefore prior to the promulgation of the Constitution. At the relevant stage the Interim Constitution was in fact in force. For the convenience of the Honourable Court I therefore also quote section 181 of the Interim Constitution:

> ***"181 Recognition of traditional authorities and indigenous law —***
>
> *(1) A traditional authority which observes a system of indigenous law and is recognised by law immediately before the commencement of this Constitution, shall continue as such an authority and continue to exercise and perform the powers and functions vested in it in accordance with the applicable laws and customs, subject to any amendment or repeal of such laws and customs by a competent authority.*
>
> *(2) Indigenous law shall be subject to regulation by law."*

30.

I am advised that it is significant to draw the Honourable Court's attention to the difference between section 181 of the Interim Constitution valid at the relevant stage and section 211 of the Constitution. In section 211(3) of the constitution it is specifically provided that customary law is subjected to the Constitution and any legislation that specifically deals with customary law. However, in section 181 of the Interim Constitution no such limitation was provided for.

31.

It is also important to refer to sections 165 and 166 of the Constitution that provides as follows:

"165 Judicial Authority

1. *The judicial authority of the Republic is vested in the courts.*
2. *The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
3. *No person or organ of state may interfere with the functions of the courts.*

4. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

5. An order or decision issued by a court binds all person to whom and organs of state to which it applies."

And

"*166 Judicial system*

1. The Courts are –

(a) …

(b) …

(c) …

(d) …

(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

32.

I am also advised that it is necessary to refer the Honourable Court to the relevant sections in the Interim Constitution that dealt with judicial authority

and the transitional arrangement relating to the judiciary that was valid at the relevant time.

33.

Section 96 of the Interim Constitution provided as follows:

> *"96 Judicial authority*
>
> *(1) The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law.*
>
> *(2) The judiciary shall be independent, impartial and subject only to this Constitution and the law.*
>
> *(3) No person and no organ of state shall interfere with judicial officers in the performance of their functions."*

34.

The relevant subsections of section 241 of the Constitution provided as follows:

> *"241. Transitional arrangements: Judiciary*

(1) ***Every court of law existing immediately*** *before the commencement of this Constitution in an area which forms part of the national territory,* ***shall be deemed to have been duly constituted in terms of this Constitution*** *or the laws in force after such commencement, and shall continue to function as such in accordance with the laws applicable to it until changed by a competent authority: Provided-*

(a) *….*
(b) *…*
(c) *…*

(1A) Until the court structures contemplated in Chapter 7 have been established as required by section 242 (1), ***the jurisdiction of courts of law which existed immediately before the commencement of this Constitution and which continued to exist by virtue of subsection (1) of this section, shall be as follows****:*

(a) *…*
(b) *…*
(c) ***Any other court shall****, in addition to the jurisdiction vested in it immediately before the commencement of this Constitution, have the* ***same jurisdiction as that which is vested in terms of section 103 in a court of similar status*** *contemplated therein, and shall exercise such jurisdiction in respect of the area of*

jurisdiction for which it was established. [Sub-s. (1A) inserted by s. 15 (b) of Act 13 of 1994.]"
(My emphasis)

35.

Although I am of the view that the legislation that dealt with the institution, status, powers and role of traditional institutions and leadership as well as customary law in some respects referred to the mentioned issues in a derogatory manner I am advised and submit that such legislation also recognised the role of customary law and institutions. The Trial Court and SCA also disregarded the legislation relevant to these issues.

36.

Relevant legislation that dealt with the institution, status, powers and role of customary law at the time relevant to the charge sheet was the TA Act, the BA Act and the Regional Authorities Courts Act of 1982.

37.

I am advised that it is clear from the above statutes read with the relevant sections in the Constitution that the traditional system of jurisprudence and

customary law are indeed recognised within the South African Law and that our Courts should recognise and adhere to these principles when applicable.

38.

