CHAPTER 3

THE EFFECTS OF THE GOVERNMENT ENVIRONMENT ON TRADITIONAL LEADERS

3.1 INTRODUCTION

The government environment consists of three different levels. These levels are called the macro-level or general level, the intermediate level and the micro-level. For the purpose of this chapter, some of the macro-environments will be discussed in detail because they have a direct impact on traditional leaders. The macro- or general environment consists of political, economic, social, cultural and technological components. It includes all influences outside the boundaries of the institution, representing all the factors external to the institution's micro- and intermediate environment influencing the functioning of these environments. In this chapter, the legal environment will be discussed because it includes factors such as the constitutional system, the nature of the legal system and legislation determining the form and control of government institutions.

A full overview of various laws and other policies which have a great influence on the traditional leaders will be provided in this chapter. In this section, the apartheid and the post-apartheid legislation and their impact on traditional leaders will be discussed in detail.

Secondly, the political component of the macro-environment will be outlined because it affects almost every facet of the public administration and traditional leaders, since these are influenced, directly or indirectly by factors such as the system of government, the Constitution, the Bill of Rights and the promulgation and implementation of laws. The political component consists of the regulations with which the authorities of a state regulate the structures and the processes within a state. These include the general political climate, the degree and nature of political power and the political party system (Du Toit and van der Waldt, 104:1999).

Thirdly, the social environment will also form a significant part of this chapter because it involves the nature, quantity and distribution of human resources. It relates to the class structure and mobility, social roles, the nature of social organisation and the development of social institutions. Due to the wide-ranging nature of the concept *social* , the cultural environment is included in the term *social environment*.

Traditional leaders play a significant role in the social environment. The social environment plays an important role in the government actions and administrative framework because any government activities potentially have an impact on people. For example, legislation to effect the apartheid policy and separate residential areas had a drastic influence on the social environment in South Africa. The heterogeneous South African population consisting of many subcultures and linguistic diversity have a direct impact on the social environment. The main aim of the government is to provide goods and services to the community so as to improve the general welfare of the society.

In this chapter, legal, political social as well as the economic environmental components will be discussed in detail. The main objective of the chapter is to establish to what extent does the impact of the government macro environment has on traditional leaders.

3.2 LEGAL ENVIRONMENT

According to Du Toit and Van der Waldt (1999:117), the legal environment includes the constitutional system, the legal system and the legislation determining the form and control of government institutions. In this section, the apartheid and the post-apartheid legislation will be discussed as far as it relates to traditional leaders and related institutions.

3.2.1 Legal environment during Unification

The arrangements with regard to local government were maintained with the establishment of the Union of South Africa on 31 May 1910 in terms of Section 85 of the South Africa Act, 1909. According to Cloete (1997:12) municipal affairs were

made the responsibility of the provincial authorities. For many years, the central government showed little interest in municipal affairs and contributed nothing to the development of local government and administrative systems for South African urban and rural areas. In 1912, the Local Government Ordinance, no. 17 of 1912 of the Transvaal as an example of previous municipal arrangements became effective and remained almost unchanged until the Local Government Ordinance,17 of 1939 was passed. This system provided for a council with a mayor, deputy mayor, committees and professional officials (De Beer, 1995:26).

In 1922, the Stallard Commission was appointed by the central government to investigate local government issues affecting blacks and it established that blacks had to be involved in their own government. The Commission also pleaded for the creation of advisory committees to serve as a link between white local authorities and black local authorities. In the meantime, the central government was forced to create a liaison mechanism with regard to influx control (De Beer, 1995:28).

The Urban Areas Act, no. 21 of 1923, was promulgated and its most important purpose was to limit the number of Black people within an urban area to the labour requirements of that area (Reddy, 1999:53). This meant that only the Bantu (as previously defined) employed in an area, were entitled to live there. Other important provisions of the Urban Areas Act, no. 21 of 1923, were that local authorities should be responsible for the housing of the Bantu within their areas and that all revenues from townships should be spent on them. This entailed the setting up, by municipalities of a native revenue account. Black advisory boards in townships were established to bring the views and desires of residents to the attention of the municipal council (Cloete, 1989:25).

When the Transvaal became a province of the Union of South Africa various activities of the municipal establishment, regional councils and other similar local authorities became the responsibility of provincial councils (Blum, Fergurson, Humell, Krause, Lawrence,van Aswagen and van Rensburg,1986:285).

3.2.2 The legislative impact on the powers and functions of traditional leaders during the National Party government

Traditional leaders, both chiefs and headman currently still have the powers and functions accorded to them under colonialism and apartheid as contained in various pre-1994 legislations. The Black Administration Act, no. 38 of 1927, the Black Administration Act, no. 68 of 1951 and the Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service were established to govern the affairs of traditional leaders. Some of the roles of traditional leaders under the preceding legislation were as follows:

- to promote the interests of the tribe or community;
- to support and actively encourage the moral and social well being of the traditional leader' s people;
- to report any condition of unrest or dissatisfaction to the government;
- to inform his people about new laws, orders and instructions;
- to convene meetings of the people when requested by government and ensure attendance.

3.2.3 The establishment of town councils for municipalities

Section 6 of the Municipal Elections Ordinance, no. 4 of 1927 entailed the establishment of town councils for particular municipalities. Councils of municipalities lawfully established prior to the commencement of this ordinance and mentioned in the second schedule to this Ordinance, was be deemed to be town councils constituted under this ordinance and members thereof, were elected under the provisions of the Municipal Elections Ordinance, no. 4 of 1927 and any amendment thereof. Such councils were regarded as a body corporate capable in law of purchasing, holding and alienating land and generally of doing and performing such acts and functions as bodies corporate could by law do and perform, subject to the

provisions of this Ordinance and any other law. In the case of works which, at the commencement of this ordinance were already in the process of execution under any law existing before such commencement could continue.

Section 7(a) of the Local Government Ordinance, no. 17 of 1939 (Transvaal) dealt with the constitution of areas of existing municipalities as follows:

- The areas of jurisdiction of town councils constituted under the provisions of Section 6(2) were areas of municipalities as defined by law or proclamation at the commencement of this Ordinance, provided that the powers vested in the Administrator by Section 9 of this ordinance could be applied in the case of any municipality for which a town council was constituted under Section 6 of this ordinance.

- Any outside area held by a council for the purpose of the tramway, electrical light or waterworks, cemetery, sewerage or drainage works or any other municipal undertaking were under the control, jurisdiction and powers of the council but were not part of the municipality and to that extent were subject to the provisions of this ordinance.

Section 9 of the Local Government Ordinance, no. 17 of 1939 (Transvaal) determined the power of the Administrator in regard to municipalities as follows:

(1) Subject to the provisions of this ordinance, the Administrator was authorised exercise all or any of the following powers :

(1)(a) declare one or more towns, villages or areas, whether such towns, villages or areas are contiguous or not, to be a municipality under the jurisdiction of a town council and constituted for such a municipality, a town council to be elected in the manner provided by the Municipal Elections Ordinance, no. 4 of 1927(Transvaal). In terms of Section 9(a), which entailed the establishment of the city council, the administrator may by proclamation in the official Gazette, declare a town council to be a city council and the municipality of such town to be a city. It is obvious that during the period under review, traditional leaders were not identified specifically.

They were not assigned functions to perform. Traditional areas were not specifically established and could thus not attend to their followers' needs.

3.2.4 The legislative impact on the establishment of advisory black committees

In 1945, the Blacks (Urban Areas) Consolidation Act, no. 32 of 1945, provided for the creation of advisory black committees for every black residential area. These committees mostly comprised accepted leaders from the various communities. Liaison was established with the town manager or town superintendent, as this person normally acted as chairperson of the committees. Nevertheless, liaison between white and black authorities failed, especially because communication did not take place on an equal footing (De Beer, 1995:29).

3.3 THE IMPACT OF LEGAL ENVIRONMENT ON LOCAL GOVERNMENT DURING THE NATIONAL PARTY GOVERNMENT

3.3.1 The creation of racially based local authorities

From 1948, the National Party government created separate racially based local authorities for each of the four racial groups (as identified for policy purposes) in the country. White local authorities were the most favourably endowed in terms of resources, facilities, services and business and industrial areas. The other three subsystems, which were the black local authorities, coloured management committees and Indian local affairs committees, were all inferior and were not viable since only some of the facilities and services could be duplicated in these areas (Cloete, 1995:2).

It must be noted that the national party came into power on the manifesto of White supremacy in government. Thus no provision was made in the policies for the accomodation of Black (Coloured or Indian) citizens. Legislation passed since 1948 provided for racially based policies concerning labour, housing, health, education. No recognition was afforded to traditional systems in the first phase of the National Party 's rule. It was only late in late 1970s when the so called Bantu systems were developed that traditional systems were acknowledged. However the tribal authorities

that were established were often politically motivated to enable Government to locate them to specific geographical areas and thus to separate them from the rest of society.

In 1948, the Continuation of Local Authorities' By-Laws and Regulations Ordinance, no. 19 of 1948, was enacted for some of the municipalities as follows:

Section 2 of this Ordinance entailed the regulations and by-laws of a local authority to be applicable to a newly established local authority. Whenever, under the provisions of any law applicable to a local authority, one class authority is constituted for any area in lieu of another class of local authority. A portion of a municipality is exercised from a separate local authority and when such new local authority is constituted, shall, in the absence of any provisions of the law , be deemed to continue to be in full force and effect until duly revoked or amended. In 1948, different systems of local government were created in accordance with the criteria of population groups (De Beer, 1995:29).

3.3.2 The division of ethnic groups

Traditional leadership institutions were administered in accordance with the now repealed Group Areas Act, no. 77 of 1957, which provided for the application of the policy of separate development to urban areas. This had to be done by creating group areas for occupation by different race groups (Cloete, 1992:194).

During the apartheid dispensation, local government consisted of local authorities for whites, Indians, coloureds and blacks. It should be borne in mind that the policy of separate development was also applicable to large numbers of the black population residing on farms owned by whites and in the urban areas outside the self governing territories and the then independent states(territories created by the National Party government give effect to the policy of separate development(apartheid) (Cloete, 1992:197).

3.3.3 Local government administration and elections

The Local Government (Administration and Election) Ordinance, no. 40 of 1960, (Transvaal) was enacted to amend the Municipal Elections Ordinance, no. 4 of 1927; the Local Government Ordinance, no. 17 of 1939; the Municipal Elections Amendment Ordinance, no. 22 of 1950; to repeal the Election of Mayors and Deputy Mayors in Designated Municipalities Ordinance, no. 27 of 1951; and to amend the Municipal Elections Postponement Ordinance, no. 42 of 1960.

This Ordinance of 1960 made provision for the establishment of a management committee for particular town or village councils and health committees. These committees were responsible for the administration of matters relating to such councils or health committees and for circumstances under which committees may be established for a municipal council and for such management committee. It further made provision in respect of a council in connection with the appointment of a town clerk as chief executive officer. They provided in particular cases for the appointment of a town secretary. Traditional leaders were prohibited to vote by the apartheid laws during the municipal elections.

The next section will provide a brief background of the legal environment from 1961 until 1983.

3.4 THE ROLE OF THE REPEALED NATIONAL PARTY GOVERNMENT LEGISLATION ON TRADITIONAL AUTHORITIES

The role of the repealed apartheid legislation in developing local government from 1961 to 1983 and how different races and traditional leaders were governed by the National Party's central government will be discussed in this section.

The establishment of the Republic of South Africa in 1961 did not bring about radical changes to the existing system of local government. The provisions of Section 85 of the South Africa Act, 1909 were retained in section 84 of the Republic of South Africa Constitution Act, no. 32 of 1961. This section authorised the provinces to

develop local government. It was during this period, that coloured and Indian local authorities were established (De Beer, 1995: 30).

3.4.1 Legal environment at national level

At national level, the same principle of segregation of population groups applied. The different races were governed by central government, which discriminated against the blacks, coloured and Indians. Black urban councils that were created in terms of the Black Urban Councils Act, no. 79 of 1961, eventually replaced the former advisory committees. It was an attempt to eliminate the lack of balance created by the system of advisory committees (De Beer, 1995: 29). The Black Urban Councils Act, no. 79 of 1961 made provision for the transfer of executive functions to councils but then only as the white urban local management deemed fit and with the approval of the responsible minister. The powers that were transferred were mostly of a mere advisory nature. A later amendment to the Act determined that the black urban council would remain subject to the white urban council in the performance of its functions. These problems led to the transfer of the administration of black affairs to 14 administration councils established in terms of the Administration of Black Affairs Act, no. 19 of 1971. It was hoped that blacks would in this manner play a role in their own government. Such administration council would be vested with important executive functions, the result being that it would govern its own people and would merely be responsible to central government (De Beer, 1995:29). This legislation did not provide for the acknowledgement of traditional authorities. The latter was dealt with by legislation passed by Parliament and not considered a provincial competence.

3.4.2 The establishment of consultative committee and management committee

The Local Government(Extension of powers) Ordinance , no. 22 of 1962 (Transvaal) was enacted by the Provincial Council of Transvaal in order to provide for the establishment of a consultative committee, management committee or a local authority for a group area or portion thereof or for a free settlement and to provide for

matters incidental thereto. In terms of Section 2 of this ordinance, the administrator may by notice in the Provincial Gazette:

- establish a consultative committee or a management committee within the area of jurisdiction of a local authority for one or more group areas or for one or more portions of a group area established for the white group or a portion of such a group area, and situated within the area of jurisdiction of that local authority;

- alter the area for which a consultative committee or a management committee has been established by decreasing it or by incorporating therein one or more group areas or one or more portions of a group area or group areas established for the same group and situated within the area of jurisdiction of the same local authority;

- increase or decrease the number of consultative committees or management committees; or disestablish a consultative committee or a management committee.

Section 2 (a) , of the Local Government (Extension of Powers) Ordinance, no. 22 of 1962(Transvaal) constituted the delegation of powers by a local authority to a management committee as follows :

1) A local authority may, subject to the provisions of subsection (2), delegate to a management committee, either generally or specifically, any power, function or duty, of whatever nature conferred on it by any ordinance, subject to such conditions and restrictions as it may deem expedient, and that management committee shall exercise such power and perform such function or duty within the area for which it has been established under the supervision and control of a local authority.

2) The power of a local authority to

a) make by-laws;

b) levy or remit rates;

c) make changes or charge fees and to reduce such charges or fees; or

d) obtain borrowing powers and raise loans.

e) It is obvious that provincial ordinances under the previous constitutional dispensation did not acknowledge traditional authorities as areas falling within the so called Bantustans. In the latter areas each government established its own legal rules regarding municipal affairs, but did not make particular provision for traditional leaders.

3.4.3 The 1983 Constitutional dispensation

In 1983, the government announced the principles and guidelines for a new constitutional dispensation at central, provincial and local level. It posed far-reaching consequences for local government. The most important of these were:

- the principle of the maximal devolution of powers and decentralisation of administration at local government level was accepted;

- joint services had to be rendered on a metropolitan and regional basis, for purposes of which bodies had to be created in which delegates would represent local authorities on some or other proportional basis designated by the authorities themselves (De Beer, 1995:34).

According to De Beer (1995:35), the Government's proposals were contained, among others, in the Republic of South Africa Constitution Act, no. 110 of 1983. Another important Act, which specifically related to local government reform, was the Promotion of Local Government Affairs Act, no. 91 of 1983. This Act laid the foundation for full participation by all population groups in local government and created a forum for consultation with all communities on local government issues.

3.5 THE ESTABLISHMENT OF THE NATIONAL PARTY 'S GOVERNMENT FOUR MUNICIPAL SYSTEMS

This section will outline how the four municipal systems were established and were administered by the previous regime's legislation. The role of the first local government democratic elections in 1995 will also be discussed because the elections resulted in power being vested in the municipal ward councillors.

The development of local government from 1983 was based on the Promotion of Local Government Affairs Act, no.91 of 1983. This Act laid the foundation for the full participation by all population groups in local government. It created a forum for consultation with all communities on local government issues. The government of the day accepted decentralisation as an important method through which decision-making powers could be entrusted to regional and local government even though local government was not inclusive of all populations (De Beer, 1995:40).

According to De Beer (1995:40), local government was subject to general law with regard to matters having to be dealt with at local level on a mutual basis and with the exception of the following:

- any matter entrusted to local authorities by or in terms of the general law;

- the execution of loan powers by a local authority other than in accordance with general policy determined by the State President acting according to the directives of Section 19(1) (b) of the Constitution.

There is no doubt that the skewed logic of apartheid is most clearly expressed in the political geography of local government. This is most distinctly illustrated by the racial divisions. In the early 1990s, local authorities presided over communities divided into racially distinct white, Black, Indian and coloured groups. Municipal boundaries demarcated areas of high-taxable development and concentrations of relatively wealthy white residents. The poorer non-white residents were forced to live in areas where the income was limited as most non-white areas lacked business and industrial areas. Houses were also rented in most cases and no property tax could thus

be levied. Revenue denied from services changes was limited and since 1980 a service levy boycott resulted in the decline of non white municipalities (Allan, Gotz and Joseph, 2001:6-7).

3.5.1 The constitutional and legislative impact on traditional leaders

The Republic of South Africa underwent fundamental constitutional transformation in terms of the interim Constitution of the Republic of South Act, no. 200 of 1993. It repealed the Constitution of the Republic of South Africa Constitution Act, no. 110 of 1983 and came into effect on 10 May 1994.

Section 4 (1) of the Constitution of the Republic of South Africa Act, no. 200 of 1993 (later influenced by the Constitution,1996) states that this Constitution shall be the supreme law of the Republic and any law or Act inconsistent with its provisions shall, unless otherwise provided expressly or necessary implicated in this Constitution be of no force and effect to the extent of the inconsistency. It also states that this Constitution shall bind all legislative, executive and judicial organs of state in all spheres of government. Section 174 (2) of Chapter 10 of the 1993 Constitution provides for local government to consist of may be metropolitan, urban and rural local governments with differentiated powers, functions and structures according to considerations of demography, economy, physical and environmental conditions and other factors which justify or necessitate such categories. Subsections 174 (3) and (4) of the 1993 Constitution provide that:

3) a municipality shall be autonomous and within the limits prescribed by or under law, shall be entitled to regulate its affairs;

4) Parliament or provincial legislature shall not encroach on the power, functions and structure of a municipality to such an extent as to compromise the fundamental status, purpose and character of a municipality.

3.5.2 Local government Transformation phases

The ineffectiveness and inefficiency of the system of local government found in South Africa led to the transformation of local government, which occurred in three phases from 1994 to 2000 and these phases will be discussed below. The Local Government Transition Act, no. 209 of 1993 makes provision for:

- the pre-interim and interim phases for the restructuring of local government;
- the establishment of provincial committees for local government;
- the establishment of local forums for negotiating the restructured form of local government in each area for the pre-interim period;
- provincial demarcation boards setting the boundaries of local authorities and delimiting the electoral wards within them (Reddy, 1996:59).

Transformation since 1994 aimed to make municipalities more accountable, financially sustainable and able to deliver critical services to all residents. Changes have included the rationalisation of municipalities from the previous 843 to 283 municipalities; new legislation on operational and financial management; and the re-assignment of powers and functions between municipalities outside metropolitan areas (Intergovernmental Fiscal Review, 2001:123). Since 1994, local government has gone through three stages of transformation as follows:

i. Pre-interim phase: Appointed councils

Starting with the pre-interim phase from 1994 and 1996, racially based local authorities in urban areas were abolished and replaced with non-racial transitional local councils (Intergovernmental Fiscal Review, 2001:123). The first phase led to the establishment of local government structures through combining the existing apartheid councils with oppositional formations, and a nominated form of local government was created. Thus, racially based local authorities in urban areas were

abolished and replaced with non-racial transitional councils. The regional services councils were replaced with Transitional Metropolitan Councils (Sutcliffe, 2001:7).

Part 4 of the Local Government Transition Act, no. 209 of 1993 regulated the local government negotiation process to be undertaken by every community to select, during the pre–interim one of the three specified transitional options to take over some or all of the functions of the apartheid local government bodies. Accordingly, Section 6 provided for the recognition and establishment of forums and Section 7 set out the matters to be negotiated (Cloete, 1995:9).

ii. The interim phase: Elected councils

The second transitional phase was the interim phase, which took place after the local government elections had been held. This phase was interim because it preceded the establishment of democratic municipalities in terms of the new Constitution (Intergovernmental Fiscal Review, 2001:123). The interim authorities were not completely democratic (for example, the Indian, coloured and white areas had the same number of ward councillors as formerly African areas even though their respective populations differed quite considerably) and they did not extend throughout South Africa (Sutcliffe, 2001:7). Part 5 of the Local Government Transitional Act no. 209 of 1993 sanctioned geographical demarcation and establishment of transitional local councils (TLCs) and Transitional Metropolitan Councils (TMCs) for purposes of elections and thus introduced the second (interim) phase of the transformation process (Cloete, 1995:21).

iii. Final phase

The final phase commenced with the implementation of the final constitutional model at local sphere , which had been drawn up by the Constitutional Assembly consisting of the National Assembly and the Senate (Cameron, 1999:85). The final transitional local government phase dealt with the 1993 Constitution (later replaced by the 1996 Constitution). Section 175 of the 1993 Constitution conferred wide statutory, regulative and executive powers and functions to elected local government to maintain and promote the well-being of all persons under its jurisdiction. It

specifically provided that a local government shall, to the extent determined in any law, make provision for access by all people residing within its area of jurisdiction to water, sanitation, transport, electricity, primary health services, education, housing and security to all people, in a safe and healthy environment, provided these services could be rendered in a sustainable manner and are financially and physically practical (Cloete, 1995:28).