I wish to refer the Honourable Court to section 42(1) of the TA Act which provided as follows:

> *"A paramount chief, chief or headman shall –*
>
> *(a) enjoy the status, rights and privileges and be subject to the obligations and duties conferred or imposed upon his office by recognised customs or usages of his tribe;*
>
> *(d) <u>maintain law and order</u> and report to the Government, without delay, any matter of import or concern, including any condition of unrest or dissatisfaction;*
>
> *(e) <u>exercise within his area, in relation to any resident</u> –*
>
> *(i) <u>The powers of arrest</u> conferred upon him, in his capacity as a peace officer, by Chapter IV of the Criminal Procedure Act, 1955 (Act No 56 of 1955) and*

*(ii) Subject to the provisions of sub-sections (3) and (4) of section **forty-six** of the said Act, the powers of search and seizure, relating to stolen stock, liquor, habit-forming drugs, arms, ammunition and explosives, referred to in sub-section (1) of that section;*

(f) ensure the protection of life, persons and property and the safety of bona fide travellers within his area, and report forthwith to the competent authority –

(i) …..;

(j) ensure compliance with all laws and the orders and instructions of any competent authority."
(My emphasis)

39.

I also refer the Honourable Court to the BA Act. In order to assist the Honourable Court I quote from section 20 of the BA Act:

"20. Powers of chiefs, headmen and chiefs' deputies to try certain offences

(1) The Minister may –

(a) by writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any

Black who has committed, in the area under the control of the chief or headman concerned-

(i) any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act; and

(ii) any statutory offence other than an offence referred to in the Third Schedule to this Act, specified by the Minister:

Provided that if any such offence has been committed by two or more persons any of whom is not a Black, or in relation to a person who is not a Black or property belonging to any person who is not a Black other than property, movable or immovable, held in trust for a Black tribe or a community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman;

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), by writing under his hand confer upon a deputy of such chief jurisdiction to try and punish any Black who has committed, in the area under the control of such chief, any offence which may be tried by such chief.

> *(2)* ***The procedure at any trial by a chief, headman or chief's deputy under this section, the punishment, the manner of execution of any sentence imposed*** *and subject to the provisions of paragraph (b) of subsection (1) of section nine of the Black Authorities Act, 1951 (Act 68 of 1951), the appropriation of fines shall, save in so far as the Minister may prescribe otherwise by regulation made under subsection (9), be in accordance with Black law and custom: Provided that in the exercise of the jurisdiction conferred upon him or her under subsection (1) a chief, headman or chief's deputy* ***may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of R100 or two head of large stock or ten head of small stock or impose corporal punishment."***
>
> (My emphasis)

40.

It is therefore significant to note that in this Act it was specifically provided that traditional leaders were empowered to impose sentences including corporal punishment on subjects in terms of our customary law subject only to the limitations mentioned.

41.

I further wish to draw the Honourable Court's attention to the Regional Authority Courts Act of 1982 ("RAC Act") in terms whereof Regional Authority Courts were established in every region (including the region of my kingdom) and which Court had jurisdiction in the particular area for which it had been established.

42.

The Regional Authority Courts were provided with jurisdiction to hear both civil as well as criminal cases with the same powers as that of a Magistrate's Court established in terms of the Magistrates' Courts Act of 1944. For convenience of the Honourable Court I quote section 3 of the RAC Act:

> *"3. (1) A regional authority court shall, where —*
>
> *(a) the accused in **a criminal case**; or*
> *(b) all the parties in a civil suit,*
>
> *are citizens of Transkei, **exercise jurisdiction concurrently with the magistrates' courts within its regional authority area and shall enjoy in all respects the same powers, authorities and***

> ***functions as that of a magistrate's court*** *established in terms of the Magistrates' Courts Act, 1944, as amended.*
>
> *(2) The jurisdiction mentioned in subsection (1) shall include the right to hear appeals lodged in terms of section 12(4) or section 20(6) of the Bantu Administration Act, 1927."*
> (My emphasis)

43.

It is submitted that, I in my position as King, clearly had judicial powers and functions in terms of the relevant legislation valid at the time of the alleged offences (1995).

44.

It is further significant to draw the Honourable Court's attention to the fact that corporal punishment was only prohibited as a competent sentence that could be imposed by Courts, which included the traditional courts that applied customary law in 1997 by the Abolition of Corporal Punishment Act, Act 33 of 1997.

45.

As already mentioned all the offences relevant to the charges against me were allegedly committed prior to 1997.

CONSEQUENCES OF FAILURE TO CONSIDER/RECOGNISE INDIGENOUS LAW, CUSTOMARY LAW AND TRADITIONAL LEADERSHIP:

46.

The material question that follows from the above is what the consequences are of the failure by the previous Courts to evaluate and consider this case within the context of indigenous law and customary law.

47.

I am advised that the basic approach set out by the Honourable Chief Justice Mogoeng in the ***Pilane*** case is with respect the correct approach. At the very least Courts have an obligation to treat African customary law, traditions and institutions, not as an inconvenience to be tolerated, but as a heritage to be nurtured and preserved for posterity.

48.

I am advised and submit that the failure to recognise and consider cases where indigenous law, customary law and traditional leadership are relevant facts within their proper context will be fatal.

49.

The very essence of an approach where due recognition and consideration of our indigenous law and customary law as well as traditional leadership is a failure to comply with the very basic principles of our Constitution and Interim Constitution at the relevant time.

50.

I am advised and respectfully submit that the fairness of the proceedings against me was severely tainted to the extent that it stands to be set aside.

51.

I am further advised that all the charges of which I had been convicted had *inter alia* two very essential elements that the State had to prove against me:

51.1. Unlawfulness.

51.2. *Dolus* (intention).

52.

I am further advised that the element of *dolus* specifically requires that the State has to prove beyond reasonable doubt that an accused person had the necessary knowledge of unlawfulness at the time that an offence had allegedly been committed.

53.

I am advised that the context within which the offences had allegedly been committed read within the legal framework set out above clearly illustrate that they had a material and extremely significant bearing on the two issues referred to above i.e. lawfulness and knowledge of unlawfulness.

54.

I am advised that the State had to prove beyond reasonable doubt that my conduct was unlawful i.e. that it fell outside the ambit of the principles referred to above and/or the legislation referred to and further that I in fact had knowledge of the fact that I acted outside the ambit of the principles of

indigenous law and customary law as well as the statutory principles referred to above.

55.

The insurmountable problem at this stage is that these issues had never been evaluated and/or properly canvassed because of the failure to duly recognise and consider indigenous law and customary law as is provided for in section 211 of the Constitution and previously in section 181 of the Interim Constitution. The Trial Court and SCA further failed to consider the statutory provisions referred to hereinbefore and the relevance of these statutory provisions on the questions relating to lawfulness and/or knowledge of unlawfulness in the charges against me.

56.

Although the Trial Court and the SCA did not with respect appreciate the issue at hand I am advised that this case also deals with the delicate situation of functionaries of a Court and situations where such a functionary may have acted beyond his or her powers. I am advised and submit that long-term incarceration of a person in my position acting in my capacity as traditional leader and functionary of a Court can clearly not be

the correct approach even if it is to be found that I may have exceeded my power.

FAIR TRIAL:

57.

I have already submitted that the failure by the Trial Court and the SCA to consider the issues relating to indigenous law and customary law as well as traditional leadership together with the statutory provisions in that regard was fatal and had a detrimental effect on the fairness of the proceedings against me.

58.

I further submit that I was not afforded a fair trial in view of the long time lapse between the alleged offences and the finalisation of the trial.

59.

The objective facts are that the trial only commenced approximately 10 years after the incidents relevant to the charge sheet and that the trial was only finalised approximately 4 years later. The appeal in the SCA was

subsequently only heard approximately 6 years after the finalisation of the trial in the Trial Court and after leave to appeal to the SCA had been granted.

60.

It appears from the judgments that I was severely criticised for deliberately delaying the proceedings because I at a number of occasions instructed new attorneys to act on my behalf.

61.

I deny the correctness of the criticism levelled against me and wish to illustrate to the Honourable Court from the record itself that I was from the outset willing and indeed desirous to conduct my own defence. It was indeed the Trial Court itself that pressured me to obtain the services of legal counsel. As will be apparent from the quotations from the record hereinafter it is clear that the motive of the Trial Court was rather to assist the prosecution in order to ensure that admissions would be made on my behalf.

62.