3.5.3 The land restitution

Section 2 of the interim Constitution Act, no.200 of 1993 confers the right to enforce restitution of a right in land to a person or direct descendant of such a person or to a community contemplated in Section 12 (2) of the interim Constitution, if the claim is lodged within three years of the date fixed by the Minister of Land Affairs by notice in the Gazette. In terms of Section 3, a person or community as just described is entitled to claim a title inland if he, she or it was prevented from obtaining title as a result of a transaction between that registered owner and the claimant or his or her antecedents in terms of which the aforesaid registered owner held the land on behalf of the claimant or his, her or its antecedents.

Section 13 provides for mediation between competing claims or for instances in which the land in issue is not state-owned. Section 14 provides for certain claims to be referred to the land claims court, which is a court of law. The Land Claims Court has jurisdiction throughout the Republic of South Africa.

The Land Tenure Rights Act, no. 34 of 1996 was enacted and concerns principally tribal land and land in respect of which persons had rights but not ownership. Schedules 1 and 2 outline particular land rights, which are converted in terms of the Act. Section 2 states that any land tenure right mentioned in Schedule 1 and granted in respect of an erf in a formalised township or any erf or other piece of land in such a township for which a township register is opened or any piece of land surveyed under a law, shall at the commencement of the Act be converted into ownership which vests exclusively in the person according to the register of land rights in respect of which the tenure is registered as the holder of the right.

In terms of Section 3 (as amended), any land tenure right mentioned in Schedule 2 and which is granted in respect of any erf or other piece of surveyed land shall upon submission by the holder thereof of a deed of transfer in the prescribed form to a deeds registry be converted into ownership by the registrar of deeds in the name of that person. A proviso is that where the state is the owner of the land outside a formalised township, the deed need not be submitted unless the minister is satisfied after an investigation that the rights or interests of putative holders are being protected and where such land is lawfully occupied by or has been allocated to a tribe or community, a tribal or community for which a resolution has been passed. It must be noted that municipalities are established on the land previously owned by traditional leaders during the colonial era.

3.5.4 The constitutional development and its impact on traditional leaders in 1996

Sections 211 and 212 of the Republic of South Africa Constitution, 1996 provide for the recognition and role of traditional leaders as follows:

211 Recognition of traditional leaders

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 include 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.

212 Role of traditional leaders

1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

2) The role of traditional leaders is to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law.

a) National or provincial legislation may provide for the establishment of houses of traditional leaders; and

b) National legislation may establish a council of traditional leaders

Section 219 (1) (a) of the Constitution of South Africa Act, of 1996 classifies *traditional leaders* as persons holding public office and requires that an Act of Parliament must establish a framework for determining their salaries, allowances and benefits. The framework referred to is set out in Section 5 of the Remuneration of Public Office Bearers Act, no.20 of 1998.It was only after the promulgation of the Remuneration of Traditional Leaders Act, no. 20 of 1998 that all traditional leaders at the level of kings, chiefs and members of the national and provincial houses of traditional leaders received remuneration based on uniform scales determined by the President. It must be noted that the role of a traditional leader is recognised by the Constitution of South Africa as a function of public administration. Thus traditional leaders are on the government ‘s payroll system.

3.5.5 Framework for the restructuring of municipal service provision

The framework for the restructuring of municipal service provision was implemented since 1998 with the adoption of the Municipal Demarcation Act,1998 and the Municipal Structures Act, 1998 for all municipalities including rural municipalities where traditional leaders are based this was required to restructure the apartheid local government system in order to provide services on a non-racial basis and in an equitable manner.

In terms of the Constitution 1996, municipalities are responsible for ensuring the delivery of services to all South Africans. In order to carry out this responsibility, municipalities will need to transform public sector service delivery through a process of restructuring. The broader objectives of the restructuring of local government are as follows:

- to reorganise the areas of operations to ensure that all areas are serviced, leading to the deployment of staff and the integration of the workforce;
- to develop an integrated approach to ensure effective, efficient and affordable service delivery, which includes the reorganisation of service delivery as part of the process;
- to recognise the reprioritisation of finances both at national government and municipal sphere over the medium term;
- to investigate and to give serious consideration to accessing other sources of funding for municipalities with the assistance of the national government;
- to involve communities in decision-making, and building greater accountability between communities and the municipality;
- to build the capacity of municipalities to deliver services.

The South African Local Government Association (SALGA) has a mandate to represent the interests of organised local government in the country's governmental system. According to Burger (2003:1) SALGA's business plan sets out a series of objectives, namely:

- promoting sound labour relations practices that can achieve high levels of performance and responsiveness to the needs of citizens;
- representing, promoting, protecting and giving voice to the interests of local government at national and provincial spheres, in intergovernmental

processes and in e.g policy-making; building the capacity of municipalities to contribute towards a developmental democratic governance system that can meet basic human needs.

3.5.6 Transformation of local government

The first section of the White Paper on Local Government 1998, provides a brief history of local government under apartheid, which points to the origins of many of the problems currently being faced by municipalities in South Africa. It highlights the history of community mobilisation and locates the current transition process in its broader historical context. This section of the White Paper provides an outline of the current local government system and discusses the specific strengths and weaknesses of different models of a transitional municipality created under the Local Government Transition Act, no. 209 of 1993 as it affects the establishment of new structures for a transformed system of local government.

The second section of the White Paper puts forward a vision of a developmental local government. It then focuses on metropolitan municipal institutions and puts forward three key motivations for the retention of metropolitan government systems in metropolitan areas.

On the basis of the White Paper on Local Government and the 1996 Constitution, the following policies governing local government were adopted in order to improve service delivery.

3.5.7 The impact of demarcation of municipal boundaries on traditional leaders

Jurisdictional areas of traditional authorities and municipal boundary issues are a reality. In terms of Section 155 (3) (b) of the Constitution 1996, an independent authority must demarcate municipal boundaries. This authority, namely the Municipal Demarcation Board, was established by the South African local government which resulted in the enactment of the Municipal Demarcation Act, no. 27 of 1998. Section 25 of the Act identifies factors that the Municipal Demarcation Board must take into

account in determining municipal boundaries. One of these factors is the area of traditional rural communities. It must therefore be accepted that in determining the current municipal boundaries, the existing areas of traditional authorities had to be taken into account.

The Local Government Municipal Demarcation Act, no. 27 of 1998, was promulgated to re-demarcate municipalities. The Municipal Demarcation Board was established to re-demarcate municipal boundaries. In terms of Section 24 of the abovementioned Act, it is stated that when the Demarcation Board determines a municipal boundary, its objective must be to establish an area that would enable the municipality to meet its constitutional obligations namely :

- provision of democratic and accountable government for the local communities;
- provision of services to the communities in an equitable and sustainable manner;
- promotion of a safe and healthy environment;
- enabling of effective local government;
- enabling integrated development ; and
- providing a tax base as inclusive as possible of users of municipal services in the municipality.

The Act provides for new boundaries for municipalities. Existing municipalities were re-demarcated and this also includes rural areas. Furthermore it implied that the contiguous areas in some cases extended across provincial boundaries. Thus the situation resulted in mass protest in the following areas:

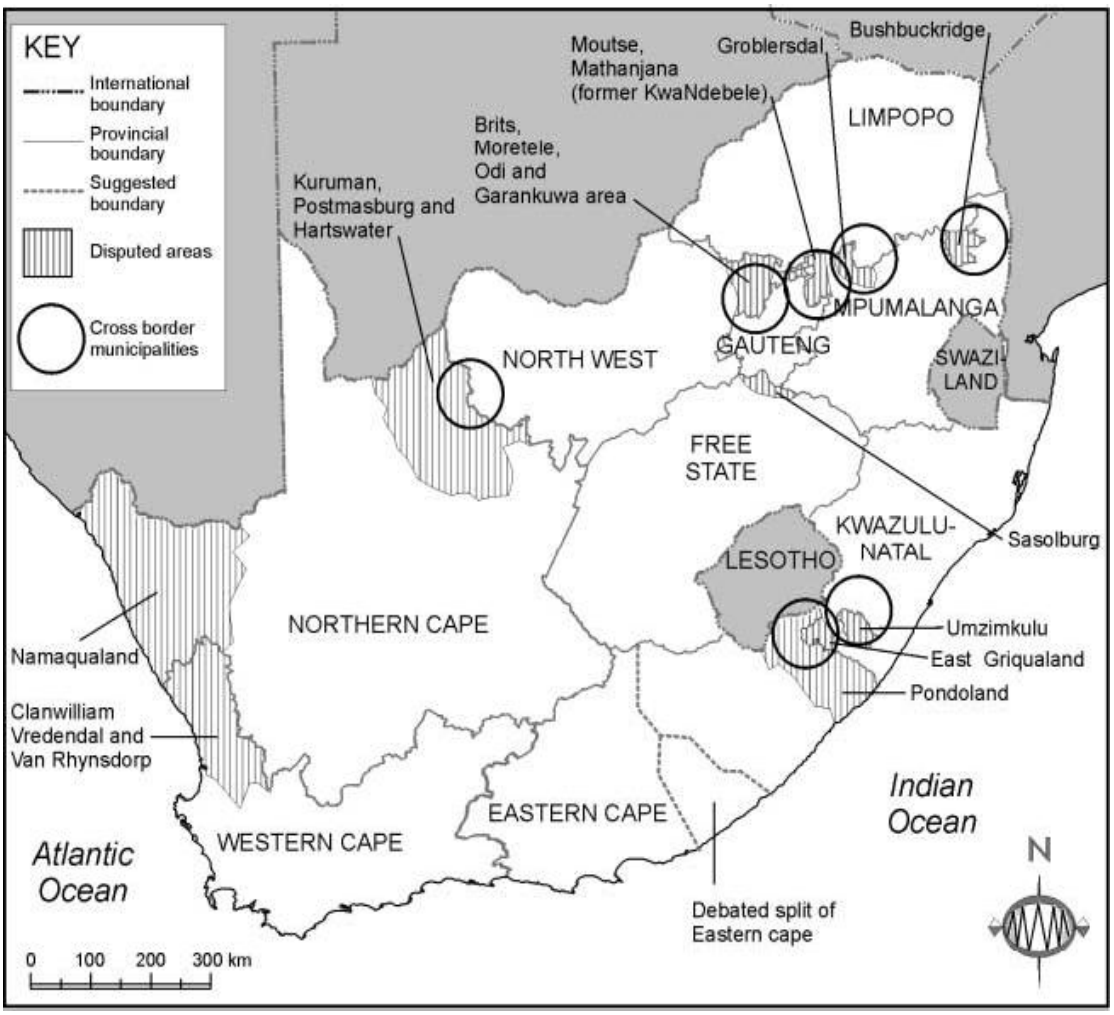
- transferring Kuruman and Postmasburg into the Northern Cape from the North-West Province;

- incorporating Griqualand East into KwaZulu-Natal leaving the Eastern Cape's Umzimkulu as an enclave;

- reassigning parts of Moutse the former KwaNdebele and adjacent areas of Gauteng into Mpumalanga;

- redemarcating parts of the former Bophuthatswana homeland and adjacent areas of Gauteng into the North-West Province (Griggs, 1998:2).

FIGURE 3.1 Disputed areas after the 1993 delimination of boundaries



Source: Ramutsindela (2007:50)

Disputes involving the incorporation of communities into new provinces were dominant in those provinces that included areas of the former Bantustans, namely

Eastern Cape, KwaZulu-Natal, Limpopo, Mpumalanga and North-West. Boundary disputes challenged the demarcation process that confirmed some of the spatial legacies of apartheid. The challenge was increased by the democratic government's failure to support the aspirations and demands of the border communities (Ramutsindela, 2007:49-50).These new areas created under the Demarcation Act, 1998 also included traditional authorities resulting in a complex political dilemma.

Section 3.6 of the White Paper on Traditional Leadership and Governance (notice no 2103 of 2002) states that as a result of the historical determination and adjustment of what are now provincial boundaries, traditional leaders are confronted with issues which are trans-provincial in nature. This has resulted in a situation where a senior traditional leader situated in one province has to perform a customary role in another province. Other factors compounding the cross provincial boundary relationships are the merger and division of communities, the appointment of traditional leaders across boundaries and lately the restitution of land to communities who lost their land in terms of racially discriminatory legislation. Land parcels that are to be restored are in some instances situated in different provinces.

3.5.8 The impact of the local government municipal structures on traditional leaders

The District local municipalities are established in accordance with Sections 12 (1) and 14 (2) of the Local Government Municipal Structures Act, no. 117 of 1998, effective from 1 December 2000.

Section 81 of the Municipal Structures Act, no.117 of 1998 clearly permits the participation in the affairs of a municipal council by traditional leaders to whom the splitting of traditional authority areas apply. It must be borne in mind that a number of traditional authority areas need not be contiguous.

The situation has resulted in the following:

- uncertainty as in which municipality a specific traditional leader should participate in terms of Section 81 of the Local Government Municipal Structures Act, no.117 of 1998;

- disparities in the delivery of services by different municipalities to a single traditional community, should such community fall within the jurisdiction of more than one municipality

- difficulty in the administration of an affected traditional community, should more than one municipality have jurisdiction in the area of such community

In terms of Section 3.7 of the White Paper on Traditional Leadership (Notice 2103 of 2002) traditional leaders may participate in municipal councils in terms of the Municipal Structures Act, no. 117 of 1998. The traditional leaders training programmes should be harmonised with those of municipal councillors. The primary objective of the capacity building programme is to enhance and empower traditional leaders and traditional institutions to enable them respond to challenges arising from the White Paper on Traditional Leadership and Governance and the Constitution.

3.5.9 System of municipal government

The main objective of the promulgation of the Local Government Municipal Systems Act, no. 32 of 2000 is to improve the internal systems and administration of a municipality. It focuses on integrated development planning (IDP) as a departure point for performance management and evaluation, resource allocation and improving the general living conditions of a community. At the same time, one of its objectives is to promote synergy between the local, provincial and national spheres of government and relationships. The Municipal Systems Act, no. 32 of 2000 aims to ensure that municipalities are able to give effect to the vision of developmental local government. It also provides guidelines for setting municipal tariffs with a view to the long-term sustainability of service delivery and meeting the needs of the poorest of the poor. Improved credit control and debt collection measures are envisaged to ensure that municipalities remain financially viable. As traditional communities form part of district municipalities, the Independent Development Plan(IDP) ought to

benefit them as well. However, the Act does not acknowledge traditional leaders specifically and thus does not promote traditional leadership.

3.5.10 The role of traditional councils

The government acknowledged the importance of traditional leaders in South Africa by enacting the Traditional Leadership and Governance Framework Act, no. 41 of 2003 in order to clarify the role traditional leaders should play. Secondly, the Communal Land Rights Act, no. 11 of 2004 was also promulgated with the initiatives to resolve land tenure problems in South Africa's rural areas. In terms of Section 19 of the Traditional Leadership and Governance Framework Act, no. 41 of 2003 a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned and also has to honour applicable legislation.

Section 20 of the Communal Land Rights Act, 2004 outlines the guiding principles for the allocation of roles and functions of traditional leaders as follows:

The national government or a provincial government, as the case may be, may through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of:

- arts and culture; land administration; agriculture; health; welfare; the administration of justice; safety and security; the registration of births, deaths and customary marriage;

- economic development; environment; tourism; disaster management; the management of natural resources the dissemination of information relating to government policies and programs.

Section 20 (2)of the Act states that whenever an organ of state within the national government or a provincial government considers allocating a role for traditional councils or traditional leaders in terms of subsection (1) that organ of state must

a) seek the concurrence of the minister, if it is an organ of state of that province; the member of the executive council responsible for traditional affairs in the province concerned, if it is an organ of that province;

b) consult with the relevant structures of traditional leadership and the South African Local Government Association (SALGA);

c) ensure that the allocation of a role or functions are consistent with the Constitution and applicable legislation;

d) take the customary law and customs of the respective traditional communities into account;

e) strive to ensure that the allocation of a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place;

f) ensure to the extent possible, that the allocation of roles or functions are implemented uniformly in areas where the institution of traditional leadership exists;

g) promote the ideals of co-operative governance, integrated development planning, sustainable development and service delivery through the allocation of roles and functions.

Section 20 of the Act (3) states that where an organ of state has allocated a role or function to traditional councils or traditional leaders as envisaged by sub-section (1), the organ of state must monitor implementation of the function outlined in sub-section (4), namely that where a traditional council does not perform an allocated function envisaged in sub-section (3), any resources given to the traditional council to perform that function may be withdrawn.

3.6 POLITICAL ENVIRONMENT

3.6.1 The Unification

Between 1910 and 1996 (a period of 86 years) South Africa had five constitutions. The South Africa Act of 1909 was enacted by the British Parliament and resulted in the formation of the Union of South Africa 1910. The South Africa Act of 1909 introduced the Westminster system government, with the modification that it also introduced four provinces with legislatures. Only whites conducted the negotiations for the South Africa Act, 1909. People of colour obtained limited representation at the local and provincial levels, but not at national level of government. In 1912, the African National Congress (ANC) led by a traditional leader, Chief Albert Luthuli was formed. The Union of South Africa continued and local government was assigned delegated legislative authority. However, national legislation established advisory committees for black townships, which were under the administration of white municipal councils until 1971 (Craythorne, 1997:2).

3.6.2 Political Environment in South Africa during the National Party Government

The South African experience of democratic government has been very short and was preceded by a long history of white dominated politics. This history can be characterised broadly by five distinct phases: mass mobilisation from 1945 to 1960, the politics of exile from 1960 to 1990, mobilisation and rebellion and internal mass mobilisation from 1970 to 1990; the political transition from 1989 to 1994 and the ascent of the democratically elected government from 1994 onwards. These phases in the evolution of the democratic system correspond with a distinctive style of leadership and set of relationships within the ruling party (Atkinson, 1998:116).

South Africa experienced unprecedented political mobilisation from the mid-1980s onwards culminating in the election of 1994. This mobilisation was channelled through a range of alternative associations under the umbrella of the Mass Democratic Movement (MDM) aligned to the ANC. Insofar as the ANC took part in this mobilisation it was a symbol rather than an organisation and may have had

demoralisation effects on its allies. Since 1994, the ANC and its allies have shown signs of a decline in levels of activism, the consolidation of control by the party in public office over party on the ground and the party in administration. Part of this process involved the assimilation of the leaders of the MDM into government and in some cases their subsequent political marginalisation (Atkinson, 1998:115).

In 1948, when the National Party (NP) came into power, there was a strong movement in favour of establishing group areas for different racial groups and removing coloured and Indian people from common municipal voters' roll forcing them to limit their local government aspirations to consultative, management and local affairs committees (Craythorne, 1997:2). The year 1972 was significant in the former Cape of Good Hope and Natal in that it saw coloured and Indian people finally removed from the municipal common voters' roll and the so-called Bantu Boards established for black townships.

In the light of the above, unrest became inevitable. In 1960, the Sharpeville uprising occurred, followed 16 years later by the Soweto uprising, followed eight years later by the 1984 unrest, followed four years later by the unrest of 1988.Thus the intervals between periods of unrest were diminishing by a half each time this occurred (Craythorne, 1997:3). It is possible to trace the trigger in each case: at Sharpeville it was the inclusion of women in the pass laws; at Soweto it was compulsory use of Afrikaans as the medium of instruction in black schools; in 1984, it was the 1983 Constitution and the implementation of Black Local Authorities Act, no. 102 of 1983; and in 1988, the ANC in exile was clearly hoping for a South African 'Prague' spring, needing just another push to bring about the fall of the then government. Government decisions based were based on poor judgement which created conditions that the ANC inside and outside South Africa could have used to spark off events in the liberation struggle.

South Africa' s second Constitution of the Republic of South Africa, Act. no. 32 of 1961 came about as a result of South Africa becoming a republic under Prime Minister Hendrik Verwoerd. The Republic of South Africa Act no.32 of 1961 was reasonably close to the South Africa Act of 1909, but was certainly no reform document. No great changes were needed because the Westminster model created a

sovereign Parliament that could and did pass some draconian laws as for Blacks, Coloureds and Indians were concerned no provision was made for traditional leaders and no recognition was afforded to indigenous systems (Craythorne, 1997:3).

After Mr. PW Botha became Prime Minister he announced in 1980 that there would be political and constitutional reform, which would replace the Westminster model with a form of power sharing based on the notion of joint decision-making. After a series of ponderous investigations, this led to the tricameral Parliament, with separate houses for whites, coloureds and Indians centred on the concept of own and general affairs; a form of black representation on provincial executive committees, regional services and black local authorities. The structure for this was the Constitution Act no, 110 of 1983, a law structured on centralisation that was so tight that it resembled a classical Marxist approach (Craythorne, 1997:3).

Since the promulgation of the 1983 Constitution, devolution of political power has increasingly been emphasised by the government as a policy priority. In keeping with this objective, the powers of black local government have been increased under the Black Local Authorities Act of 1982 and the Black Communities Development Act of 1984. Coloured and Indian management committees have been given the capacity to become autonomous and to undertake any local government function, in terms of the Promotion of Local Government Act of 1983 (Heymans and Totemeyer, 1988:30).

According to Craythorne (1997:3), if one puts it in parallel, there was on the one hand, a partial loosening but not abandonment of apartheid and, on the other hand, an ever- shortening cycle of violence which, if not stopped, would have led to a bloody civil war. It is at this point that the paradigm shift occurred, starting with secret talks by NP members with ANC members in exile; continuing with the 1989 referendum on power sharing and culminating in Mr FW de Klerk‘s epoch-making declaration of 2 February 1990 that the ANC and other liberation movements were unbanned, that Mr Nelson Mandela would be released and that negotiations for power-sharing were to be held. The Group Areas Act of 1957 was abolished along with some other apartheid measures. This led, in time, to the Congress for Democratic South Africa (CODESA) in 1992, which eventually broke down for a number of reasons. CODESA was followed by the multiparty negotiating body which worked through 1993 at Kempton

Park to produce South Africa's fourth Constitution, namely the interim Constitution titled the Constitution of the Republic of South Africa Act, no. 200 of 1993. The interim constitution for the first time in the history of South Africa, constitutionally entrenched the existence and status of local government.

The interim Constitution provided for the National Assembly and for the Senate, sitting jointly, to be the constitutional assembly for the negotiation of a new and final constitution according to a set of constitutional principles. The Constitutional Assembly worked from 1994 to 1996 and after a delay the constitutional text was finally certified by the Constitutional Court and became the Constitution of the Republic of South Africa, 1996 which was assented to by President Mandela and published on 18 December 1996. Despite the withdrawal of the NP, the concept of a government of national unity continued until 30 April 1999 or until the President was elected after the next elections for the National Assembly (Annexure B to Schedule 6 to the Constitution, 1996 (Craythorne, 1997:4).

It must be noted that during the National Party government the Bantustans were created and many legitimate traditional leaders were displaced and eliminated. The role of traditional leaders was outlined in the repealed legislation which governed the Bantustans system.

3.6.3 The reformed municipal elections

This section outlines the processes of the first democratic local government elections in South Africa.

The democratisation of South African local government was brought to a satisfactory conclusion with local government elections being held in eight provinces except KwaZulu-Natal because of the municipal demarcation boundary problems in November 1995. The run-up to the local government elections started on 27 January 1995 and a 90-day campaign resulted in 23 million potential voters being registered. The registration process, which started officially in January 1995, was a completely new concept to most voters as they had little or no experience of democratic local government. A local government task team was established to facilitate registration,

ensuring that the process was co-ordinated and standardised at national sphere. The objective was to ensure that the elections in November 1995 were free and fair and efficiently managed. Other functions included, *inter alia*, ensuring uniform election regulations, assisting where problems arose, ensuring adherence to time frames set, mobilising resources of whatever nature whenever necessary, and organising and overseeing voter education (Anon., 1995:7).

The task group introduced a communication plan to promote participation in the elections. The overall aim of the communication plan was to encourage all adult South Africans to participate in the elections by:

- emphasising the impact local government has on lives;
- explaining the composition and functions of the new municipalities
- explaining the electoral process from voter registration to polling day.

The target group consisted of metropolitan or urban voters, rural voters, community leaders and organisations, news media executives, women's organisations, school and tertiary institutions as well as youth organisations. The campaign was planned and executed in support of the overall government communication strategy, reflecting progress made in transforming the lives of the South Africans. The campaign, which was non-partisan, objective and credible, was allocated R42-million by the central government (Anon. 2000:2).

In terms of results, the local government elections reflected national trends set in the April 1994 elections but with less enthusiasm and lower polls (Streek, 1995:25). It was generally accepted that the resources, finance and organisational skills of the different political parties also influenced the results. In the April 1994 elections, all the political parties received substantial funding from the taxpayer through the Independent Electoral Commission. Consequently, this enabled them to launch massive advertising campaigns, hire staff and offices and , generally, maintain a high profile. The local government elections were, however, organised by the nine

provincial governments, none of which had the necessary resources to subsidise the costs of political campaigning (Streek, 1995:26).

Well-resourced political parties who were able to raise funds consequently had greater organisational strengths. This impacted on voter registration as well-organised parties ensured that more of their supporters were registered to vote than the opposition's supporters. The elections also gave South Africans an opportunity to call the parties to account. In addition, the elections provided the opportunity to call the parties to account. (Reddy, 1996:13). Given these developments, local government elections were indeed an important event in the country's political history (Reddy, 1996:14).

Since the first democratic local government elections of 1995 and 1996, rural communities have municipalities headed by democratically elected councillors, representative of their interests. On the district councils, black councillors are now generally in the majority even if they often inherited the same boundaries, structures and staff from the regional services councils or joint services boards. This change in composition is obviously not sufficient to transform the structures from ones which focused purely on the delivery of hard infrastructure to organisations more attuned to developmental and democratic approaches. The most visible differences concern the types of primary level of local government and also the relationship between the councils and the administrative structures (Atkinson, 1998:97).

Local government elections were held in seven provinces on 1 November 1995. The elections in KwaZulu-Natal and the Western Cape were held in May and June 1996 respectively. The reasons for the postponement of the elections in these provinces were demarcation or ward disputes, the inclusion of tribal areas led by traditional leaders and the absence of a model for rural local government. This sphere of government is now in place in all parts of the country and South Africans can once again congratulate themselves on their good sense and pragmatism in completing the structure of democracy (Reddy, 1999:203).

3.6.4 The 2000 local government elections

The 2000 local government elections ushered in a new system of local government in a five-year period. The 2000 local government elections marked the final stage in the democratic transformation of South Africa. After the first fully democratic national and provincial elections in 1994, transitional local government elections were held in 1995 and 1996. After that, policies and legislation were developed and the Municipal Demarcation Board set the municipal boundaries and municipal elections were held on 5 December 2000 to complete the democratic transformation of local government in South Africa (Anon. 2000:1). Institutions involved in the democratic transformation in South Africa included the Department of Provincial and Local Government, the Municipal Demarcation Board, the Department of Home Affairs and the Independent Electoral Commission(IEC), which was responsible for the registering of voters and conducting the municipal elections (Anon.2000:1). The elections, constituted a landmark in the democratic consolidation in South Africa.

3.7 CULTURAL ENVIRONMENT IN SOUTH AFRICA

South Africa is the only nation-state named after its geographic location; there was general agreement not to change the name after the establishment of a constitutional non-racial democracy in 1994. The country came into being in 1910 that united two British colonies and two independent republics into the union of South Africa (Van Wyk, 1998:1).

The population numbering approximately 40 million, consists of eight officially recognised groups as Blacks; white Afrikaners, descended from Dutch, French, and German settlers, who speak Afrikaans, a variety of Dutch; English speaking descendants of British colonists; a mixed race population that speaks Afrikaans or English and an immigrant Indian populations that speaks primarily Tamil and Urdu. A small remnant of Khoi and San aboriginal populations lives in the extreme northwest. Rural areas are inhibited primarily by Bantu speakers and coloured speakers of Afrikaans. The largest language group is Zulu. Black Africans make up about 77% of the population, whites about 11%, Coloureds about and Indians over 8% and other minorities less than 4% (Van Wyk, 1998:2).

South Africa has early human fossils at Sterkfontein and other sites. The first modern inhabitants were the San (Bushman) hunter-gathers, and the Khoi (Hottentots), who herded livestock. The San may have been present for thousands of years and left evidence of their presence in thousands of ancient cave paintings (rock art). Bantu speaking clans that were ancestors of the Nguni (today's Zulu, Swazi, and Tsonga peoples) and Sotho language groups (today's Batswana and Southern and Northern Basotho) migrated down from east Africa as early as fifteenth century (Van Wyk, 1998:3)

In the interior after nearly annihilating the San and Khoi, Bantu speaking peoples and European colonists opposed one another in a series of ethnic and racial wars that continued until the democratic transformation in 1994. Conflict among Bantu speaking chiefdoms was common and severe as that between Bantus and whites. In resisting colonial expansion, black African rulers founded sizable and powerful kingdoms and nations by incorporating neighbouring chieftaincies. These resulted in the emergence of the Zulu, Xhosa, Pedi, Venda, Sotho, Tsonga nations along with Afrikaners (Van Wyk, 1998:3)

According to Grant (2006:6) protection of cultural rights in the South African Constitution is clearly heavily influenced by international human rights. The Constitution of the Republic of South Africa, 1996 describes South Africa explicitly as one sovereign democratic state and establish a common South African citizenship which recognise and protects the diversity of languages and cultures represented within commonality. Sections 30 and 31 provide particularly for the protection of culture. Section 30 states that every person shall have the right to use the language and to participate in the cultural life of his or her choice.

The aim of protection and maintaining cultural diversity is given further impetus by Section 85 of the Constitution which mandates the creation of a commission for the promotion and protection of rights of cultural, religious and linguistics communities The stated objects of the commission are the promotion and development of peace, friendship, humanity, tolerance and national unity among such communities (Grant, 2006:6).

Section 211 specifically requires the application of customary law to be consistent with the Constitution. Section 39 emphasises this first by obliging courts to promote the spirit, purport and objects of the Bill of Rights in interpreting legislation and developing common and customary law. The subjection of the right to culture and customary law to the Constitution and in particular to the Bill of Rights was bitterly contested during the constitutional negotiations which preceded agreement on the 1993 interim Constitution and again during the process of ratification of the 1996 Constitution.

The Congress of Traditional Leaders of South Africa (CONTRALESA) led the lobbying to exclude culture from of the Bill of Rights. The position was motivated in part at least by resistance to the imposition of what is seen by many as Western values as well as a desire to reassert the worth and importance of customary law and tradition. Decades of political and cultural dominion have left African peoples highly suspicious of the agenda of the proponents of modernisation. The culture protection lobby is concerned that without appropriate language in the Constitution specifying the rights of people to be themselves, the international human rights movement with its individualistic influences will swamp them on its march towards recreating the world in the image of the West (Grant, 2006:7-8).

In the first half of the apartheid period, there was a close relationship between race and class but the relationship weakened in the later apartheid years and has continued to weaken rapidly after the end of apartheid. The relationship is weakened not because of growing numbers of poor white people, but because of rising intra racial inequality within the majority black population. At the top end, the black middle class and elite have been growing rapidly. At the bottom end, unemployment confines many to chronic poverty in a society without significant subsistence or other means of sustaining an acceptable level of living. agriculture (Seekings, 2003:109).

In the pre-1940 period, public welfare was established for white and coloured people through a combination of immigrant working-class power and the social and economic solidarity present in the emergent Afrikaner nationalist politics. Unusually and probably because of the latter factor the welfare system entailed a hefty dose of social assistance alongside social insurance.

In the 1940s, this racially exclusive system was extended to blacks and Indians through various policies. After the election of the National Party to government in 1948 the state toyed with the idea of undoing the multi-racial public welfare system but politics proved different from the politics of expansion. For two decades, the apartheid state resorted to minimising redistribution through widened racial discrimination in benefit levels. From around 1970 the National party sought to appease blacks, coloureds and Indians on racial and slowly removed racial basis discrimination in the benefit levels. Parity was only obtained under the democratically elected government in 1993 (Seekings, 2003:110).

3.8 CONCLUSION

Chapter 3 dealt with the impact of the government environment on traditional leaders. The chapter outlined the macro-environment because it has a direct impact on traditional leaders. The macro or general environment consists of political, economic, social, cultural and technological components. It includes all influences of traditional leaders outside the boundaries of the institutions, areas of jurisdiction which are all the factors external to the institution's micro- and intermediate environment that influence its functioning. In this chapter the legal environment was discussed because it includes factors such as the constitutional system, the nature of the legal system and legislation determining the form and control of government institutions. Without a proper understanding of the correct use of the repealed legislation and the current legislation it would be difficult to follow the discussion presented.

A full overview of various laws and policies, which had a great influence on the traditional leaders, was provided in this chapter. In this section, the apartheid and the post-apartheid legislation and their impact on traditional leaders were discussed in detail. The political component of the macro-environment was outlined because it affects almost every facet of the public administration and traditional leaders, since these are influenced, directly or indirectly, by factors such as the system of government, the Constitution, the Bill of Rights, and the promulgation and implementation of laws.

The political component consists of the regulations with which the authorities of a state regulate the structures and the processes within a state. These include the general political climate, the degree and nature of concentration of political power and the existing party system. The three transitional phases of local government in South Africa, which are the pre-interim, interim and final phases, were also outlined. The 1995 and 2000 local government elections were discussed in detail because the municipal elections had both a negative and positive impact on the structures of traditional leaders' structures. Traditional leaders were positively impacted by equal service delivery by rural municipalities and were also negatively impacted by the demarcation of municipalities as well as the powers vested in the ward councillors.

The social environment formed a significant part of this chapter because it involves the nature, quantity and distribution of human resources. It relates to the class structure and mobility, social roles, the nature of social organisations and the development of social institutions. Due to the wide-ranging nature of the concept *social*, the cultural environment is included in the term *social environment*. The economic environment was discussed in detail, as well as the main aim of the government to provide goods and services to the community in order to improve the community's general welfare. In drawing up the national budget provision for the general interest of the community is made as well as setting priorities for the use of public funds.

The next Chapter consists of a discussion of the history and role of traditional leaders in the promotion of service delivery. The Royal Bafokeng Administration will be discussed in detail as a case study. Traditional leaders had the ability to render services in their territories and community. Traditional leaders' public services were in existence during the pre-colonial era and every tribal chief was an authority on all aspects of life in the community. Traditional leaders led military expeditions, initiated and performed a variety of ceremonies to promote the well being of the tribes, maintained peace and order and allocated tribal land. The chief in council delegated some of his powers and functions to the heads of smaller administrative units called *izinduna* (Zulu) *tindhuna* (Tsonga) or headmen, who were the extensions of the chief's authority.

CHAPTER 4

THE ROLE OF TRADITIONAL LEADERS IN MUNICIPAL SERVICE DELIVERY: A CASE STUDY OF THE ROYAL BAFOKENG ADMINISTRATION

4.1 INTRODUCTION

The history of traditional leaders will be discussed in detail in this chapter. Traditional leadership is an institution that has developed over many hundreds of years in Africa. It has served the people of Africa through wars, periods of slavery, famine, freedom struggles, economic and political restructuring and during colonial and apartheid periods. The institution of traditional leadership is rooted in Africa and in the hearts and minds of all ordinary Africans taking pride in its history, culture, origin and identity. Central to the institution of traditional leadership customs, traditions and cultural practices form the basis of the legal system which regulate the lives of the people. Every traditional community has defined territorial boundaries. Communal ownership of land is the cornerstone of the economic life of people.

Prior to the introduction of colonialism, social organisation in South Africa was characterised by a number of tribal regimes based on patriarchy and inscriptive norms. Each tribe, as is still the case, has a traditional leader as the central figure. The traditional leader was the highest authority in the territory and had various functions which were not exercised autonomously by an individual, but in collaboration with a tribal council that represented the people. The people saw the traditional leader not only as a link between people and the ancestors but also as a spiritual, cultural and judicial leader and the custodian of the values of the community. The Traditional leader was the co-ordinator of the various aspects of everyday life, the realisation of community dreams and aspirations and the creator of harmony between people and the natural, spiritual, social and economic environment.

Traditional leadership is one of the oldest institutions of government, both in Africa and the rest of the world. It predates colonialism and apartheid and it represents early

forms of societal organisation. The rest of the world has gone through eras of monarchical rule of one form or another. All absolute monarchies in the world have now given way to new forms of societal organisation, which in the main are democratic forms of government. South Africa has been similarly affected by the worldwide trend towards democracy. With the advent of colonialism, the institution of traditional leadership was subjected to repression and was used as an instrument in the implementation of such colonial policies as indirect rule. However, notwithstanding oppression by successive colonial and apartheid regimes, the institution of traditional leadership pioneered resistance and led numerous struggles against colonialism. The advent of democracy in South Africa is also due to that pioneering role which traditional leaders played.

In South Africa between 11 and 18 million people currently fall under the jurisdiction of approximately 800 traditional leaders. These leaders do not exercise their functions alone; a single traditional leader may be assisted by up to 10 or more subordinate leaders resulting in a total of some 10 000 traditional leaders. Any decision on traditional leaders and institutions could therefore affect nearly 40% of the South African population (De Villiers, 1997:40).

The indigenous people living in South Africa in the various parts of the country when the Europeans arrived were nomadic people who moved from place to place with their cattle. The settlements which were more or less comparable with white urban areas were the tribal settlements established by the Africans in the territories which later became known as Ciskei, Transkei, KwaZulu-Natal, Qwaqwa, Bophutatswana, Venda, Gazankulu, KwaNdebele, Lebowa and KaNgwane (Cloete, 1997:3).

The history of traditional leaders from 1847 to 1994 will be discussed in detail in this chapter. A historical background of the Royal Bafokeng traditional leadership system will be provided. The royal Bafokeng nation corporate entities and Mutual and Federal as well as Fraser Alexander transactions will be discussed in detail. Royal Bafokeng governance and the Communal Land Rights Bill of 2003 will be fully discussed in this chapter. The Impala Platinum mines and Royal Bafokeng nation royalties will also be discussed. Royal Bafokeng customary law structures and the building of roads by the Royal Bafokeng and Government building safer roads will be

addressed in this chapter. The municipal services rendered by traditional leaders will be outlined in detail to illustrate the role traditional leaders could play in a particular community. The chapter will also provide a comparative study of different traditional leadership systems e.g in Botswana, Swaziland, Lesotho, Namibia, KwaZulu-Natal. The main objective is to establish to what extent they differ from the Royal Bafokeng Administration in terms of municipal service delivery.

4.2 HISTORICAL BACKGROUND OF TRADITIONAL LEADERS

Traditional leaders ruled the tribe and they were considered by the tribe as both fathers and sons. The traditional leadership role was a bonding factor as it was responsible for attaining the common goal of a community. Traditional leaders ruled over the members of the tribes as kings in council and according to the principles of African democracy and accountability. With the advent of colonialism, the African traditional government was systematically weakened and the bond between traditional leaders and subjects gradually eroded. Colonialism deprived peoples not only of the land and property, but also of dignity and culture. The ancient African societal system, which was the basis of its humanity and mutual co-operation and protection, was destroyed (Anon., 2007:2)

According to Myburgh and Prinsloo (1995:6), the traditional leader (chief) is hereditary: *inkosi yinkosi ngokubelethwa* (the chief position is by birth). The general principle regarding succession to chieftainship is that the genealogically highest ranking among the male adults of the ruling family is the successor.

The colonial tendency to describe all African rulers as chiefs obscured the diversity of political structures that actually existed in southern Africa. Admittedly, in some cases, as with the Swazi, Sotho and Zulu, where particular rulers had gained primacy over the rivals, the colonial authorities called the principal rulers, kings. In other cases as with the Xhosa, where central control was weaker, the colonial authority called the senior ruler a paramount chief. Nevertheless, indiscriminate use of the term *chief* has made it difficult to establish a more precise terminology that remains true to the people's own conception of the status of rulers (Bennett, 1995:66).

The traditional style of African government diverged widely from the democratic mode associated with modern Western states. African leaders needed no special training; their pedigree qualified traditional leaders for office. Nor did leaders have any precisely defined powers over the subjects authority was diffuse and all-inclusive. What today might seem an alarming concentration of power in one person is, however, tempered by the fact that traditional leaders are neither autocratic dictators nor faceless bureaucrats. Traditional leaders are like fathers to the nations and are talked about in the idiom of kingship (Bennett, 1995:67).

The wise leader does not dictate to the subjects. As a common saying has it: k*gosi ke kgosi ka batho* [a chief is a chief through the people]. A ruler, keeps in touch with popular opinion through the councillors, the ward heads and elders, who are normally senior kinsmen and notable leaders in the community. No important decision is taken without prior consultation (Bennett, 1995:68).

The institution of traditional leaders has existed for some time in South Africa. It survived colonialism; it survived apartheid and has to survive the challenges of a new order in the post-apartheid society. The indigenous authority system in South Africa has been characterised by the presence of two distinct types of indigenous components; firstly, a political and administrative component and secondly, a socio-political component. The political and administrative components consist of a central decision-making body for the tribe. The structure is more or less the same for kings and chiefs in that both have an inner council. The chief is the most important figure in the central tribal government. The chief is the eldest son of the father's principal wife; holds a hereditary position and is therefore generally the most senior member of the most senior lineage and clan within the tribe. Although the chief is qualified by birth to succeed the father, there is a need for formal designation, training and inauguration as chief (Zungu, 1992:167).

The first man to settle on unoccupied land with followers is the chief and ultimately the primary ancestor of the group. Although the situation above was generally applied, it was not automatic. The chief's eldest son could be blocked from succession if found to be unfit or mentally incompetent to govern. Other considerations include the past conduct, mannerisms, the capacity to lead, valour and popularity. The chief

had to have insight and selfless commitment to the ideals of the community (Ayittey, 1991:43).

The inner council, which consist of the chief s confidential advisers, are trusted by the chief, and the tribe usually assisted the chief in governance. These positions are assigned to the elders with a proven record of wisdom and bravery. Membership is not limited, but was drawn mainly from the inner circle of the chief's relatives and personal friends. The membership also included the influential members of the community (Zungu, 1992:162).

In the pre-colonial era, every tribal chief was an authority on all aspects of life in the community. The chief has to lead military expeditions, initiate and perform a variety of ceremonies to promote the well-being of the tribe, maintain peace and order, as well as allocate tribal land. The chief in council delegates some of the powers and functions to the heads of smaller administrative units called *izinduna* (Zulu) *tindhuna* (Tsonga) or headmen who were the extension of the chief's authority. One of these was usually the chief *induna* working very close to the chief and is viewed as the chief's eyes and ears (Zungu, 1992:162).

There are also be messengers with the ability to link the chief with various functionaries. The messengers conveyed messages to the community regarding dates of meetings as well as dates of hearing litigants. Besides advising a chief, the members of the council would inform members of the tribe about decisions of the chief and the council and ensure that these decisions were carried out. The chief's function as a religious head is most important to the tribe. Through this function, the chief provides an important linkage with the ancestral spirits. The chief is viewed as the living representative, guarding the tribe. Good relations between the chief and the ancestors are essential for the tribe's very existence and, from time, to time rituals has to be performed to ensure that relations were in order (Zungu, 1992:163).

The concept of local government and leadership in Africa date back to the pre-colonial era when a traditional system of leadership was either hereditary or achieved through recognition of benevolence and loyalty to the clan. Leadership was also assumed through bravery, especially in territorial acquisitions as a result of tribal

warfare. In the west African sub-region, pre-colonial traditional forms of leadership that characterised either inheritance or achievement simply thrived and became more viable through the consensus of elders in the community and transcended through the clan. This type of tradition of community leadership was the origin of chieftaincy or kingship, which gradually engendered ruling houses upon which the community depended for protection, advice and promotion of sustained cultural values. In return, the community paid homage to their leaders by giving them esteemed reverence in varying forms and circumstances (Pelonomi, 1992:18).

Each traditional leader ruled as an independent *king* who enjoys unlimited and undefined powers over the tribe or territory. Although local leaders engender a cohesive form of traditional government with tribal councillors assisting the natural rulers in various forms of decision-making, there is no form of unified government across tribal lines or territories. Before the advent of colonial rule in Africa, however, traditional governments in various local jurisdictions appeared fragmented as tribal warfare was still prevalent. They therefore, could only exercise limited power within the domain of the leadership (Pelonomi, 1992:19).

To understand the varied legacies of colonialism in Africa the particular nature of colonialism experienced on the continent must be specified. The current ubiquitous usage of colonialism as a catch-all to describe the desperate experiences of many societies under imperial rule is useful; it needs specific details in particular instances for productive illumination (Schwarz and Ray, 2005:269)

In the indigenous constitutional system, the king or chief was the central figure of authority. The king wielded legislative, executive and judicial authority. As ruler of the tribe, the king had the power to allocate land, the land was theoretically the king's property, which was held by the king as trustee of the people. These responsibilities were justified for the privilege of sovereign immunity that the chief could do no wrong. The king was generally male and earned the position through succession, although there are recorded exceptions, such as the Modjadji Tribal Authority where the traditional leader is a female (d'Engelbronner-Kolff , Hinz and Sindano, 1995:120).

4.2.1 The role of traditional leaders in Natal

In 1847, the colonial administration in Natal viewed the tribe as a basic unit that was expected to exercise authority and act as agent of the colonial government. The different governments that came into power over the years had different aims and strategies to utilise traditional authorities as their tools. The colonialists' objective was to exercise control over the Zulus in Natal. Colonialists used tribal leaders to govern and in doing so, recognised customary law. In the Natal Ordinance, no. 3 of 1849 customary law was recognised in its entirety, except "insofar as it was not repugnant to the civilised world". The chiefs were to exercise the judicial functions, although the extent of the jurisdiction was not specified. Some check of the power was maintained through a general control exercised by magistrates (Roodt , 1993:18).

Section 5 (1) (a) of the Black Administration Act, no. 38 of 1927 stated that the head of the state in South Africa (governor-general at that stage) was empowered to create new tribes, divide existing tribes, and demarcate the area occupied by the members of the tribe. Section 2 (7) of the same Act stipulated that the head of the state in South Africa may recognise or appoint a person as a chief of a tribe and may make regulations concerning the duties, powers, privileges and conditions of service and possible dismissals of such chiefs. The same Act made provision for limited civil and criminal jurisdiction to be conferred upon the recognised chief. The Act tried to recreate the indigenous tribal system as if it was a new concept, rather than entrenching what already existed.

4.2.2 Traditional leaders legal framework

In 1927, the South African government appropriated to itself the power to create and divide tribes as necessary for good government for blacks. It could appoint any person it chose as chief or headman. The foundation was thereby laid for restructuring African political institutions to suit the policies of the future apartheid state (d'Engelbronne-Kolff *et al*., 1995:15).

The chieftainship in South Africa was no longer a hereditary institution. A chief was a creature of statute. The Black Administration Act, no. 38 of 1927 empowered the

Prime Minister to recognise any existing descendant of a traditional chief and to appoint anyone to become a chief. The Prime Minister enacted regulations under the Act prescribing that all the people residing within the jurisdiction of a traditional leader must be loyal and respect the duties, privileges and conditions of service of chiefs and headmen. Having so ordained, the regulations further stipulated that the chief shall carry out orders vested in the native affairs commissioner or any other officer of the government or face summary dismissal (Tsotsi, 1992:62).

After Unification in 1910, the principal concern of the new government was to impose uniformity. The individual history and the special circumstances of each of the provinces had produced curiously diverse court structures and degrees of recognition of customary law. Underlying the desire for uniformity was another less overt need to promote tribalism and chieftain authority. Only in 1927, African courts were finally reorganised. The Black Administration Act, no. 38 of 1927 was a major component of a new policy for the African population. Throughout the country courts of chiefs and headmen were established on the basis of authority given by government warrant (Bennett, 1991:62).

Section 2 of the Black Administration Act, no. 38 of 1927 authorised the Governor-General to appoint a chief and Section 2 (8) authorised the Minister to appoint an acting chief, headman or acting headman. In terms of section 20, the Minister could confer limited criminal jurisdiction on a chief or headman. The Minister could empower this person with jurisdiction to adjudicate upon:

a) all customary law crimes except those listed in the third schedule to the *Black Administration Act 38 of 1927*(Olivier ,1998:191).

According to section 12 (1) of *the Black Administration Act, no. 38 of 1927* the Minister could:

b) authorise any black chief or headman recognised or appointed in terms of subsection (7) or (8) of section 2 to hear and determine civil claims arising out of black law and custom brought before him by a black resident within a chief ‘s jurisdiction;

c) at the request of any chief upon whom the jurisdiction had been conferred in terms of paragraph (a), authorise a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought him by blacks against blacks resident within such chief's area of jurisdiction:

The Act determined that a chief, headman or chief's deputy shall not under this section 12(1) or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage. Only chiefs and the deputies appointed under this section could constitute official courts. It is unlikely that chiefs' courts consistently made the careful distinction between criminal and civil matters as were required to be done by the Act and by common law. If they acted *ultra vires* and imposed a penalty when not authorised to do so they would fall foul of their prescriptions of the common law regarding crime (Bennett, 1991:64).

The rights and powers of the chief were mentioned prominently in authoritative statements dating from the nineteenth and twentieth century. In the old customary law, the tribe was a community forming a political and social organisation under the government, control and leadership of a chief operating under the authority of the national or tribal customs. The chief exercised the functions of a king, chief justice and chief executive. In the council, the chief exercised the sovereign right of making laws, while in person acted as a chief (Kerr, 1976:25).

There are divergent statements in the sources concerning the powers of the chief regarding land in former customary law. On examination, this appears to refer to different occupation of land or to powers such as expropriation, which were always retained by a sovereign. There were statements which appear to have given the chief absolute powers over all land occupied by the tribe. Thus it was stated that the land occupied by a tribe was regarded theoretically as the property of the paramount chief in relation to the tribe as a trustee holding it for the people who occupy and use it in subordination to the chief, on communistic principles; the land was administered by the chief and the councillors for the people and the people must live wherever they were placed by the chief or the headman (Kerr, 1976:30).

4.2.3 The establishment of tribal authorities

In 1951, the government needed to integrate new local authorities into existing tribal structures to create the Bantustan system of government. Chiefs who were not amenable to state directives, no matter what traditional legitimacy they might have enjoyed, were removed from office or passed over in matters of succession. The outcome was a compliant oriented cadre of traditional rulers, that provided leadership for homelands as and when independence was sought from "white" South Africa (d'Engelbronner-Kolff *et al*., 1995:15).

The Black Authorities Act, no. 68 of 1951 dealt with the indigenous tribal council and its responsibilities. This Act established tribal authorities and regional authorities where a tribal authority was established for a recognised tribe and a regional authority could be established for two or more tribal authorities. Section 3 of the Black Authorities Act, of 1951 dealt with the constitutions of these authorities, allowed for the recognition of an existing tribal authority if it was functioning according to the laws and customs of the tribe.

During the anti-apartheid strikes and boycotts as well as many other activities, traditional leaders played a crucial role, even when the apartheid regime negatively affected their status as leaders. For instance, Chief Albert Luthuli was one of the chiefs devoted to the commitment of the freedom of the people. He chose to lose the status as a chief at Groutville in 1952 rather than cease anti –apartheid activities within the African National Congress (Liebenberg and Spies, 1994:382). Furthermore, because Chief Luthuli later became the president of the African National Congress, the apartheid government reacted by banning him in terms of the Suppression of Communism Act in 1953 (Liebenberg and Spies, 1994:382). Thus instead of promoting traditional leadership, by honouring exceptional leaders, their authority was undermined by suppressing their leadership capabilities.

The Black Authorities Act, of 1951 established a system of hierarchical local government in rural areas based on traditional organisation but with statutory powers and functions. Whereas the functions of the lowest level (tribal authority) were limited to carry out general administrative tasks and advising government on the needs of the

community, the powers and functions of a regional authority were quite extensive. Two or more areas for which tribal authorities had been established constituted a black regional authority. Its powers and functions under the Black Authorities Act, of 1951 include the power to provide for the following services (Rugege, 2000:14):

- establishment, maintenance, management and operation of education institutions;
- the construction and maintenance of roads, bridges, drains, dams, tunnels and any work ensuring satisfactory water supplies or for preventing or combating soil erosion;
- suppression of diseases in stock by construction of dipping tanks;
- establishment, maintenance, management and operation of hospitals and clinics;
- improvement of farming and agriculture generally.

Regional authorities were awarded the power to make by-laws: including by-laws prescribing fees for services rendered by such authority or rates payable by a specified class of persons in respect of services made available by such authority. In terms of Section 3(30 of the Black Authorities Act, no. 68 of 1951, the chairman and the members of the regional authority had to be elected or selected in a manner prescribed by regulation from among the chiefs, headmen and councillors of the tribal authorities for the areas in respect of which such regional authority was established (Rugege, 2000:14). It could be argued that the Act in fact, reorganized the municipal status of traditional leaders. Although limited in extent, it could be viewed as an elementary form of local government in traditional areas.

Succession to the chief is hereditary according to the rule of the primogeniture in the agnatic line. Except among the Balobedu of the Northern Transvaal, women are thus precluded from office. At most, women are permitted to act as regents when the male heir is a minor. The main duty of the chief is to cherish the people and to promote

their interests. The chief must govern well and fairly. More specifically, regular attendance at meetings of councils and consultation with his councils and relatives are expected (Bennett, 991:105). From this expectation it could be deduced that tribal chiefs are required to honour the basic tenets of democracy i.e. consulting members of the community albeit relatives. Democratic rule from a western perspective is not followed as no election of chiefs are conducted.

The formal powers of the chief are considerable. As head of the tribe, the chief is the symbol of a tribal unity. The chief is the ruler, maker and guardian of the law and leads in war and external relations. As a religious leader, the chief links the people with the ancestors. He allocates land and regulates agricultural, pastoral, hunting, trading and other economic activities (Bennett, 1991:105).

The Black Authorities Act, of 1951 provided that the Governor-General could, with due regard to African law and custom and after consultation with every tribe and community concerned, establish in respect of any tribe or community or in respect of two or more than one area in which a tribal authority has been established, a Bantu regional authority. The Act provided for the gradual delegation to these authorities of specified executive and administrative powers in the area of jurisdiction (Tsotsi, 1992:83). Thus, to some extent the roles of traditional leaders were acknowledged.

At the head of a tribal authority is a chief or headman of a tribe assisted by tribal councillors. Except in the Transkei, the chief or headman in accordance with local law and custom nominates the majority of councillors. The native commissioner appointed the rest of the councillors. The duties of these authorities were to assist and guide the chief in allocating the land, prevention of animal diseases, punishment of certain offences and other matters (Tsotsi, 1992:83). The extensive statutory powers, duties and functions of traditional leaders were outlined in the Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of Chiefs and Headmen, no. 110 of 1957, as follows:

- promote the interests of the tribe or community, support and actively encourage initiatives and measures for the material, moral and social well-being of the people;

- maintain law and order for the tribe or community;
- report any condition of unrest or dissatisfaction or any other matter of serious importance or concern to the government;
- carry out all such lawful orders as may from time to time be given by officers of the government;
- ensure the enforcement within the area of all laws and all orders, instruction or requirements of the government relating to the administration and control of the people in the area;
- inform the people of new laws, orders, instructions;
- report to the relevant government authorities outbreaks of disease among people or stock, commission of crime, illegal possession of firearms, intoxicating liquor, activities of persons who disturb and obstruct peace, order and good government by holding unauthorised meetings, distribution of publications and pamphlets;
- convene meetings of the people when requested by government and ensure attendance;
- hear and determine civil cases and try to punish criminal cases if conferred with jurisdiction;
- exercise powers of arrest and custody of offenders conferred on a peace officer;
- hold powers to search without a warrant any person or homestead if there are reasonable grounds for suspecting that arms and ammunition or stolen stock or produce are hidden in a homestead or other place, seize and carry anything seized to the nearest police post; and

- detain and impound stock brought into the area under unlawful or suspicious circumstances.

The chief's other duties included the enforcement of all government laws and orders and reporting:

- the outbreak of disease;
- the commission of crime;
- the presence of strangers in his area
- the activities of persons who destruct the peace, order and good government, by holding of unauthorised meetings, the distribution of publication and pamphlets or in any other manner

The office of the chief under this policy combine the functions of health officer, magistrate, police investigator, social security police and political leader (Tsotsi, 1992:62). From the above exposition it could be deduced that in particular areas, functions and powers were assigned to traditional authorities. These were, however limited and made limited contribution to enhancing the status of such leaders.

4.2.4 Traditional leaders before transformation

The independence of some of the Bantustans between 1976 and 1981 did not initially alter power relations in rural areas. If anything, the power of traditional authorities, from sub-headman to paramount chief was strengthened. By the 1980s and 1990s, mass mobilisation had spread to the countryside. During this period, the Bantu authority system came under renewed attacks (Ntsebeza, 1999:86).

There was a call for the resignation of headmen. In large areas of the Ciskei, the tribal authority system collapsed and the civic associations took over. Tribal authorities in most parts of the Transkei region were also affected. In KwaZulu-Natal an intense

bloody war took place mainly between the supporters of the Inkatha Freedom Party and the United Democratic Front and later the ANC when the latter was unbanned. A second feature of the early 1990s was the time when negotiations for a new South Africa began in earnest. Initially excluded from talks, traditional authorities were subsequently invited. There were two reasons for this. Firstly, the ANC did not want to harm the relations with the Congress of Traditional Leaders of South Africa (CONTRALESA) before the envisaged elections. Secondly, both the ANC and the National Party wanted to ensure the participation of the Inkatha Freedom Party(IFP) in the negotiation process. Finally, this period was characterised by the abolition of the Bantustans with the acceptance of the new Interim Constitution Act, no. 200 of 1993 (Ntsebeza, 1999:86).

4.2.5 The role of traditional leaders during first phase of democratisation

During the 1990s, South Africa experienced a two-phased integration of traditional political institutions. Following a process of protracted consultation and negotiation, the interim Constitution of 1993 defined an initial institutional framework for the integration of traditional leadership at national, provincial and local spheres. The Constitution recognised traditional leadership and customary law in general, defining the institutionalisation of a national council of traditional leaders and provincial houses of traditional leaders and finally recognising traditional leaders as *ex- officio* members of democratically elected local government structures (Dusing, 2002:294).

The detailed provisions in the interim Constitution of 1993 have been replaced in the final Constitution of 1996, by brief and general condition regulations, providing a basis for any model of integration of traditional leadership still to be established. Despite the recognition of the institution in the final setting, no provision has been made for their effective functioning (Dusing, 2002:294).

The conflicts and inconsistencies that beset traditional rulers under colonialism and apartheid were not solved in the Constitution of the Republic of South Africa Act, no. 200 of 1993. Existing leaders traded their political support for confirmation of their present position by the interim Constitution. Section 18 (1) provides that: A traditional authority which observes a system of indigenous law and is recognised by law

immediately before the commencement of this Constitution, shall 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.

The interim Constitution than preserves whatever powers leaders now exercise in their respective areas. It gives traditional leaders new positions in both provincial and national legislatures. In provinces in which traditional authorities exist the relevant legislature is obliged to establish a house of traditional leaders. In all matters concerning traditional authorities and customary law, these bodies are entitled to advise and make proposals to the provincial legislature or national Parliament. Traditional leaders may acquire seats in the provincial houses of traditional leaders in North West, Mpumalanga, Limpopo, Eastern Cape and the Kwa-Zulu Natal provinces and the national council of traditional leaders through nomination or election by their peers (Bennet, 1995:72).

In 1994, the Congress of Traditional Leaders of South Africa held a workshop. The following resolutions were adopted:

- Traditional leaders have the right to nominate candidates for election to public office, provided that once elected a leader must vacate the position of a traditional leader.

- the Constitution must acknowledge and protect the status of traditional authorities as fully-fledged primary local government structures in rural areas. This means that all functions and powers guaranteed to local government should also be accorded to rural local government. The structures of rural local government should be such that:

    - traditional leaders within the area of jurisdiction are regarded as rural local government areas;

    - elections are held in such areas and;

- traditional leaders of the area are automatically members of the council.

District councils established to combine rural and urban local authorities on sub-provincial basis. These councils could render particular services on behalf of or in partnership with all municipalities, whether urban or rural. Traditional authorities could also request local and provincial governments to render services. The senior traditional leader of the rural municipality should enjoy participation in the district councils in addition to the indirectly elected representatives from the various urban and rural municipalities. Traditional authorities should in their capacity as rural municipalities, render services to all individuals residing in their areas of jurisdiction irrespective of their gender, community, affiliation, race and language (Keulder, 2000:10-14).

Traditional leaders and authorities have a significant role to play in South Africa. Failure to understand and accommodate traditional culture and practices could precipitate a major crisis and impede the ongoing constitutional development process. While it is widely accepted that traditional leaders and the traditional councils render an important service, a distinctive characteristic of the constitutional debate is the use of political and constitutional concepts that disregard crucial elements of the African reality (De Villiers, 1997:40).

It has already been explained that some Africans still live in tribal villages in the traditional territories. These tribal villages are referred to as informal urbanisation. An advantage of tribal villages is that the people construct houses with the result that they keep their self-respect and independence. The people also meet their own needs according to their expectations (Cloete, 1997:9).

Undoubtedly, there is inadequate literature on indigenous administration. Lungu (in Ismael *et al.*, 1997:118) for example, observes that existing descriptions of indigenous administration come mainly from anthropologists and historians and little from administrative theorists. The tribe, the basic political unit of the indigenous communities, is replete with instances of local government.

A second feature of note to local government is the decentralisation of monarchical systems, especially in religious ritual kingdoms. The tribal chief (also known as paramount chief or king) is served by several territorial chiefs who act as vassals. Ranking below territorial chiefs are headmen and superintended village administrators. It is worth noting that in some instances headmen continue to be elected by the community, while in others their ascendances to power are hereditary. The subdivision of tribes into territorial chiefdoms and villages inevitably lead to a geographic autonomy for rulers at those levels (Ismael *et al.*, 1997:119).

The official policy towards the courts of chiefs and headmen in South Africa has changed considerably over the years. In the early nineteenth century, when British rule was being extended into the eastern region of the Cape Colony, white magistrates were instructed not to apply customary law and to replace the chiefs. This policy was defended as part of the government's civilising mission in Africa. It is quite obvious, however, that the policy was part of a wider programme to undermine indigenous political authority (Bennett, 1991:61).

4.3 BACKGROUND OF THE ROYAL BAFOKENG ADMINISTRATION

In terms of the Notice 2520 (Government Gazette, no. *25492* 2003:1), the Communal Land Rights Bill of 2003 was published. The manner in which the Bill affects the Bafokeng and other similarly placed communities are outlined in detail. The Bafokeng has an ancient genealogy traceable to the 1100s. Part of the general southward movement of the Batswana groups of people, the Bafokeng settled in an area which included the whole of the present municipal area of Rustenburg, Kroondal and Marikana, well before 1700. The approach adopted towards land in Bafokeng law and custom is one of communal tenure, whereby ownership of the land vests in the community and not in any individual. In 1840, the first white settlers arrived in the Rustenburg area and began to displace the Bafokeng from the land on which they had lived for many years.

The Royal Bafokeng nation is organised in five regions as follows:

- the capital region around Phokeng;

- the Northern Region around Rasimone and Chaneng

- the central region that includes Kanana and surrounding villages

The north-east region includes Maile–Kopman, Tlaseng, Tantanana and Thekwan and Photshaneng are located in the south east region. Each region has its own administrative and recreational complex. This is how the Royal Bafokeng intends to bring services closer to the people who require them (Molotlegi, 2007:3). Thus, it is possible to really bring resources to the community.

Bafokeng (People of the Dew) numbers about 300 000 people. About 160 000 live in an area some 150 km north-west of Johannesburg in South Africa, with the balance scattered primarily throughout South Africa. The Royal Bafokeng nation has retained the unique cultural identity and traditional leadership structures and is led by a hereditary kgosi (king), currently Kgosi Leruo Molotlegi. The Bafokeng are descendants of the Sotho-Tswana people that just over a thousand years ago travelled southwards from central Africa over a period of 200 years. A substantial portion of these migrants settled in the area now incorporated into the countries of Botswana and Zimbabwe. The Bafokeng, however, continued travelling south before finally settling in the twelfth century in an area known as the Rustenburg valley where the community remained relatively stable. The mining of diamonds in South Africa started in the 1860s. Thousands of fortune seekers from around the world flocked to Cape Town, the capital of the British-governed Cape Colony, before undertaking the 1 500 km trek north of the arid Western and Northern Cape to the mining town of Kimberley (Molotlegi 2007a:1).

At the same time Afrikaner farmers (Boers) seeking to escape British rule started to settle in the Rustenburg valley. The farmers ignored the traditional rights of ownership enjoyed by the Bafokeng and started to survey and register farms. Kgosi Mokgatle, great-, great-, great-, great-grandfather of the current king, realised that ownership of the traditional Bafokeng land was likely to be forfeited. In a remarkable act of foresight and collective sacrifice, he ordered units of young men of the Royal Bafokeng nation to walk to Kimberley to work and earn money that was deposited in a central community fund. As funds were generated, the King sought the help of

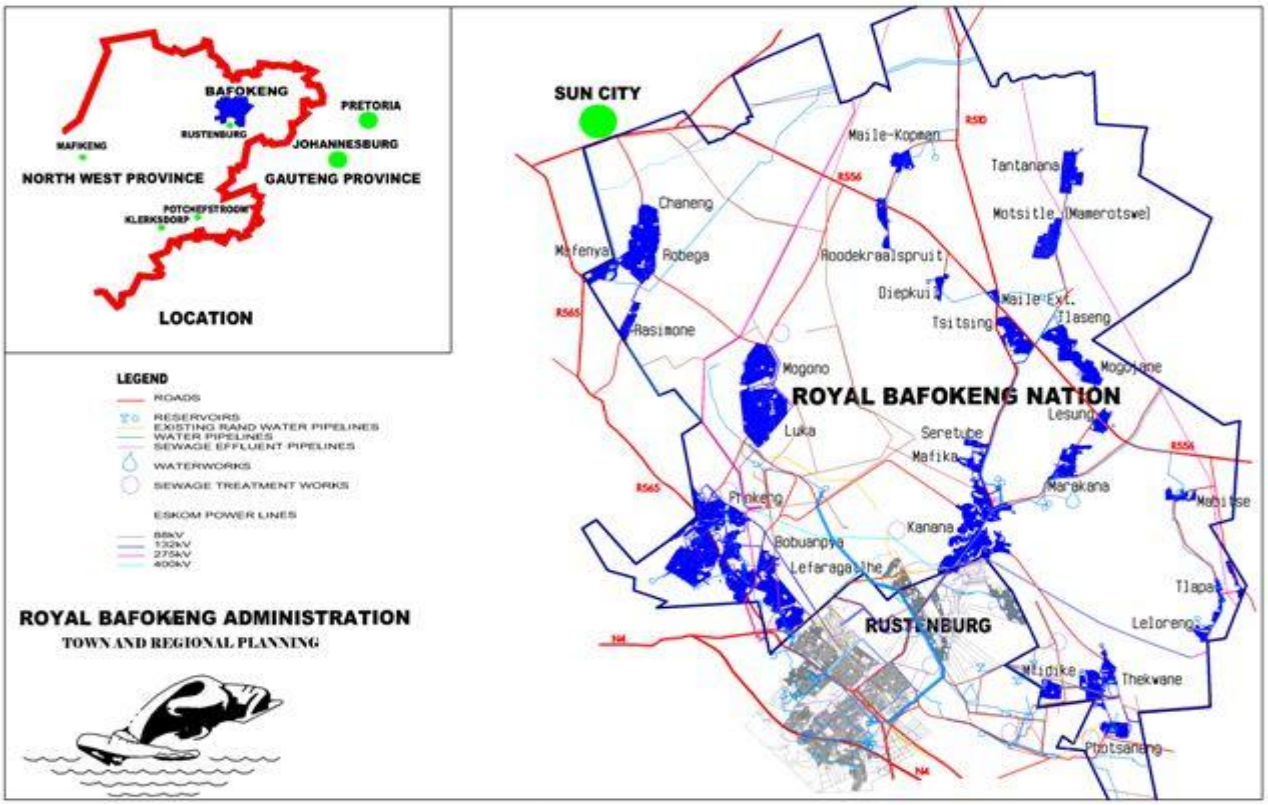
Lutheran missionaries to act as front for the Bafokeng and buy up farms in the area. Some 900 hectares, or two-thirds of the land currently owned by the Bafokeng, was acquired in this way over a 20 year period.

In the 1920s, geologist Hans Merensky discovered in the Rustenburg valley the surface outcrop of the world's greatest ore body, known as the Bushveld igneous complex. In particular, substantial reserves of platinum group metals (PGMS) such as platinum, ferrochrome, rhodium and palladium were discovered on land owned by the Royal Bafokeng Nation(RBN). Over the next 70 years, various attempts were made by the governments of the day, aided and assisted by the major mining companies, to dispossess the Royal Bafokeng nation of their land rights. All efforts were ultimately unsuccessful and the mining companies thereafter agreed to pay royalties to the Royal Bafokeng nation in exchange for the right to mine on RBN land. For many years, the Royal Bafokeng nation leaders were in conflict with the former regime's national and regional governments. The authorities reacted by neglecting the development of the region. The Royal Bafokeng nation was therefore compelled to spend practically all of their royalty income received on infrastructure. During the past two decades, more than R2 billion of communal wealth has been invested in regional infrastructure such as roads and bridges, water reticulation and reservoirs, electricity supply extensions, schools, clinics, civic buildings and sports facilities (Molotlegi, 2007a:1).

FIGURE 4.1 The Royal Bafokeng Administration offices

Source: Anon .(2007b:2)

FIGURE 4.2 Royal Bafokeng nation map



Source: Anon.(2007b:5)

4.4 ROYAL BAFOKENG CONSOLIDATES BUSINESS INTERESTS WITHIN ROYAL BAFOKENG HOLDINGS

On 9 March 2006, the Royal Bafokeng nation announced that its wholly owned commercial entities are being merged. Royal Bafokeng Resources (RBR) and Royal Bafokeng Finance (RBF) combined to form one holding company, Royal Bafokeng Holdings (RBH). RBH investments include significant interests in Implats, the BRPM joint venure with Angloplats, Merafe Resources, Astrapak, SA Eagle, Fraser Alexander and Senwes (Carroll, 2006:1).

Royal Bafokeng Resources was established in 2002 to manage the community's mining interests. In order to diversify the commercial portfolio, Royal Bafokeng Finance was formed in 2004 to develop the non-mining assets. While it was initially important for the two entities to focus and establish momentum in executing their

respective mandates that phase of development has now been completed (Carroll, 2006:1).

Royal Bafokeng Holdings is responsible for the management and development of Royal Bafokeng Nation's commercial portfolio across all asset classes. All current employees of RBR and RBF are retained within the new RBH structure. According to Carroll (2001:1), the combination of the two entities into a single structure should improve the efficiency of capital allocation and enable the business to harness more effectively the skills and experience within Royal Bafokeng Resources. Royal Bafokeng Holdings. The creation of Royal Bafokeng Holdings is an important milestone in the Royal Bafokeng nation's Vision 2020, a multi-decade, people-centric development plan. RBH has no individual shareholders and its primary purpose is to generate income for the developmental needs of the current generation as well as to protect and grow the asset base for future generations. RBH's investment objectives are therefore closer to those of an inter-generational trust or endowment fund than a normal commercial company (Carroll, 2007:1).

4.4.1 Royal Bafokeng Finance buys Fraser Alexander

Royal Bafokeng Finance (RBF), an investment arm of the Royal Bafokeng nation has acquired the entire shareholding in Fraser Alexander Holdings, one of South Africa's oldest service groups to the mining and industrial sectors. An agreement was reached to purchase 100% of the equity in Fraser Alexander Holdings by Royal Bafokeng Finance. The transaction was subject to the Competition Commission's approval and other conditions applicable. Fraser Alexander Holdings, in turn, is the 100% owner of Fraser Alexander Bulk Mech, Fraser Alexander Construction and Fraser Alexander Tailings. In addition, they own subsidiary operations in Botswana, Namibia, Zimbabwe and Swaziland. In 2006 Royal Bafokeng Finance acquired a black economic empowerment shareholding in Fraser Alexander thus allowing them to expand their activities (Mail & Guardian 6 October, 2005:1).

Royal Bafokeng Finance(RBF) acquired 100% of an established and very successful business, which serves the mining industry in particular. Royal Bafokeng Finance's

roots are in the mining industry and it was considered relevant for Royal Bafokeng Finance to own Fraser Alexander Holdings. Through Fraser Alexander Holdings' broad geographic spread, communities adjacent to mining operations can be assisted with developmental programmes (Mail & Guardian 6 October, 2005:1).

The customers and the staff were excited about the transaction. Fraser Alexander Holdings started looking for a black empowerment shareholding. Ultimately Fraser Alexander has become a fully black-owned business. Not only will it strengthen the company's existing business with its major customers, but it will also open new avenues for the company particularly in the development of public enterprises. The negotiations with RBF were conducted in an extremely positive spirit. The transaction was effective from the date when all conditions were met. The parties involved declined to disclose the acquisition price (Mail & Guardian 6 October, 2005:2).

4.4.2 Royal Bafokeng: Expanding business opportunities

Old Mutual, South Africa's largest life assurance company, sold a controlling stake in its 77%-owned subsidiary Mutual and Federal (M&F) to a black economic empowerment (BEE) group in a deal worth R8-billion. Industry sources indicate that the BEE buyer of Mutual and Federal, South Africa's second-largest short-term insurer, was the Royal Bafokeng Holdings (RBH), whose chairman is Kgosi Leruo Molotlegi, the king of the Royal Bafokeng nation, as noted earlier.

Royal Bafokeng Holdings, which manages and develops the commercial assets of the Bafokeng, has long wanted to increase its financial services interests. The move could suggests that Old Mutual chief executive Jim Sutcliffe bowed to pressure from foreign shareholders, who demanded that if Old Mutual relinquishes its SA operations altogether (Stovin-Bradford, 2007:1). Old Mutual has been trying to achieve closer co-operation between operations under the Old Mutual SA (OMSA) umbrella including Nedbank and Mutual and Federal. The transaction seems to have brought Old Mutual South Africa's Project Phinda to an end, which was an attempt to get the three companies to collaborate. Project Phinda emerged from a 2005 tripartite meeting which was held at the Phinda game reserve in KwaZulu-Natal (Stovin-

Bradford,2007:1). Project Phinda has brought about large savings and produced revenue gains for the Old Mutual group. Cash-generative Mutual and Federal has long been regarded as a key dividend source for London-listed Old Mutual. However, Stovin-Bradford (2001:1) states that Sutcliffe was prepared to counter an offer, first for M&F, and possibly even for Nedbank.

Long-term investors in Old Mutual knew that its stakes in Nedbank and M&F were incidents of history and that there were never any original strategic plan for the three to work together according to Stovin-Bradford (2007:2). Even at Phinda there was acknowledgement that the senior management of Old Mutual, Nedbank and M & F had not really spoken to each other previously. This left three possibilities: selling M & F to an international trade buyer, a private equity group or a BEE buyer. No obvious international buyer has come forward. The US sub-prime mortgage-induced credit crisis has slowed the pace of private equity deals. Mutual and Federal, with a market capitalisation of R7,8-billion, falls just above the sort of deal size a local private equity firm might be able to accommodate (Stoven-Bradford, 2007:1-4).

It is argued that Mutual and Federal's existing BEE partners, including Wiphold and Sphere, which together own 11% of Mutual and Federal, do not have the financial means for such a deal. There are really only three BEE groups able to raise such amounts. One is Tokyo Sexwale's Mvelaphanda, which has just acquired a 30% interest in Sunday Times owned by Jonnic Communications. Another one is Patrice Motsepe's ARM group but it has stakes in Sanlam, which leads to conflict of interest. Therefore, the buyer is likely to be Royal Bafokeng Holdings, which already has a 10% stake in South Africa's fourth-largest short-term insurer, Zurich Insurance Company which, until recently, was known as South African Eagle (Stovin-Bradford, 2007:2).

4.4.3 Impala Platinum (Implats) and Royal Bafokeng deal approved

The parties entered into an agreement in 2006 in terms of which the 300 000 strong Bafokeng nation would convert Implats shares into the royalty payments due to it for the next 31 years. The Royal Bafokeng nation owns the land on which Implats mines

its platinum in the Rustenburg valley. Until recently, the RBH was rewarded with royalties for the right to mine the land, transforming the Bafokeng into Africa's wealthiest tribe. The transaction transformed the Bafokeng into Implats's largest shareholder with over R75 million (13,4%) of the company's shares (Mantshantsha, 2007:1).

Implats and the RBN agreed on the deal in September 2006, then valued at R12,5 billion (R170/Implats share) and the shares were transferred to Royal Bafokeng Holdings (RBH) in March 2007. The RBH holds all the Royal Bafokeng nation's investments. Implats's shares totalling over R20 billion. In March 2007, the RBH investment portfolio was estimated at over R25 billion, with Implats making up more than half at R17bn (Mantshantsha, 2007:1).

4.5 ROYAL BAFOKENG MODEL OF GOVERNANCE

In an age when hereditary rule is often regarded as being an anachronism, the Bafokeng believe that this form of traditional government and adaptations made over the years, neatly balance recognition of tribal custom and expression of the popular will. The Bafokeng king, Kgosi Leruo Molotlegi, explained in a speech at Brown University in the United States that the Bafokeng traditional form of government espouses certain principles of democracy. These include mechanisms to ensure that the king is carrying out the will of the people. Political representation is present at multiple levels of local government, and even a system for electing village representatives to the king's consultative council is in operation. There are examples in the historical record of Bafokeng kings being fined for not carrying out the will of the people. Perhaps the most significant adaptation the Bafokeng have made to their form of government followed South Africa's transition from apartheid to democracy in the early 1990s (Molotlegi, 2007:5)

The Bafokeng moved with the times and introduced a system of electing particular community representatives. This in turn, saw a departure from a patriarchal form of governance with a number of women being elected to the Royal Bafokeng nation 's executive council. Kgosi Leruo Molotlegi noted that the Bafokeng are rooted in, but not bound by tradition. The institution, status and role of traditional leadership is

protected by the South African Constitution,1996. The king considers the traditional system as a way of organising community life that is founded on basic human principles such as respect, sense of community, and sense of commitment to one's neighbours as well as oneself. It is upon these principles that the Bafokeng system has developed and changed to meet the needs of the times. The 29 villages that make up the Bafokeng community are divided into 72 traditional wards, each of which is regulated by a hereditary headman and headmen's wives. The headman is assisted in carrying out duties by a minimum of four ward men (Molotlegi, 2007:5). This system allows wards to have representation in decision making and thus some form of democratic government is practised.

Duties of the headman are many and varied and he must keep the king's office informed of births, marriages and deaths, and of pressing issues or specific problems in the community. The headman must resolve disputes ranging from the use of resources to family matters. If the headmen are unable to resolve disputes, such as those within a marriage they refer the aggrieved party to the Royal Bafokeng tribal court, which sits in the civic centre in Phokeng. If an aggrieved party is unable to secure justice through these channels, the aggrieved party can then seek redress through the formal magistrates' court in neighbouring Rustenburg. The headman must also ensure development of the community. For example, the identification of talented young people as candidates for Royal Bafokeng nation bursaries to support tertiary education (Molotlegi, 2007:6).

On another level, the headmen must supply character references for young people seeking work. The Royal Bafokeng nation as a whole is represented by the executive council consisting of 39 members, 29 of whom are elected by villagers, and 10 of whom are appointed by the king. The executive council has the status and functions similar to those of a municipality as defined in South African legislation applicable to municipalities, with committees responsible for portfolios such as youth, community development, health and education. Whenever important decisions affecting the entire community need to be made, the *kgosi* convenes the supreme council of the Royal Bafokeng nation. This consists of the executive council, headmen and traditional

councillors. The highest-ranking decision-making body in the nation is called the supreme council (Molotlegi, 2007:6).

The *kgotha kgothe* is a general meeting, held twice a year by the Bafokeng nation, whenever there is an important matter to be debated. The King's mandate comes from consulting with the supreme council during the general meetings. The king's proposals can be overturned and his input and views on matter can be amended by the general meeting. Decisions made by the councils are implemented by the Royal Bafokeng Administration (RBA), which is effectively the nation's civil service. It employs a staff of some 400 people. RBA is funded by the Royal Bafokeng nation out of revenue derived from royalties and dividends received from mines operating on the nation's land. An estimated R2 billion of this money has been invested in infrastructure and services for the community since 1996 (Molotlegi, 2007:6).

As a traditionally governed entity, the Royal Bafokeng system of governance embraces a range of mechanisms for ensuring that people's concerns, opinions, and ideas are integrated into policy-making, and that there are sufficient checks and balances in place so that no branch of the traditional system can act on its own. With the introduction of elected village councillors, there are also more women in positions of authority than before. Although the Royal Bafokeng Administration relies on indigenous law and traditional forms of conflict resolution to mediate most conflicts at local traditional authority level, it is also subject to the laws and legal procedures of the Republic of South Africa (Molotlegi, 2007:6).

The democracy continues to adapt as in the recent innovation of Dumela Phokeng. Drawing inspiration from the word *dumela,* meaning greetings, this interactive initiative sees King Leruo Molotlegi and the key representatives visiting each of the nation's 29 villages. These weekly meetings at the beginning of the year enable the king to keep in touch with the community and afford villagers an opportunity to share ideas (Molotlegi, 2007:6).

4.6 ROYAL BAFOKENG CUSTOMARY LAW STRUCTURES

The Bafokeng traditional (customary) system of government consists of the King, tribal council (also called the council of noblemen), the headmen or council of headmen and the *(pitso)* or tribal assembly. In the case of legislation and other important matters which affect the whole indigenous community, Bafokeng procedure requires that the king consult and inform the indigenous community at a tribal assembly. Matters of such importance to the indigenous community as a whole as requiring the meeting of tribal assembly include legislation as well as the disposition of tribal land or mineral rights (Government Gazette no. 25492 of 3 October 2003:9).

In matters, such as the building of roads, schools and matters regarding mines, the council of headmen meets with and advises the king. In the case of the Bafokeng 72 headmen are recognised in terms of Bafokeng custom. Further, the custom of the Bafokeng is that each headman is entitled to be accompanied by one or two ward men chosen by that headman to assist him and to accompany him to meetings of the Council of headmen. The full complement of councillors at a meeting of the headmen and ward men therefore potentially totals some 216 persons. Historically the practice is that a smaller council (referred to for convenience as the *tribal council*) administers the day-to-day affairs of the Bafokeng. This tribal council consists of a much smaller number of persons (approximately 16 persons) nominated by the constituencies of the headmen and appointed by the king. This tribal council operates as a policy and decision-making body in relation to day to day operations of the Bafokeng. Important decisions or those involving large amounts of money are required to be taken by the headmen, ward men and councillors of the Tribal Council sitting together (Government Gazette no. 25492 of 3, October 2003:9).

The system of traditional authority observed under indigenous law recognised by the Bafokeng immediately prior to the commencement of the 1993 Constitution was preserved by that Constitution. Similarly, the powers and recognition of traditional leaders according to customary law were recognised by the Constitution, 1996.

The Bophuthatswana Traditional Authorities Act, no. 23 of 1978 created a tribal authority for each indigenous tribe. The tribal authority, where there is an existing

tribal government functioning in accordance with the law and customs observed by that tribe, is the tribal government. The chief is an *ex officio* member and chairman of the tribal authority. The tribal authority consists of those members of the tribe recognised as councillors in accordance with the law and customs of the tribe and who, with the chief, constitute tribal government; and such additional members of the tribe as may be appointed to the tribal authority by the chief with the approval of such officiating councillors.

Section 4 of the Bophuthatswana Traditional Authorities Act, of 1978, describes the statutory duties of a tribal authority which are generally to administer the affairs of the tribe and to assist, support and guide its chief in the exercise or performance of the powers conferred upon him by the Act or under any law (Government Gazette, no. 25492 *o*f 3 October, 2003:9).

The tribal authority has the duty to establish a proper administration and appoint personnel to manage that administration. Legal proceedings against a tribal authority may be instituted by or against the chairman of that authority (i.e. the chief) in the official capacity.

In contemporary Bafokeng Administration one further administrative body, must be taken into account, namely the executive authority or council. Following the democratic elections in 1996 a Constitution of the executive authority or council of the Royal Bafokeng nation was signed (the Bafokeng Council Constitution). The king of the Bafokeng as well as the chief negotiators of a number of interested stakeholders of the Bafokeng assumed authority. This constitution recognises and upholds the indigenous law of the Bafokeng, the authority of the king and the seniority of the Council of Headmen as the legislative authority of the Bafokeng nation. (Government Gazette, no. 25492 of 3 October 2003:10).

This Bafokeng Council Constitution does not purport to be the constitution of the Bafokeng Royal nation itself, but is a constitution only of the body styled the executive authority or Council of the Bafokeng. This executive authority or council was established to replace the traditional tribal council as the body, which administered the day-to-day affairs of the Bafokeng, and to ensure that it is a

democratic body rather than one where the members are simply appointed by the King, as was the case historically with the tribal council. It is important to note that this council must include women.

Like the tribal council before it, the executive authority or council has both policy and decision-making powers in relation to the day-to-day operations of the Bafokeng. The finances and property of the community and all matters provided for in the Bophuthatswana Traditional Authorities Act of 1978, are entrusted to the executive authority or council (Government Gazette, no. 25492 of 3 October 2003:10).

4.7 THE ROYAL BAFOKENG NATION CORPORATE GOVERNANCE DEPARTMENT

The Royal Bafokeng nation has formalised by-laws that articulate the powers and mandate of each office and they have ensured that people‘s expectations of the leaders match that leader’s specific mandate and that such transparency will lead the way to better administration. Examples of such measures include the formalisation of each ward’s executive and sub-committees as well as the process of transferring someone from one ward to another. The process was started in June 2006 and was completed in June 2007.The second phase was completed in June 2008. With a clear sense of what the leader’s responsibilities are, the Royal Bafokeng nation will be in a better position to expand the range of services that are administered at the level of services comparable to municipal services (Molotlegi, 2007:3).

The Royal Bafokeng Administration’s Corporate Governance Department comprises the following functional areas: Royal Bafokeng Nation Group Legal Services, Traditional Governance Structures, Land Affairs and Government Relations. The functional areas are briefly outlined as follows:

i Group Legal Services

- ❖ Inter Company Loan Agreements

After careful consideration of the legislative impacts as well as structuring the affairs of the Royal Bafokeng Nation as a group, a decision to convert inter company loans to

equity has been taken. For the period under review, Group Treasury, Corporate Governance and the Royal Bafokeng Holding Executive Management have taken stock of all the loans which must be converted. Conversion shall take place after the remaining Royal Bafokeng Nation Development Trust trustees have been appointed

(Royal Bafokeng Nation Kgotha Kgothe,2008:5).

- 2010 Fifa World Cup

The South African Local Organising Committee has on behalf of the Federation of International Football Association(FIFA), tabled addendums to the Royal Bafokeng Administration stadium authority Agreement for consideration and approval. For the period of under review the Confederation Cup Addendum Agreements have been concluded. Undertakings relating to the regulation of billboards and signage have also been reviewed and concluded with FIFA in respect of both the Stadium Precinct and Phokeng. It must be noted that the Royal Bafokeng Administration as a traditional authority contributed extensively towards the 2010 FIFA World Cup by availing the abovementioned stadiums for the tournament.

- Lebone II College and the Royal Bafokeng Institute

Following the registration of Royal Bafokeng Institution as a Section 21 Company, policies which will regulate internal business processes have been tabled in the Royal Bafokeng Institute's Executive Management for consideration before they can be approved. A draft Entity Compact Agreement which will regulate the relationship between the Royal Bafokeng Nation and the Royal Bafokeng Institute has been tabled for the Royal Bafokeng Institute for inputs and consideration before it can be signed. The registration of the Lebone II College of the Royal Bafokeng as a Section 21 Company has been conclude. The Corporate Governance Department formulated policies jointly with the RBI and Lebone II College Management to improve internal control and streamline processes within Lebone II(Royal Bafokeng Nation Kgotha Kgothe,2008:5).

- Royal Bafokeng Development Trust

At the beginning of 2008, the Office of the King held a briefing session with the elected trustees on institutional arrangements brought about by the Royal Bafokeng

Development Trust. There was also a detailed briefing relating to the Royal Bafokeng Nation Treasury processes and how an interface with the trust will be achieved.

- ❖ Legislative impact

For the period under review, legislation with an impact on the RBN have been considered and amendments proposed for inclusion in legislation have also been published for comments. New legislation published, relate to Traditional Courts Bill and Customary Succession Bill. With regard to Traditional Courts both written and oral submissions were made to the Justice Portfolio Committee. This Bill was put on hold by Parliament after oral presentations were made. Inputs on the Customary Succession Bill were submitted in writing only (Royal Bafokeng Nation Kgotha Kgothe,2008:5).

Under traditional leadership institutions, the Traditional Leadership and Governance Framework Amending Bill *and* National House of Traditional Leaders Amend Bill were published. Written submissions regarding these were also submitted to Parliament.

Communal Land Rights Act Regulations have been published by National Government. Written submissions were made to the Department of Agriculture and Land Affairs. No oral submissions have been invited. The Department of Agriculture and Land Affairs issued the Land Use Management Bill which was also reviewed by the Department at the time of reporting (Royal Bafokeng Nation Kgotha Kgothe,2008:5).

4.7.1 Leadership development

The Royal Bafokeng nation has established the Bafokeng Education Institute. A component of the Institute is devoted to developing leadership training programmes for all the Royal Bafokeng nation's leaders including the king. The stated goal is to ensure that each headman either has a degree or diploma in by 2020. In this way the Royal Bafokeng nation will achieve a world-class leadership that will serve as an example across South Africa and globally (Molotlegi, 2007:3).

4.7.2 Challenges facing local headmen

The King is fully committed to address all matters related to headmen. The outstanding succession disputes will be resolved by empowering a commission of inquiry to investigate and establish the facts of each case. Secondly, those headmen who are no longer able to meet the demands of their office and allow the rightful heir to take their place will be retired so that the rightful heir can take his place. The headmen were organised in the regional committees according to Master Plan's regional map 1 in June 2007. Headmen are expected to be the role models to the Royal Bafokeng nation as well as the bearers of the nation's tradition. The conduct of the headmen must be irreproachable, fair and worthy of emulation (Molotlegi, 2007:3).

4.7.3 Demarcation of traditional wards (*makgotla)*

In order to effectively run and govern each ward, there is a need for leaders to physically demarcate each ward clearly. The smallest administrative unit is not based on loose affiliation or kingship; it is a geographical area that falls under the jurisdiction of a particular *kgosana*. According to Molotlegi (2007:4), demarcating each and every ward will be challenging. However, clear demarcation will help to clarify people's allegiance and community responsibilities (Molotlegi, 2007:4).This will also facilitate service rendering as community members will be able to establish the area of jurisdiction of a service provider.

4.7.4 Bafokeng traditional councillors

The current council ended its five-year term in March 2007. Instead of scheduling new elections to elect another council, the system was change to bring it into line with the Traditional Leadership Act of 2004. There was a three-month transition period was determined during which the former council had to finalise its affairs until the new council could become operational. A smaller council currently consists of some elected members and some appointed members. It consists of elected and one appointed members who represent a region. This council is working closely with the Rustenburg local municipal councillors to achieve the development goals of each of

the five Bafokeng regions. The rationale behind the change is to ensure closer alignment between the Rustenburg councillors and the Royal Bafokeng councillors and to reduce the overall numbers so that the traditional council remains representative and more effective (Molotlegi, 2007:4).

For the period under review, traditional councillors were inducted on all aspects of the RBN governance system and business processes. Departments and entities such as the Office of the King, RBA, RBH and RBI assisted traditional councillors with their plans and processes to achieve an understanding of the goals of the RBN. A training and development programme for traditional councillors has also been approved. Traditional councillors were trained in meeting procedure and taking minutes (Royal Bafokeng Nation Kgotha Kgothe, 2008:8).

The traditional council resolved to develop a five year plan covering investments, human capacity building, infrastructure, economic development and health. The traditional council has also reviewed the former Executive Council's mandate and scope in order to achieve the smooth running and co-ordinated inter-linkages with other structures of the RBN such as traditional wards and the municipality's ward structures (Royal Bafokeng Nation Kgotha Kgothe, 2008:8).

Considering the practices followed by the traditional councillors, the usual Western type of decision making is not followed. Thus in evaluating the western governing style, provision has to be made for traditional systems as well to accommodate the principles of such systems.

The traditional council deals with an extensive review of the level and quality of infrastructure projects which are undertaken by a number of the RBA 's local service providers after the King had intervened to put a moratorium on pending projects. The traditional council recommended that the moratorium be lifted on condition that contractors with a proven track record and the Construction Industry Development Board accreditation and grading be considered when awarding tenders for the remainder of projects in the 2008 financial year (Royal Bafokeng Nation Kgotha Kgothe, 2008:8).

4.8 COMUNAL LAND RIGHTS

With the arrival of the Boer settlers in the Transvaal, a rudimentary system of land registration was introduced. It became more sophisticated over time. Initially, the grants of such farms were performed informally by the landdrost who issued certificates of registration for land. By the mid nineteenth century, all the land forming the Greater Rustenburg region has been granted and registered in favour of Boer farmers. In law, the registered owner of land had absolute rights of ownership and possession. Accordingly, while the Bafokeng continued to occupy portions of the ancestral land, no rights of ownership existed. Thus, for example, the principal village which was within the present municipal area of Rustenburg was vacated and moved to the village of Kanana situated on what is today the farm Reinkoyalskraal. In April 1844, the first Boer Constitution, being the Thirty-Three Articles drawn up at Potchefstroom, determined that no equality between blacks and whites with regard to the land rights exists (Government Gazette no. 25492 of 3, October 2003:2).

Blacks were not allowed to settle near village lands, to the detriment of the inhabitants, except with the consent of the full Volksraad. The Volksraad of the South African Republic *(Zuid-Afikaansche Republiek)* more specifically the Transvaal Republic) resolved in November 1853 that commandants-general could grant farm land to blacks provided that such land be occupied by the blacks and the descendants conditionally as long as there is compliance with the law. In case of disobedience, such tenure may be declared lapsed, and, if so, it remains a loan farm, and the conditions or rent may be determined by the natives' good behaviour and obedience. In June 1855, the Volksraad passed a resolution which provided that no one who was not a recognised burgher should have any right to possess immovable property in freehold. All coloured persons were excluded. Burgher rights were never granted to the natives (in accordance with the *Grondwet)*. The *Grondwet*, which was the Constitution of the Transvaal Republic, was adopted at Rustenburg in 1858 and provided that no equalisation of coloured persons in the state would be permitted(Government Gazette no. 25492 of 3, October 2003:1-2). Thus it could be argued that inequality regarding land rights could be traced back to the mid nineteenth century. This ultimately had a negative effect on the permanent settlement of Blacks.

This in turn had an effect on the development of orderly urbanised settlements and consequently on traditional leaders to gain experience in governing.

The issue of whether blacks could purchase land arose when the commandant of the Rustenburg district enquired of the Volksraad whether blacks in the district could purchase land from a burgher. The executive council proposed to the Volksraad that in such cases transfer should be made out in the name of the government, the use of the farm being available to the blacks andhis/her heirs as long as the conduct is in accordance with the law. The Volksraad proposed that according to law no land should be sold to blacks, but this was rejected. The Volksraad referred the matter back to the executive council for a report as to the best way in which to provide the blacks with locations and what would be in accordance with the law (Government Gazette no. 25492 of 3, October 2003:2).

The government retained a pre-emptive right to land where black purchasers wished to dispose of land. The 1871 resolution of the Volksraad was not acted upon and did not become law. The Volksraad decided that no transfer of land to blacks will be allowed. A petition in 1872, requested that land not be sold to blacks and that blacks not be entitled to obtain freehold ownership. In 1873 the question of land ownership by blacks was again raised in the Volksraad, which referred the issue to the government. Government submitted its report to the Volksraad in 1874 and placed before it a proposed law on the transfer of land to blacks. The proposed law provided for the transfer of land (property) to any coloured person who can produce a certificate from the field-cornet of the ward in which he resided or was resident, or from the landdrost of the division in which the person resides, that such person was well known to the landdrost as an honest, quiet, industrious and peace-loving person, faithful to the Republic.

The report and the bill were both rejected by the Volksraad. The resolution, which rejected the proposed law, stated that it was in conflict with the *Grondwet* (Constitution). The Volksraad resolution of 1855 continued to apply, whereby blacks were excluded from holding property in freehold (Government Gazette no. 25492 of 3 October 2003:2).

In January 1875, King Mokgatle of the Bafokeng, assisted by J.A. Butner, enquired of government whether a farm that the Bafokeng had purchased could be transferred into the Bafokeng's name should that not be possible a proposal was to be made for the farm to be transferred the name of the government in trust on behalf of the Bafokeng nation. The response from the executive council was to refer Butner to a Volksraad resolution of the previous year in which the government refused to approve the transfer of land into the name of either an indigenous community or the government in trust for such community. Up to the time of the British occupation in 1877, the grant of land for black occupation was done in accordance with the abovementioned conditions.

On 12 April 1877, Britain annexed the Transvaal. The annexation proclamation guaranteed equal justice to the persons and property of both white and coloured, but without granting equal civil rights, such as the right of voting, entitlement to other civil privileges incompatible with the natives uncivilized condition. The proclamation guaranteed that all private *bona fide* rights to property, guaranteed by the existing laws of the Transvaal Republic would be respected. The British administration changed the position by initiating the principle of vesting land title for blacks in a responsible representative of the government as official trustee. The Lagden Commission Report was later to record this change in policy towards the purchase of land by blacks, during the British occupation.

In 1877, when the British occupation took place a modification of the principle of the South African Republic refused to recognise the right of blacks to purchase land. It was considered inadvisable to make a change by which blacks should have the right to purchase land and to have it registered. The policy, adopted by Sir Theophilus Shepstone was to make the secretary for native affairs *ex officio* trustee for the blacks. Thus the secretary secured rights. The office was a permanent one, risks concerning expense in the event of the death of a trustee were obviated. The Lagden Commission Report also records that until the time of annexation of the Transvaal, the government of the former South African Republic was, up to this point reluctant to allow blacks to acquire land by purchase. In these circumstances, the natives resorted to the missionaries to buy land on behalf of the Royal Bafokeng nation, which were

registered in the name of the missionary. The purchase price was collected by each black chief of the relevant tribe, principally in cattle, and the missionary arranged the transaction (Government Gazette no 25492 of 3, October 2003). As early as 1869 the Bafokeng nation had purchased and paid the purchase price of £9 for a portion of land, which was registered in the name of a missionary. In 1871 the Bafokeng purchased and paid the purchase price of £150 for a further portion of land. Further similar purchases followed in 1874, 1876 and 1879 with all these farms being registered for the Bafokeng in the names of missionaries with the Hermansburg Mission Society. The British government did not approve of land purchased by indigenous communities being held by missionaries. The government accordingly instructed that until further legislation on the subject, all land purchased by or for natives are to be held in trust by the secretary for native affairs for such natives (Government Gazzette no. 25492 of 3, October 2003).

Prior to July 1879, King Mokgatle of the Bafokeng obtained an interview with Sir Theophilus Shepstone regarding land ownership by blacks. It was indicated to King Mokgatle that according to the law blacks ,could not obtain ownership in land and that until such time as the law was amended, no change in this respect could be achieved. Accordingly, the government enquired from King Mokgatle as to what arrangements had been made in respect of the land, which had already been purchased by the Bafokeng. Mokgatle informed the government that the land was transferred into the name of a missionary viz. the Reverend Penzhorn. The problem was that the Reverend Penzhorn no longer wished to shoulder this responsibility as it was anticipated that the Bafokeng would have problems in relation to the properties when Reverend Penzhorn died. The government agreed with this and indicated that it would be better if the land could be transferred into the name of one or other government official in trust for the Bafokeng because the office of such official would continue to exist even if the holder of that office died (Government Gazette, no. 25492 of 3, October 2003:3).

In December 1879, the Reverend Penzhorn wrote to the colonial secretary, M. Osborne, requesting that the Bafokeng be given evidence of the fact that the government would transfer the land into the name of a trustee on behalf of the nation.

The Reverend Penzhorn indicated that the Bafokeng intended to purchase a further farm and that the seller was prepared to sell it provided it could be transferred into the name of King Mokgatle or the government in trust. It was confirmed that the suggestion that the land should be transferred to the government in trust is consistent with the law. There had been one or two similar applications and the land has been transferred to the secretary for native affairs in trust for the native purchaser. It was suggested that a similar course be adopted in the Bafokeng case.

It was stated that the Queen had approved the handing over of the country back to the former Boer rulers and the natives would be allowed to buy or acquire land. The transfer of the land would be registered in trust in the names of three gentlemen who would constitute a Native Location Commission. The Commission would mark out black locations, which the great native tribes could peacefully occupy. In marking out these locations, existing rights would be guarded. The Transvaal Government on the one hand, and the blacks on the other, had to respect the boundaries so defined Article 13 of the Pretoria Convention. It was thus recorded that the blacks would be allowed to acquire land, but the grant or transfer of such land would in every case be made to and registered in the name of the Native Location Commission and held in trust for such blacks.

According to the Lagden Commission Report the Volksraad resolution of August 1884 approved the principle that blacks could not hold land in their name and that the principle was acted upon by the registrar of deeds under the government of the second British occupation. In 1882 and 1883, the farms Zanddrift and Beerfontein, which had been purchased by the Bafokeng, were registered in the Deeds Register in Pretoria and transferred in full and free ownership for the Native Location Commission in trust for the Bafokeng nation. (The commission included among its members Paul Kruger, Vice-President of the Transvaal Republic, and George Hudson, the British Resident Commissioner).

In 1887, the farm Beerkraal, purchased by the Bafokeng, was transferred to the superintendent of natives in trust for the Bafokeng. In 1890, the farm Doornspruit was similarly transferred. The transfer of the farms to the Superintendent of Natives illustrated the prevailing policy of the government of the Transvaal Republic with

regard to registration of land acquired by blacks. Prior to August 1898, King Mokgatle of the Bafokeng requested the government to have all Bafokeng farms, which were at the time registered in the names of missionaries transferred to the Superintendent of natives in trust for them. However, the relevant documents were mislaid in the office of the native commissioner of Rustenburg. In October 1899, Britain declared war on the Transvaal Republic, formally annexed the territory and renamed it the Transvaal Colony. War continued until peace talks were concluded with the treaty of Vereeniging in May 1902. In consequence of the British victory a British official, the commissioner of native affairs, formally succeeded the Superintendent of Natives (Government Gazette, no. 25492 of 3, October 2003:5).

Under the second British occupation, Sir G.Y. Lagden was appointed as commissioner of native affairs. In 1903, a portion of the farm Kookfontein that had been purchased by the Bafokeng was transferred to the Commissioner of Native Affairs in trust for the Bafokeng. In July 1904, the Lagden Commission issued its *Report Relative to the Acquisition and Tenure of Land by Natives in the Transvaal* which stated of the class of land held by the Bafokeng. These properties were almost entirely acquired under the previous Government. Being property purchased by communal subscription, it was not practicable to exercise the same control as over government locations.

The title to such property was to be vested in the commissioner of black affairs in trust for the owners, who could not, therefore, encumber or dispose of the interests without the consent of the government. In 1904, the farm Vaalkop which had been purchased by the Bafokeng, was similarly transferred to the commissioner of native affairs, the successors in office, in trust for the Bafokeng. In April 1905, judgment was handed down by the supreme court of the Colony of the Transvaal in the case of Tsewu versus. Registrar of Deeds. On the basis that all the inhabitants of the country enjoy equal civil rights under the law, the court held that blacks of South Africa were entitled to claim transfer in the deeds office of any land of which he was the owner. The court unanimously upheld the right of a black to obtain registration of transfer.

The court held that there was no law which justified the position adopted by the registrar in refusing to register land in the name of the black plaintiff. Chief Justice

Innes stated that no doubt the practice has prevailed for years in this country of not allowing transfer of land to be made directly to any native, but insisting upon transfer being taken in trust by an official appointed by the State. The judge stated that the existence of that custom cannot, in judgment, justify the attitude of the respondent. It was for the legislature to deal with the matter if it is thought right to make special provisions regarding the natives (Government Gazette, no. 25492 of 3, October 2003:6).

In the Tsewu, case the court referred to the Volksraad resolution of 1855 and decided that, had this not been repealed, blacks would have been directly prohibited from holding property in the Transvaal. In September 1906 the farm Klipgat purchased by the Bafokeng was transferred to the commissioner of native affairs for the Transvaal in trust for the Bafokeng. Soon thereafter, the Bafokeng purchased two further farms, Turffontein and a portion of Beerfontein, from the Hermansburg Missionary Society for a purchase price of £680(R1360). On 11 July 1910, a resolution was passed by the Bafokeng that the transfer of those farms be passed from the missionaries to the minister of native affairs in trust for the Bafokeng (Government Gazette, no. 25492 of 3, October 2003:6).

The Transvaal was granted responsible government in the Colony of the Transvaal in 1907. The change resulted in the appointment of Johann Rissik as the Minister of Native Affairs in the Transvaal. He succeeded the commissioner for native affairs. In accordance with the recommendation regarding land owned by blacks contained in the Lagden Report, the Transvaal Government commenced the transfer of land nominally held by missionaries as representatives of indigenous communities into the name of the minister of native affairs for the Transvaal. Accordingly in June 1907, six farms which had previously been purchased by the Bafokeng and nominally held by missionaries, were transferred free of transfer duty to Rissik in the capacity of Minister of Native Affairs in Transvaal, in trust for the Bafokeng. In November 1909 the farm Reinkoyaalskraal was purchased by the Bafokeng and similarly transferred to the minister of native affairs in trust.

The Bafokeng continued to purchase land after 1913 but the effect of the Native Land Act of 1913 made it very difficult to acquire further tracts of ancestral land. Three

further portions of the farm Kookfontein that fell within the scheduled area were however transferred to the Minister of Native Affairs in trust. The Bafokeng resolution which authorised this transfer, further resolved that a £2-pound(R4.00) levy be imposed on each adult male member of the Bafokeng in order to raise the funds for the purchase price. The farm Doornspruit Annex was purchased from the government by the Bafokeng for the sum of £175(R350) in August 1935.

This farm was transferred by way of a crown grant to the Minister of Native Affairs in trust for the Bafokeng. As this was a sale of government land, the transfer was made not only with the approval of the Minister of Native Affairs, but also required the approval of Parliament. It was apparent from the resolution approved by Parliament on 21 May 1934, and from the relevant executive council minute, that the government and Parliament regarded the sale of Doornspruit Annex as a transaction whereby freehold ownership in this land would pass from the state to the Bafokeng. In September 1935, the farm Toulon was exchanged for a portion of the state- owned farm Tweedepoort and registered in the name of the Minister of Native Affairs in trust for the Bafokeng. Again both the minister of native affairs and Parliament approved the transfer (Government Gazette, no. 25492 of 3, October 2003:7).

The Native Trust and Land Act, of 1936 provided that where a black man was the owner of the mineral rights, no person could prospect for minerals without the written permission of the Minister of Native Affairs. This legislation discriminated directly against blacks and the Bafokeng nation. It is quite apparent from the records surrounding the lease of mineral rights over various of the Bafokeng farms, that the government officials in the native commissioner's office, the secretary for native Affairs, the Minister of Native Affairs and the Bafokeng all regarded the Bafokeng as the owner of the land and as such entitled to deal with mineral rights on such properties as the owner thereof. For example, on 14 September 1953, the secretary for mines in a letter to the secretary for native affairs regarding a proposed prospecting contract between the Bafokeng and a mining company in respect of six portions of Bafokeng land stated that it would appear that the ownership of both the surface and mineral rights in respect of the land in question was vested in the Bafokeng Tribe and

the land therefore ranked as private land for the purposes of the mineral laws (Government Gazette, no. 25492 of 3 October 2003:7).

In dealing with the land related issues, the Bafokeng have always exercised rights consistent with ownership. The government functionaries holding the land in trust for the Bafokeng had never purported to exercise rights inconsistent with the Bafokeng's rights of ownership. The single notable exception to this was President Lucas Mangope of the former Bophuthatswana when concluding a mining contract in 1990 on behalf of the Bafokeng against the will of the Bafokeng. The Bafokeng is an indigenous community governed by the system of indigenous law. In Bafokeng indigenous law a decision to dispose of communal land can only be taken at a general meeting (*pitso)* of the Bafokeng. This principle of indigenous law has been recognised by the South African courts. The precise role of the government functionaries who held the Bafokeng land as trustees was never spelt out. In practice, through the course of more than a century, the government functionaries who were trustees never interfered in the Bafokeng's right to deal with the land or mineral rights. (Government Gazette, no. 25492 of 3 October 2003:7).

4.9 IMPALA PLATINUM MINES

The early period under South African mining law, Impala Platinum mines approached the Bafokeng in 1966 to obtain a prospecting agreement, which gave the company the right to explore its reserves to determine their viability. Under this agreement, a provision was made to grant Impala Platinum mines the right to exercise an option to obtain a mining permit to mine the mineral reserves. This was deemed acceptable because of the enormous costs incurred in prospecting. The prospecting agreement also set out the royalties the owner of the mineral rights should receive, and the period for which those rights would be granted, should the company take up its option to mine. After completion of the prospecting, Impala Platinum mines approached the Mining Leases Board for a mining permit, the granting of which had to be accompanied by proof of the viability of the reserves. The company's financial capacity to undertake mining in the Bafokeng reserves was then formalised in a mining lease (Manson and Mbenga, 2003:27-28).

According to Manson and Mbenga (2003:27-28), the owner of the mineral rights did not have to be approached in order to obtain the mining lease, and the mining company was given power of attorney for those rights on their behalf. The odds, therefore, were stacked against the owners of the mineral rights even in law. The Bafokeng approved of these arrangements, but only after a general meeting of the community had passed a resolution expressly authorising the Minister to enter into agreements on behalf of the nation (Manson and Mbenga, 2003: 27-28).

In 1977, the mining leases in respect of what was termed the First and Second Bafokeng Areas were registered. For the sake of convenience, these agreements were referred to as the 1977 agreements, although they came into effect at an earlier period. The royalty payable to the Bafokeng, in terms of the 'agreements', was 13% of the Impala Platinum mines taxable profits. Impala Platinum mines acquired the right to mine for a period of 35 years, from the time that the mining permit was granted, i.e until the right was terminated in 2003. This right enabled Impala Platinum mines to mine two reefs, the Merensky and UG2 (reef). In the mid-1980s, Impala Platinum mines became aware of the need to obtain access to the third Bafokeng area, known also as the Deeps, because the UG2 reef was becoming less profitable to mine and 'the Deeps' held the promise of better reserves. At this point, some attention needed to be given to the issue of royalties. Historically, the relationship between a mining company and the owners of mineral rights in South Africans had been an unequal one (Manson and Mbenga, 2003:28).

The owners, usually farmers or black communities, were not able to match the high powered mining experts that the big companies employ, and were not knowledgeable enough to analyse or evaluate the information, which relates to mining operations or mineral exploration. The land owners had to accept the explanation of the mining representatives. This resulted in the relevant communities being misled in some instances. The result is that communities did not in all cases receive the full benefits of the mining due to them Manson and Mbenga(2003:28).

In the case of base metals, where there was a more plentiful world supply, the chances of a disproportionate deal between owner and mineral exploiter was less than in the case with rare metals because supply and demand ensured the emergence of a general

pattern of royalties. In the case of platinum, however, the Bushveld complex, the site of the Bafokeng platinum reserves, contained the only identified significant reserves of the metal in the world. Approximately 90% of the market is in the hands of South African mining houses, 60 % under Anglo-American and 30 % in the hands of Impala Platinum. The struggle to control and mine these reserves, therefore, takes on a more pronounced emphasis in which powerful mining interests will invest significantly more resources in order to obtain the best terms possible. On examination, both the pattern and amount of royalties paid to the Bafokeng reveal an interesting picture. Firstly, there is no clear rate or means of determining the royalty sum. Thus, the first royalty provided for 4% of taxable income. This increased over the years to 5%, then 7%, 10%, paid by the Impala Platinum mines in royalty (Manson and Mbenga, 2003:28).

The basis of determining royalty is, therefore, purely arbitrary, and usually provides for improvement on a previous rate. Secondly, in arriving at taxable income, mining companies are entitled not only to deduct their capital expenditure but also their future capital expenditure. The argument is that the high capital cost of establishing a mine require a form of tax relief to allow for a reasonable cash flow release. The effect of this deduction is that, in certain years, a mining company can make a substantial profit, but because there is provision for future capital expenditure, there is no taxable income (Manson and Mbenga, 2003:29). Thus the Bafokeng has no guarantee regarding their revenue from this source. It also implies that it is difficult for the Royal Bafokeng Administration to budget as the revenue is uncertain.

Having made a profit, the company will have a distributable income, which is distributed as a dividend to its shareholders. However, the owner of the mineral rights, because royalty is based on taxable income, might very well receive no or very little payment in royalties. Thus, not only is the mineral owner disadvantaged, the mining company actually controls the division of any excess revenue. The returns on capital investment from 1971 show that, up to 1978, the annual dividend paid to Impala's founding shareholders varied from 30 % to 50 % on the capital provided. From 1980, shareholders received the following approximate returns on capital investment:

TABLE 4.1 Impala shareholder's percentage return on investment; 1980-1995

1980	**1981**	**1982**	**1983**	**1984**	**1985**	**1986**	**1987**
88%	97%	66%	75%	119%	117%	119%	141%
1988	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**
159%	221%	230%	258%	235%	167%	101%	167%

Manson and Mbenga (2003:29)

A statement by the Bafokeng community in the Sunday Times (27 April 1997), concluded that "it would be fair to say that Impala has been the cash cow of the Gencor Group, providing the Group with a significant portion of the capital that has enabled it to become one of the leading mining houses in South Africa". The Bafokeng, however, did not receive their first royalty until 1978. The Bafokeng community, the owner of the ore reserves, is referred to for the first time in Impala's annual report published in 1988, 20 years after Impala Platinum mines commenced mining operations. In that report, the amount paid in royalties during the financial year was set out separately for the first time. Indeed, had the Bafokeng not been embroiled by then in a legal dispute with Impala, probably no reference would have been made at all in the report. The Bafokeng were paid interest-free advances on royalties to be paid in the future, being equivalent to 10 % of the dividends declared. To conclude, the Bafokeng by the mid-1980s had received royalties for only seven years, which in any event were relatively low. Furthermore, Impala Platinum did not acknowledge that there was an inherent problem in the manner in which royalties were calculated . It could thus be stated that the Bafokeng was not treated in an equitable manner and thus does not derive the financial benefits due to lack of clarity in the calculation of royalties.

According to Manson and Mbenga (2003:30), in 1985, for reasons already mentioned, Impala approached the Bafokeng to obtain an expansion of mining operations to include the third Bafokeng area, or the Deeps. This provided the leader at the time, King Edward Lebone Molotlegi, the opportunity to put forward a number of queries and complaints regarding the issue of royalties, describing the payments made to the Bafokeng as a pittance and raising the issue of trusteeship over Bafokeng land.

The managing director of Impala Platinum mines, D.A. Ireland, wrote back attempting to clear up possible misunderstandings, and argued that the royalty presented by the South African Development Trust Corporation was in respect of base mineral mining in South Africa, where the going rate is 10% of the net profit However, platinum cannot be viewed as a base mineral. Ireland, however, did agree to raise the royalty from 13% to 18% of taxable income.

The particular series of events resulted in the Bafokeng, on one hand, and the former Bophuthatswana regime and Impala on the other, becoming involved in a prolonged course of conflict with high costs to both. Impala initiated an approach to the former Bophuthatswana government, essentially to establish if there was any means of forestalling the Bafokeng's demand for access to information and to enquire if the "homeland" government could in any way assist in obtaining a mining lease for the Deeps. Representatives of Impala and Gencor met the Bophuthatswana Minister of Economics, Energy Affairs and Mining, E. Keikelame, and then Prime Minister Lucas Mangope, in October and November 1987. Finally, it was agreed that Impala would write to Keikelame stating the objection against furnishing the information, and would then invite Ministerial intervention (Manson and Mbenga, 2003:30).

The Minister duly responded on 9 December 1987, instructing Impala not to divulge any information unless instructed to do so by the trustee of the tribe. This decision was made between the Bafokeng Tribe (applicant/plaintiff) and Impala Ltd, and Bophuthatswana ministers of the Energy Affairs, Land Affairs and the President of the Republic of South Africa.

Nevertheless, it led to a series of further meetings between senior officials of Mangope's government and Impala so that a common defence could be prepared to the Bafokeng application. To sum up, the significance of this development was, first, to have Impala and the Bophuthatswana government enter into an alliance that would emphasize the differences between the former Bophuthatswana government and the Bafokeng. Secondly it introduced a marked political dimension to the conflict, inserting into the legal dispute the notion of trusteeship as a crucial argument. It also offered certain Bophuthatswana officials the opportunity to extend the venal interests. The salary of the Bophuthatswana Minister of Finance, Leslie Young, was augmented

by Gencor. Later, the lawyers acting for the Bafokeng were able to allege that payments had been made to other officials as well. Inevitably, when the matter came to the Bophuthatswana supreme court, it was ruled by Judge Smith that the Bafokeng could not terminate a contract between them and Impala. Considering that the land over which the mining leases were granted included not only the Bafokeng's first and second areas, but also land owned by the South African Development Trust (SADT) or state land, and in order to terminate the agreement it would have required the consent of the owner of the SADT land, because it was an indivisible contract. Secondly, a breach of this nature, over refusal to disclose information, did not warrant termination (Manson and Mbenga, 2003:31).

4.10 INFRASTRUCTURE DEVELOPMENT BY THE ROYAL BAFOKENG AND THE NORTH WEST PROVINCIAL GOVERNMENT

Income generated by Royal Bafokeng Nation's commercial interests has been invested in developing the infrastructure and people of the Rustenburg valley. In excess of R2 billion of the Royal Bafokeng nation 's funds have been spent on roads, utilities, schools, clinics and other public amenities over the past decade. The majority of the users of these amenities are non-Bafokeng residents and visitors to North-West Province (Carroll, 2007:1).

The road between Phokeng and Boshoek was rehabilitated and upgraded towards the end of 2007. The road is known for accidents which have claimed many lives . This emerged at signing of an agreement between the North-West provincial government and the Royal Bafokeng Nation in Phokeng. Apart from the accidents which happened on the road regularly, the upgrading and rehabilitation project, which started around June 2007, a year after the completion of the tender process, was also prompted by the forthcoming Soccer World Cup to be staged in this country in 2010 (Molotlegi, 2007:1).

The R110 million project was financed jointly by the Royal Bafokeng Administration and the North-West provincial government and was done in four phases. Phase one of the project was the construction of a 9,1km dual carriageway road from Phokeng to

Boshoek and the erection of street lights along the road. The 9,1km carriageway was followed by the construction of a 4,1 km two-lane carriageway. Phase three was the construction of a 10.8 km carriageway road from Boshoek to Ledig, while phase four was the construction of a 5,2 kilometres road from Ledig to Sun City (Molotlegi ,2007:1).

A member of the executive council in the North-West legislature described the agreement between his department and the Royal Bafokeng Nation as an indication of the success between governments that worked with its people, especially traditional leaders, in major projects. It was further stated that they would be meeting each other halfway in this project, adding that the road would also help in facilitating the movement of platinum. King Leruo Molotlegi described the agreement as a continuation of a partnership which dates back to 1997 between the government and the Bafokeng. The King stated that it was, with the 2010 Soccer World Cup soccer tournament in mind, agreed to partner with the government. Royal Bafokeng stadium is one of the venues that will be used to host some of the 2010 Soccer World Cup Games and as such the Boshoek road would be used by some of the teams and soccer supporters that will be staying at Sun City hotel during the tournament (Molotlegi, 2007:2).

4.11 THE ROYAL BAFOKENG ADMINISTRATION MODEL

Before discussing other traditional authorities, attention should be focused on the peculiar situation of the Royal Bafokeng Nation. It is the only traditional grouping in South Africa with access to extensive minerals. This puts them in a unique position as the nation could fund most of the municipal functions within their area of jurisdiction. They are, therefore not dependant on a municipality as a sphere of government for the financing of services provided. However, the Modjadji, Zulu and the Botswana traditional authorities lack direct sources of revenue and are dependant on the government's budgetary allocation. This situation results in unequal development due to unequal access to funding.

4.12 KWA ZULU-NATAL PROVINCE TRADITIONAL LEADERSHIP SYSTEM

4.12.1 KwaZulu- Natal traditional leadership system

The province of KwaZulu-Natal has been the scene of many conflicts since the 1830s between the Zulus and the Voortrekkers; the British Empire and Boer settlers (resulting in the Anglo-Boer War); the Zulus and the British Empire (resulting in a number of Anglo-Zulu wars); as well as between factions of the ANC and the IFP. The homeland of KwaZulu was granted self-government under the apartheid government on 1 December 1977. The capital of the then KwaZulu was Ulundi and the chief minister of the KwaZulu government was Chief Mangosuthu Buthelezi, leader of the Inkatha Freedom Party (IFP) (Olivier, 2005:90).

Although KwaZulu-Natal was relatively large it was segmented into 10 major blocks and a number of smaller blocks, and spread throughout a large portion of the province of KwaZulu-Natal. In 1994, KwaZulu-Natal became a province of the newly established Republic of South Africa under one sovereign state concept (Section 1 of the 1996 Constitution).The former KwaZulu merged with the former province of Natal to become KwaZulu- Natal (Olivier, 2005:90).

In 2006 the KwaZulu- Natal Traditional leadership institution was transformed by the KwaZulu- Natal Traditional Leadership and Governance Act, 2005.The transformation of the institution of traditional leadership in KwaZulu-Natal resulted in 280 traditional leaders (amakhosi) being sworn in and the establishment of district houses of traditional leaders. The transformation aligns the institution with democratically elected councillors by electing 11 new houses of traditional leaders. It must be noted that traditional leaders in KwaZulu-Natal Province are now required to be sworn in and to pledge allegiance to the Constitution and legislation governing traditional leaders(Khumalo,2006:1).

The KwaZulu-Natal Traditional Leadership and Governance Act, 2005, which was enacted in December 2005 aligns the duties of the traditional institutions with that of the democratically elected institutions of local government. The government wants to

ensure that there is partnership between traditional leaders and democratically elected councillors. The partnership brings development in rural areas. The process established 11 new houses of traditional leaders in all the district municipalities in KwaZulu-Natal including the Durban (Ethekwini) Metropolitan Council. The formation of these houses enables amakhosi to participate meaningfully at local sphere in the process to develop communities. Members of the new houses are be sworn in by taking oath of office in a similar manner as members of Parliament (Khumalo,2006:1).

The new houses will operate like Parliament on a five year term after which there has to be elections for office bearers and the houses must be reconstituted. After the establishment and swearing in of members of the local house of traditional leaders, representatives must be elected per district to the provincial house of traditional leaders. Representation to the provincial house is based on proportional representation. The objectives of the changes are an attempt by government to harmonise relations between traditional leaders and municipalities which in certain instances, have slowed and even curtailed development. The new houses elevate the status of traditional leaders as these houses exist at the level of district municipalities and allow them to participate on matters of rural development (Khumalo,2006:1).

4.12.2 Succession to office of monarch

The national Constitution recognises the institution of the monarchy of KwaZulu-Natal as hereditary in succession, which is determined by customary law applicable to the institution of the monarchy of AmaZulu or provincial legislation.

A vacancy in the office of the monarch caused by death or abdication must be filled as soon as practicable according to customary law and provincial legislation. In terms of provincial legislation, the royal family must inform the Premier of the Province of the person identified as successor to the monarch's office by applicable customary law. The Premier must then, in the official Gazette of the province, publish a notice declaring the successor so identified for general notification (Olivier, 2005:91).

4.12.3 Role, responsibilities, powers and functions of the Monarch

The Monarch has various responsibilities and functions, including to uphold the national Constitution, and the laws of KwaZulu-Natal and to recognise the unique and diverse culture and heritage of KwaZulu's people.

The Monarch must strive to represent a symbol of unity to the people of KwaZulu-Natal and promote peace, stability and nation building. Further powers, responsibilities and functions may be conferred upon or assigned to the monarch by the Constitution, customary law and national legislation. These include responsibilities and functions generally and specifically conferred upon or assigned to a king or queen by regulation made in terms of applicable national framework legislation as pertains to traditional leadership and governance, as well as provincial legislation (Olivier, 2005:93).

The Monarch has a traditional or ceremonial role, responsibilities or functions conferred upon or assigned to him by regulation in terms of national framework legislation. In addition he may open or address sessions of the provincial legislature, subject to rules and orders of the provincial legislature. Also subject to a resolution of the provincial house of traditional leaders the monarch may open or address sessions of the provincial house of traditional leaders.

Subject to a resolution of and conditions imposed by the executive council, the Monarch may confer honours and distinctions, meet foreign dignitaries or represent KwaZulu-Natal culturally and socially both within South Africa (Olivier, 2005:93). It must be noted that the role, responsibilities, powers and functions of the traditional leaders in the KwaZulu- Natal exceed those of other traditional leaders in other provinces. For example in the Royal Bafokeng Administration the King is mostly responsible for the affairs of Bafokeng nation.

4.12.4 Revenue sources of the KwaZulu-Natal Monarchy

In 2007 the KwaZulu-Natal Provincial legislature passed the Royal Household Trust Act, no. 2 of 2007 and together with this Act, the KwaZulu-Natal Traditional

Leadership and Governance Act, no. 5 of 2005 the Premier and the members of the Provincial Executive Council have given full recognition to the role of traditional leadership in KwaZulu-Natal province. The KwaZulu-Natal legislature have subsequently established the Royal Household Trust Provincial Act, no. 2 of 2007.

4.12.4.1 KwaZulu-Natal Royal Household Trust Act, no. 2 of 2007

The KwaZulu-Natal Royal Household Trust Act, no. 2 of 2007 marks a milestone in the history of KwaZulu-Natal and the Royal Household. Through this legislation the KwaZulu-Natal Provincial Government has made it possible for the Royal Household to reach its full potential. The effect of this legislation is that the KwaZulu-Natal provincial government is the only legislature that has enacted legislation benefiting in particular the King and his Royal Household. There is no provision made for other traditional leaders in other provinces.

The Act establishes a statutory trust to be administered for the benefit of the monarch and other members of the Royal Household. Section 3 of the Act makes it abundantly clear that the Trust must benefit the king and the Royal Household, including their

a) material welfare;

b) educational needs;

c) aspirations;

d) social well-being, befitting their status.

The Trust is a juristic person and a provincial public entity subject to the Public Finance Management Act, no. 1 of 1999. The Trust is governed by a board of trustees. Its financial statements must be audited by the Auditor-General and fulfil all the requirements of the Public Finance Management Act,no.1 of 1999 (PFMA). The Trust is to be funded, amongst others, by monies appropriated by the Provincial Legislature, donations or contributions from any lawful source. The board of trustees of the Trust and the king and the royal household, now have at their disposal the legal framework

and the legal mechanism to ensure that the Zulu monarchy and the royal household reach their fullest potential. The provincial government encourages all role-players and stakeholders to make the fullest use of the KwaZulu-Natal royal household trust, which has great potential benefits to be unlocked for the King and the Royal Household. Policy guidelines and regulations, which were to be developed and finalised at the end of August 2008,would enable the chairperson to effectively balance the requirements of the PFMA and the special needs of the monarchy. Further to this and with the aim of enhancing the capacity of the royal household, the provincial government appoints key personnel including a chief financial officer and other administrative officials to attend to issues such as administration and protocol. The officials report directly to the director-general of the Provincial Government.

4.12.4.2 KwaZulu-Natal Provincial Government Budget Review

For the 2008/2009 financial year the Department of the Royal Household has been allocated an overall budget of R39,356-million. It should be noted that the government of the province is responsible for the maintenance and upkeep of all the royal palaces. A technical report is compiled to determine the state of the palaces and the funding requirements. Staff rationalisation is undertaken in consultation with the relevant stakeholders. The provincial government has restored the dignity to the royal house and the institution of traditional leadership in KwaZulu-Natal. The budget consists of the following programmes:

- Programme 1: Administration-Support Services to the King (R22,001million). This programme will continue to provide the required support to the king and members of the royal family.

- Programme 2: Planning and development (R14, 725-million). This programme caters for the running of royal palaces.

- Programme 3: The king's farms (R 2, 630-million). The King's farms play a pivotal role and also contribute towards the socio-economic development of the province.

The KwaZulu-Natal provincial government's initiative to enacting the KwaZulu-Natal Royal Household Trust Act, no. 2 of 2007 confirms that there is a need for other provincial governments to enact similar legislation. From these programmes it can be deduced that the largest portion of the provincial budget for the Royal House is allocated to administration. No direct allocation is made for service delivery to the zulu nation as is the case with the Royal Bafokeng.

4.13 THE ROLE OF TRADITIONAL LEADERS IN SELECTED OTHER SADC MEMBER STATES

In this section, a discussion of the role of traditional leaders in Swaziland, Botswana, Namibia and Lesotho will be provided.

4.13.1 Swaziland traditional leadership system

Due to continued conflict with the Zulu nation, the Swazi nation moved northward in the early 1800s to what is currently known as Swaziland. The Swazi people had several leaders of whom the most important was King Mswati II. The Swazi was not satisfied with the small piece of land they occupied at the time. Under the leadership of King Mswati II, the Swazi expanded to the northwest in the 1840s and stabilised the southern frontier with the Zulus. Discussions aiming at a new constitution started in 1966. The constitutional committee agreed on a constitutional monarchy for Swaziland, with self-government to follow parliamentary elections in 1967. Swaziland became an independent state on 6 September 1968 (Hugh, 2004:87-89).

Independence did not mean co-operation between the different parties in Swaziland. The conflict after independence between the different parties led to the repeal of the Constitution and the dissolution of Parliament by King Sobhuza on 12 April 1973. All powers of government vested in the traditional leadership council. All political parties and trade unions were banned. The king justified the actions by arguing that it was necessary because the unions and political parties practise systems that were incompatible with Swazi tradition. In 1979 when the new Parliament was convened, the king exercised his powers in the manner in which representatives were elected and

appointed. The king appointed some of the members and the others were elected (Hugh, 2004:89).

Queen Regent Dzeliwe became the head of state after the death of King Sobhuza in August 1982. The disputes amongst the Swazis continued, which led to the replacement of the Prime Minister by Queen Dzeliwe. Then the internal disputes led to the replacement of Queen Dzeliwe by Queen Regent Ntombi. The queen named her son Prince Makhosetive heir to the throne. Queen Ntombi exercised her influence through the leading figures of the *Liqoqo* (Parliament). Prince Makhosetive returned from England to ascend the throne. Prince Mkhosetive was enthroned as Mswati III in April 1986. Mswati abolished the *Liqoqo* and a new Parliament was elected in November 1987. The king appointed Obed Dlamini, a former trade unionist, as Prime Minister in 1989. Internal disputes continued in Swaziland. The People's United Democratic Movement, an underground political party, criticised the king and the government and called for democratic reforms in Swaziland. This led to political reforms approved by the king and the preparations for national elections in 1993. King Mswati III is still the head of state with Obed Dlamini as the head of Government. The king must approve legislation passed by Parliament before it can become law. This is an indication that all power is still vested in the monarchy. The current situation makes the political reform started by king Mswati and Obed Dlamini questionable according to (Hugh,2004:90).

The King tends to interfere in the independence of the judiciary. This led to a situation where Swaziland functioned without a court of appeals. The government's refusal to abide by the court's decision in two important rulings led to the judge's resignation. The chief justice resigned from office and two other justices of the high court were removed from office. A draft constitution for Swaziland was released for comment in May 2003. This meant that Swaziland operated and still operates without a constitution. In terms of the draft constitution, the constitution will be the supreme law of the country and the king will remain head of state. chapter XV of the draft constitution recognises traditional leadership (Hugh,2004:91). It must be noted that in Swaziland the traditional leader is the head of the state and there is no provision for democratically elected structures.

The President of the Swaziland National Association of Teachers commented on the monarchy by saying that the association would like to consider the king as a cultural symbol within a democratic political system like the crowned heads of Europe. Prince Mfanisibili Dlamini responded by saying that the word *symbol* means nothing more than a powerless figurehead. The prince postulated that 80 % of the Swazi people live like their ancestors lived, within chieftaincies headed by chiefs appointed by the king (Hugh, 2004:91). Thus it could be stated that traditional leaders still rule the country.

4.13.2 Lesotho traditional leadership system

Lesotho gained independence from the United Kingdom on 4 October 1966. The Lesotho government is a parliamentary constitutional monarchy. Constitutional Government was restored in 1993 after 23 years of military rule. In 1998, violent protests and a military mutiny following a contentious election, prompted a brief but bloody South African intervention. Constitutional reforms have since restored political stability. Peaceful parliamentary elections were held in 2002. The Prime Minister is the head of government and has executive authority. Unlike in Swaziland, the king in Lesotho serves a ceremonial function. The king no longer possesses any executive authority and is prohibited from actively participating in political initiatives. Under traditional law, the college of chiefs has the power to determine who is next in line of succession, and who shall serve as regent in the event that the successor is not of a mature age. Traditional leaders are well represented in legislative structures. The bicameral Parliament consists of the senate, 33 members being principal chiefs and the other 11 appointed by the ruling party. The Constitution provides for an independent judicial system. The judicial system is based on English Common Law and Roman-Dutch law. The monarch appoints the chief justice. The judicial system provides for traditional courts that exist predominantly in rural areas. The Basotho courts have no option but to apply customary law because 99,7% of the population are Basothos (Hugh, 2004:93-94). It could be argued that in Lesotho a confined system exists. On the one hand traditional systems are accommodated through customary law. On the other hand a Western styled Parliament has been established.

4.13.3 The Namibian traditional leadership system

Namibia gained full independence from South Africa on 21 March 1990 after 70 years of South Africa administering South West Africa under the terms of Article 22 of the Covenant of the League of Nations and a mandate agreement by the League Council on 17 December 1920. Namibians are of diverse ethnic origins, with the Ovambo, Kavango, Herero, mixed race, whites and Tswana the principal groups. Namibia consists of 87% black population, 6% white and 7% is mixed race. Fifty per cent (50%) of the population belongs to the Ovambo ethnic group (Hugh, 2004:95).

SWAPO assumed power at independence in 1990 with Sam Nujoma as President and head of state. Namibia is a republic with the President as head of the state and government. The Constitution with a bill of rights is the supreme law of the country. The Namibian Constitution recognises the right to culture. Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of the Constitution and further subject to the condition that the rights be protected. This applies as long as it does not impinge upon the rights of others or the national interest. The recognition given to culture implies the recognition of customary law because it is pointless to recognise culture without a legal system that must take note of customary law and apply it where necessary. The concern is that the Constitution does not mention traditional courts. The Namibian Constitution has a similar provision as the South African Constitution, regarding traditional leadership. Chapter 12 Section 5, the Namibian Constitution states that there is a council of traditional leaders. It is established in terms of an act of Parliament to advise the President on the control and utilisation of communal land and on all such other matters as may be referred to it by the President for advice.

It is necessary to recognise the right to culture in Namibia because of the role of traditional leaders substantially diminished after independence. As with the case of many other African countries, the colonialists used traditional leaders to their own advantage. According to Hugh (2004:96-97), the colonialists used traditional leaders to implement their policies and enforce colonial laws. As a result of their collaboration with the colonialists, traditional leaders did not gain favour with the liberation movements such as the South West Africa People Organisation (SWAPO).

As already stated above, because of the absence of referral to traditional courts, traditional leaders are stripped of most of their powers. For example, traditional leaders lost their jurisdiction over criminal matters. They can only try civil cases based on customary law. Traditional leaders also lost their powers of detention and the tribal police was disbanded. The Namibian Traditional Authorities Act, no. 25 of 2000 does not enhance the role of traditional leaders. The Act restricts traditional leaders to cultural or traditional matters and assist government in maintaining peace and order. Unlike South Africa, the Act does not give traditional leaders any role in development and service delivery. (Hugh, 2004:97).

In terms of Section 3(2) of the Namibian Traditional Act, no. 25 of 2000 traditional leaders are required to assist the police and other law enforcement agencies in the prevention and investigation of crime and the apprehension of offenders. Traditional leaders in Namibia are allowed only to assist government in the implementation of policies and governmental programme. Traditional leaders are not allowed to be in charge of these policies and programme. As in South Africa, there is tension between traditional leaders and the elected municipal councillors. The elected members, for instance, do not approve of the levying of fees for the use of communal land by traditional leaders. Part of the cause for the tension is that power has been taken from traditional leaders and vested in the elected members of municipalities (Hugh, 2004:97).

According to Keulder (1998:61-62), co-operation between traditional leaders and elected representatives in matters of development only exists in urban areas. In terms of Section 156 of the Namibia Traditional Leadership Act, no. 25 of 2000 unlike in South Africa, traditional leaders in Namibia have no right to hold elected political positions while holding the position of chief or head of a traditional community. However, nothing prohibits traditional leaders from being elected to municipal councils and participating in decisions on development and other issues.

4.13.4 The Botswana traditional leadership system

A major problem encountered by the creators of many of the new states in Africa has been that of defining a satisfactory position of traditional tribal authorities in a more

integrated and democratic political system. In Botswana, a solution has been sought at the level of local government, where much of the chief's power has been transferred to elected district councils, as well as at the national level where a house of chiefs has been created to advise government and Parliament. This body merits examination as a constructive effort to synthesise indigenous and imported institutions and to accommodate the interests and demands of the hereditary rulers and the more conservative subjects, which remain deeply rooted in the tribal structure, in a manner acceptable to new elite and the supporters eager to be modernised. (Proctor, 1968:59).

Before the establishment of the Protectorate (colony) over Bechuanaland by Britain in 1885, no unified government existed in the territory. Botswana was inhabited principally by the Batswana people, who were divided into eight tribes, namely Bakgatla, Bakwena, Balete, Bamagwato, Bangwaketse, Barolong, Batawana and Batlokwa. Each of these tribes was ruled by a powerful hereditary chief and was politically distinct from the others. There was neither a paramount chief nor any supra-tribal authority and no national consciousness transcended tribal loyalties. The British governed Bechuanaland initially through a form of parallel rule and later through indirect rule allowing a great deal of autonomy to the eight separate tribal administrations. The district commissioner served as the only formal link between the chief and the central administration although the resident commissioner occasionally consulted the chiefs directly on matters affecting tribal interests (Proctor, 1968:59).

The administrative system of the Botswana traditional leadership system is founded on the principle of delegating responsibility. At the head of the whole tribe is the chief (k*gosi; morena*). The chief is assisted in the execution of his duties by various forms of council. Local divisions within the tribe, such as sections, districts, villages and wards are divisional councils. Each local authority is responsible in the first place to the head of the next larger social group to which his people belong (Schapera, 1994:53).

The abovementioned local divisions are directly, or through some similarly, senior local authority responsible to the chief. There is a fair range of differences between one tribe and another with regard to certain forms of local administration. However the central government in the form of the chief and the councils appear to be

essentially the same throughout, although variations occur in matters of detail. There is also such institutions as the age regiments and the tribal assemblies through which the tribe as a whole is on occasion marshalled directly before the chief. In effect, therefore, the government of the tribe is ultimately concentrated in the hands of the chief, but existing social and territorial organisation are used to perform delegated functions of more local concern. (Schapera,1994:53).

The chief's life is not merely one of immense privilege. The chief has many duties to perform for the tribe, duties which, if faithfully carried out, may impose an immense pressure on his time. The chief's duties are to watch over the interests of the people and be kept informed of tribal affairs generally, to protect and look after the welfare of the tribe as trustee, to treat the people well and justly, to see that no harm or misfortune befalls the tribe and to listen to the subjects regardless of the rank. The wealth accumulated by the Chief must benefit the whole tribe and he is responsible for the maintenance of law and order (Schapera, 1994:68).

In terms of Section 15 of Chapter 41 of the Chieftainship Act, no. 14 of 2005 the current functions of the traditional leader in Botswana are as follows:

- to exercise his powers under this Act to promote the welfare of the members of the tribe;
- to carry out any instructions given to him by the Minister;
- to ensure that the tribe is informed of any development projects in the area which affect the tribe; and
- to convene traditional council meetings to obtain advice as to the exercise of his functions under this Act.

4.14 COMPARATIVE ANALYSIS: THE GOVERNMENT OF SOUTH AFRICA AND THE TRADITIONAL SYSTEM OF SWAZILAND

Government is vested in the monarchy in Swaziland. In South Africa, government is vested in a democratically elected government with the President as the head of state. In South Africa, the Constitution, containing the Bill of Rights, is the supreme law of the country(Section 2). Every law is subject to the Constitution and can be challenged to determine whether it is constitutionally acceptable. In Swaziland, it is not possible to test the constitutionality of any law at the moment. The king approves all the laws and signs it into power. Tradition is deeply rooted in the people because the majority of the population are Swazis with a small percentage of Zulus. Swaziland's culture is intertwined with its political system. In addition, the monarch's power is believed to be rooted in the ancestors. The Swazi traditional life is about collective beliefs shared by all, who agree to abide by the king's wisdom and do not dare question the king's authority (Bennet,1985:4)

The effect of this is that the future of customary law seems acceptable in Swaziland. In South Africa, it will probably be a continuous struggle to retain constitutional recognition of customary law, as was indicated by the groups that opposed the initial recognition of the interim Constitution. The same can be said with regard to traditional leadership. As long as government is vested in the monarch in Swaziland; traditional leadership will remain part of governmental institutions. The continued recognition of traditional leaders in Swaziland will depend on the effectiveness of these leaders. The chiefs in Swaziland are responsible, through traditional powers vested in them by the king, for raising local resources and co-ordinating delivery of basic services. In South Africa, that is the responsibility of local government. Traditional leaders participate through these legislative structures in South Africa (Bennet,1985:4) .

4.15 COMPARATIVE ANALYSIS: THE GOVERNMENT OF SOUTH AFRICA AND LESOTHO

The kingdom of Lesotho recognises customary law as part of the system of law. The Lesotho customary law has been recorded in several texts of which the earliest

probably is a Cape commission on laws and customs of the Basotho of 1873. South Africa is a republic and Lesotho a parliamentary constitutional monarchy. The traditional way of life is deeply rooted in the population of Lesotho because of the high percentage of indigenous people practising traditions and customs. Customary law in Lesotho enjoys a similar status as it does in Swaziland (Bennet, 1985:5).

The President in South Africa, as the head of state, has executive authority vested by the 1996 Constitution of the Republic of South Africa. The King in Lesotho, in conjunction with the chiefs, is the guardian of tradition. In South Africa it is the opposite. In South Africa, the kings and chiefs, are integrated into the formal system of government. They the guardians of tradition concerning the relevant tribe. Due to the difference in government between South Africa and Lesotho, the future of customary law in Lesotho is more secured. In Lesotho, the traditional leaders play a more meaningful role in the upliftment of the people than in South Africa. In the latter country traditional leaders are only involved in matters concerning tribal customs of specific areas. Because of the history of South Africa, the relationship between the head of state and traditional leadership is limited as traditional authorities don't cover the total geographic area. Although Lesotho has a parliamentary government, it can be said that the traditional leadership could survive political changes as long as the country recognises the monarchy as the titular head of state according to Bennet (1985:5).

4.16 CONCLUSION

The history of traditional leaders was discussed in detail from 1847 to 1994. The historical background of the Royal Bafokeng traditional leadership system was provided in this chapter. The Royal Bafokeng nation, corporate entities and the Mutual and Federal as well as Fraser Alexander transactions were discussed. The chapter covered the Royal Bafokeng customary law structures and the building of safer roads by the Royal Bafokeng and Government.

The main objective the comparison was to establish to what extent they differ from the Royal Bafokeng Administration. The next chapter will provide the local

government case studies with specific reference to the Botswana tribal authorities, the Royal Bafokeng Administration and the Modjiadji Tribal Authority.