At the outset it appeared that the main concern of the Trial Judge was to assist the prosecution to further their case against me. This was clearly illustrated by the conduct of the Trial Judge when he went to great lengths in order to persuade me to make admissions in order to assist the State in their case and even asked an attorney to assist me pro-amico at the request of the Court only to make formal admissions to assist the State.

63.

To illustrate the above I quote certain relevant passages from the record of proceedings:

> *"**COURT**:* *Mr Dalindyebo now where are we, where do we stand today, are you asking this Court for a further postponement so that you can raise funds to get legal representation, or do you want to continue with this case without legal representation, what is your position today?*
>
> ***ACCUSED**:* *My Lord I believe that there are many influences outside the system which are influencing the running of this case, and for those reasons, I am insisting that I will represent myself in this matter, and the case must go on."*
>
> (My emphasis)

Record of Appeal: Volume 1: P. 184, lines 10 - 18

And

"*COURT*: *Now also this case would normally require an accused person to make certain formal admissions so that the proceedings can be shortened and we don't waste time those are technical admissions that must be made to shorten the proceedings, but if you are not properly represented, you would not know which admissions to make and which admissions does not to make, and this case can just continue dragging on for six months if not longer in the absence of any of these admissions and that is not in the interest of justice either. So everything points to the fact that you out to be legally represented."*
(My emphasis)

Record of Appeal: Volume 1: P. 185, line 17 to P. 186, line 3

And

"***COURT***: *… The Court also does not have the power to direct the Government to pay the fees of your counsel. But the*

Court can make recommendations, and I have reason to believe that if I make strong recommendations then my recommendations will be sympathetically viewed. Because I believe that it is in the interest of justice not only in your interest, but also in the interest of the Prosecution, and the interest of the State that you be legally represented, I am prepared to make strong recommendations to the Legal Aid Board, to appoint a senior an experienced Counsel to assist you in the trial, and I am also prepared to make those recommendations to Government, but the ultimate decision rests with the Legal Aid, and with the Government not with me.

ACCUSED: *Understood my Lord.*

COURT: *So Mr Dalindyebo what do you want to do, do you want me, do you want to ask for an adjournment, so that we can try and get you legal representation and as such application on your part, because it must be your application, it can't be can application by the Court, it must be your application. It will be supported and recommended by the Court, or do you want to continue with your own defence what do you want to do? Do you want to speak to your subjects?*

ACCUSED: *My Lord I have been under apprehension for quite some time, and I think that my position is that if I don't get assistance on the terms that I am putting before this Court, I will have to go on with this trial without representation. Number one I don't want to waste the time of this Court, and number two this case has been*

drawing, has been going on for such a long time with postponements.

COURT: *Now what is your answer do you want to go on with the case, or do you want to, are you asking for an adjournment, so that you can get legal representation?*

ACCUSED: *My Lord I have considered all options open to me, and my application is that we should go on with the case.*

COURT: *Are you sure that you want to do that do you understand the implications?*

ACCUSED: *My Lord although people will not like the decision I have taken, but I am personally sure that I want the case to go on."*

(My emphasis)

Record of Appeal: Volume 1: P. 189, line 14 to P. 191, line 5

And

"COURT: *You must understand the law of evidence. What evidence you can call, what evidence you cannot call, and if you make a mistake then you must live with that mistake.*

INTERPRETER: *As your Lordship pleases my Lord.*

ACCUSED: *My Lord although I will not understand the legal issues that you are putting to me my Lord, I will have to bear*

with the Court, and I will have to suffer the consequences.

COURT: *You nevertheless still want to continue conducting your own defence?*

ACCUSED: *My Lord I want to conduct my own defence in this case.*

COURT: *Now I can see some of your subjects shaking their heads, they are not in agreement with you, and I agree with those who shake their heads. But it is your choice. Are we carrying on?*

ACCUSED: *Yes my Lord.*

COURT: *Very well. Now there are a number of admissions, which the Prosecution will require you to make before we start, which are of a formal nature.*

ACCUSED: *Yes my Lord."*

(My emphasis)

Record of Appeal: Volume 1: P. 192, lines 4 to 22

And

"***ACCUSED***: *My Lord my respectful appeal to this Court is that we should go on with the case.*

COURT: *Very well, now to get back to the admissions, in the absence of formal admissions being made so this case can continue for the year which is not in your interest, neither is it in the interest of the administration of justice.*

Now because it is my duty to ensure that you receive a fair trial, I will also ensure that you do not make admissions, which you shouldn't make, but I will urge you to make admissions, which will shorten the trial, and which are merely of technical value. You understand that?

ACCUSED: *Yes my Lord."*

(My emphasis)

Record of Appeal: Volume 1: P. 194, lines 3 to 14

And

"COURT: *Now will your require an Advocate or an Attorney from the Legal Aid Board to assist you in making these only for purposes of making these admissions, or are you prepared to go in consultation on your own with Mr Carpenter?*

ACCUSED: *My Lord I will appreciate if an Advocate is appointed by the Legal Board, to look into the question of admissions.*

COURT: *Now you said you wanted Advocate Zilwa to assist you, I can understand that you don't have the funds to finance the trial of two months because that is how long this trial is going to take. But surely if you want Counsel of your choice, you will be able to afford him for an hour, which*

is better than a Legal Aid, and his Counsel of your choice has already consulted with you, he knows the case, and perhaps you can instruct him only for purposes of assisting you in formulating the admissions, I suggest we rather go that route, and then you are happy, you have Counsel of your choice, and I am sure that you have will have the funds to pay him. You see if you go to the Legal Aid Board, then you have got to appeal with my recommendation only for purposes of assisting you relating to the admissions, and that's going to take another two weeks perhaps before the Appeal process is finalised, so it will be quicker to go the private route and employ Mr Zilwa."

(My emphasis)

Record of Appeal: Volume 1: P. 195, line 8 to P. 196, line 6

And

***"COURT**:* *But I urge you Mr Carpenter from our side please to at least get the formal admissions, and the second term admissions in place before we start with the case. …*

***MR CARPENTER**: No my Lord, Just one fact Mr Zilwa had informed me that he intended to make no admissions in that. I don't know what to do, if there will be any point in having him then to point to then do the admissions.*

Mr Sangoni is present, who has been assisting his Attorney, maybe it's not necessary that he does specific Mr Zilwa, but he can get legal assistance to just finalise the 220 Admissions. So our submission is maybe that maybe just inform the accused that legal representation of experienced legal representation like Mr Sangoni might be able to assist him.

COURT: *I thought Mr Stofile was his Attorney?*

MR CARPENTER: *Mr Stofile, Mr Sangoni is a legal representative, but he has been his advisor, he has not been appointed as his legal representative, he is just here.*

COURT: *Is Mr Sangoni in court?*

MR CARPENTER: *He is in court. I don't know if he is in a position to be able to assist.*

INTERPRETER: *He is present in court my Lord.*

COURT: *Mr Sangoni as an officer of the Court may I ask you animus curiae if you will assist the accused in either getting legal representation just for purposes of assisting him in making the formal admissions, or alternatively for you to assist him, can I ask you to do that?*

MR SANGONI: *Yes Sir.*

COURT: *That's very kind of you, and on behalf of the two assessors and myself I want to express our sincere appreciation for your assistance thank you very much. Mr Sangoni will help your, Mr Dalindyebo your Attorney has kindly indicated that he will assist you.*

The matter this case is then adjourned until 10 o'clock."

(My emphasis)

Record of Appeal: Volume 1: P. 196, line 23 to P. 198, line 19

INTEREST OF JUSTICE:

64.

I submit that it is in the interest of justice that leave to appeal be granted as the Honourable Trial Court and SCA's judgment and order materially affects the rights and status of all traditional Courts and leaders throughout South Africa.

CONCLUSION:

65.

I submit that a proper case has been made out for the relief sought and therefore pray for an order in terms of the Notice of Motion.

_____

DEPONENT

SIGNED and SWORN to at _____ on this _____ day of OCTOBER 2015 by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.

_____

COMMISSIONER OF OATHS

FULL NAMES:
BUSINESS ADDRESS:
AREA:
DESIGNATION: