

## EMERGING RURAL STRUGGLES AGAINST UNELECTED TRADITIONAL LEADERS AND THE ROLE OF THE COURTS

### Lessons from rural villages of the Eastern Cape

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This paper reflects on the use of the legal system by rural people in their struggle for democratised rural governance. In particular, the paper shows how the judgement of the High Court is utilised to raise awareness of rural people around struggles aimed at advancing their democratic rights. Indeed, there has been a groundswell of rural resistance in various rural communities across the Eastern Cape. Central to their demands has been the right to elect their leaders. There have also been victories in which rural residents have succeeded in enforcing their rights to elect their leaders. The author, thus, argues that while the court order may have led some rural residents to over-rely on the legal system it has assisted the rural residents of Cala Reserve not only to win the right to elect their leaders but also became a useful tool for raising awareness and mobilising rural residents in other rural communities who are standing up to claim citizenship rights.

**Key words:** Traditional leaders, Cala Reserve, imposition of an unelected headman, courts, the legal system, High Court.

### Introduction

*In seeking to realise the more radical vision, as outlined above, perhaps most problematic is the road to this future agrarian economy. As noted earlier, neither a land movement nor a radicalising state presently exists in South Africa. Historical and global evidence, including the example of Zimbabwe, strongly suggest that massive rural mobilisation is required in order to push through (sic) any meaningful rural change (Hendricks, et al., 2013:357).*

As the preceding epigraph shows, there is a view that South Africa needs to chart a “radical vision” that is based on an agrarian economy. More importantly for our purposes is the argument that “massive rural mobilisation is required” for the attainment of the “radical vision”. And, in his chapter on *South Africa’s countryside: Prospects for change from below*, Ntsebeza (2013:155-6) concludes that “rurally-oriented social movements” are still weak and “would remain weak as (sic) least for some time”.

This paper reflects on the emerging rural struggles and the possibilities for rural mobilisation in South Africa’s countryside. There has been a mushrooming of rural struggles across the Eastern Cape for the democratisation of rural governance since 2013. The imposition of unelected traditional leaders has triggered a growing demand for the democratisation of governance in rural areas. The struggle of the residents of Cala Reserve, despite their reliance

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on the legal system, has snowballed as the news spread to other rural areas across the Eastern Cape. Thus, the High Court judgement became a mobilising tool in other rural communities such that there has been a groundswell of demands in the villages for the right to elect their local leaders.

This paper argues that whilst it is true that there are presently no strong rurally-oriented social movements in South Africa, these emerging rural struggles raise the possibility of the development of such a rurally-oriented social movement. Although the case started in Cala Reserve and was largely pursued through the High Court, the judgement became an organising instrument whose ramifications go well beyond Cala Reserve, reverberating throughout the whole province.

In terms of the structure of the paper, the next section discusses the origins of the current rural struggles, highlighting processes leading to the emergence of the struggle to democratise rural governance. This section on the genesis of the struggles to democratise rural governance gives background to the struggles. It shows how the problem started. The section that follows focuses on the response of members of the Planning Committee (PC) to the imposition of an unelected headman in the village. Important to note is the decision of the PC to pursue the legal route when lobbying did not yield results. It also shows how the decisions of the courts were used as means towards the mobilisation of a broader rural society beyond the locality where the struggle originated. The paper ends with a discussion and concluding remarks.

### **The genesis of the rural struggles to democratise governance**

The genesis of the current rural struggles is the “Landmark judgement” by the High Court in Bisho on the 18 August 2015 (see Daily Dispatch, 20 August 2015). As is explained later, the judgement opened the floodgates enabling rural residents to challenge the legitimacy of traditional leaders in many rural areas of the Eastern Cape. The judgement by a Full Bench of High Court judges followed an earlier judgement by the lower division of the High Court. The judgement of the lower division of the High Court was then contested by the local chief (Chief Gecelo of the KwaGcina Traditional Council [KTC]), the Premier of the Eastern Cape, the Member of the Executive Council (MEC) for the Department of Co-operative Governance and Traditional Affairs (COGTA) and the Eastern Cape House of Traditional Leaders (ECHTL). That is the reason there was the second judgment of the full bench of the High Court. Collaboration between the state and traditional leaders led to the imposition of an unelected headman in Cala Reserve on the 27 March 2013. The imposed headman replaced Mr Jongilizwe Hamilton Fani who had retired at the end of February 2013. Mr Fani was elected to headmanship in 1979, and was the last headman to be elected in the area since the colonial period. According to Ntsebeza (2013), there is a list of elected headmen in Cala Reserve, beginning with Duncan Makhohliso (Mfengu), and is followed by Boy Nophothe (Mpondomise), Mahlamvana Guata, Velile Guata and Sthukuthezi Guata (amaGcina). As can be seen from the list, all the headmen, except the Guata’s from the amaGcina clan, came from different families. Even the Guata members assumed leadership through election. Thus, Cala Reserve had an established tradition of elected headmen that dates back to the late 19<sup>th</sup> century.

From the onset, the impending retirement of Mr Jongilizwe Fani sparked polarised discussions in Cala Reserve in early 2013, according to Jongilizwe Tasana.<sup>2</sup> The discussions revolved around the headman's replacement and the process thereof. On the one hand, some residents were concerned about whether or not there would be adherence to the tradition of electing a headman; while on the other hand, there were residents who did not share the same much concern about following the tradition of elections. Thus, the discussions divided the residents between those who wanted an elected headman, in line with their custom, and those who wanted an umGcina as the leader of the village. The discussions also rekindled historical social divisions between the *bona fides* or *iinzalelwane*, and the outsiders or *amalose*, the latter consisting mainly of former farm workers who are viewed as *omabhulwini*<sup>3</sup> or outsiders in the community. Some *bona fides* reject the leadership of people considered as *oomabhulwini*. The candidate headman – Gideon Sitwayi – was regarded as an outsider despite the fact that he has stayed in the village since the 1950s. He has also been headman Fani's right-hand man and even acted as headman when the former's health failed.<sup>4</sup>

The character of the person chosen to lead the village was of particular concern for Mr Tasana.<sup>5</sup> Sharing his views with the author at the beginning of February 2013, Mr Tasana pointed out that the residents may take "ill-considered decisions by choosing someone who is not useful to the community" (*izigqiboezingenangqiqo, sithatheumntuongeyonzuzokulelali*). Mr Tasana made clear his preference for Mr Gideon Sitwayi, not only because he was already a sub-headman and the deputy of headman Fani, but also because he was a good mannered person.<sup>6</sup> Other residents were equally concerned about the headman's retirement. One of these is Mr Mcebisi Ntamo, a community leader in the area who echoed Mr Tasana's views.<sup>7</sup> On 26 February 2013, Mr Mcebisi Ntamo reported on a community meeting that took place in Cala Reserve the previous day.<sup>8</sup> The meeting was called by members of the local Planning Committee (PC)<sup>9</sup> who decided to be pro-active and not allow the KTC to dictate terms to the community. Participants in the meeting resolved that Mr Gideon Sitwayi, who had been acting as the deputy headman, should become the new headman. All except one of the participants at the meeting chose Mr Sitwayi as the future leader. The only person who dissented was a member of the Guata family who indicated that he would prefer the new headman to come from his family, according to Mr Ntamo. The member reasoned that the headmanship should revert to his family because as far as he was concerned headman Fani held the position on behalf of the family.

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<sup>2</sup> He expressed these views on several occasions during conversations with the author, which started at the beginning of 2013.

<sup>3</sup> *Umabhulwini* is a derogatory term referring to a person from the white-claimed farms who were also called *amalose* (loose people) because they had no land and later became labour tenants of the local landholders (see Ntsebeza, 2005; Ncapayi, 2013). In Cala Reserve the term was used to describe the first group of landless people that emerged in 1902 (see Ntsebeza, 2005).

<sup>4</sup> See also Founding Affidavit of Penrose Ntamo, page 11.

<sup>5</sup> He expressed these views on several occasions he had conversations with the author from the beginning of 2013.

<sup>6</sup> He expressed these views on several occasions he had conversations with the author from the beginning of 2013.

<sup>7</sup> The author travelled with Mr Ntamo and Mrs Nomvuzo Nophothe on the 10<sup>th</sup> February 2013 to a workshop in Port Elizabeth.

<sup>8</sup> Notes of the author, dated 28 February 2013.

<sup>9</sup> The PC is a local committee that worked closely with headman Fani to plan development in the area.

Participants in the meeting later mandated the incumbent headman and the now late Mr Penrose Ntamo to report the community's decision to the KTC. However, the community decision did not sit well with the KTC members who severely criticised Mr Fani when he and Mr Penrose Ntamo delivered the report. The first to register his disapproval was the secretary of the KTC who angrily told the delegates that the community acted illegally in not involving the traditional council when conducting the meeting to choose the new headman. Nonetheless, the secretary promised the delegates that the KTC members would discuss the report in their meeting scheduled for 4 March 2013. The secretary's unhappiness was just a prelude to what was to follow.<sup>10</sup>

The KTC members were furious about the developments in Cala Reserve, according to two SMS (short message services) from Mr Zwelakhe Moni. He wrote:

*Things are getting tough regarding the election of the new headman (in Cala Reserve – my emphasis). It seems there are people in the traditional council who are opposed to the elected new headman (Izinto zifunaukubanzimamalunganosibondaomtsha. Ingathikukhoabantuabayiphikisayo enqileni).*<sup>11</sup>

Zwelakhe's second message was even more revealing of the attitude of the *amaGcina* Royal family.

*I am presently accompanying members of Cala Reserve to deliver a letter to the traditional council about the election of the new headman. My sense is that there are headmen who disapprove the election of the new headman, especially those from the amaGcina clan. These headmen allege that Mr Fani acted out of line in allowing the election of the headman to take place. (Ngoku ndihambe nabanye ukuya eNqileni basa iletter yabantu base reserve engqinisisa ulonyulolukasibonda. Ngendlela endive ngayo kuthiwa kukho into ethi ubawo uFani wenze intando yakhe).*<sup>12</sup>

Zwelakhe further reported that the headmen in the traditional council harshly criticised headman Fani for allowing the community meeting to take place. This was despite the fact that headman Fani had explained that the meeting was called by the PC and it was the right of the community to meet if they wanted to. Members of the traditional council would hear none of that, according to Zwelakhe.<sup>13</sup>

Mr Fani's report in the meeting of the PC on 10 March 2013 confirmed Zwelakhe's report. He said: "the KTC members attacked me for allowing the community to elect my replacement" (*iNqila indihlasele kakhulu ngokuvumela ukuba umzi wonyule umntu ozakuthatha iintambo kum*). Thus, the KTC rejected the community decision. In the process of rejecting Mr Sitwayi's election, members of the KTC questioned the authenticity of the attendance register on the grounds that there were no signatures against the names of participants in the community meeting. The KTC members ended their attack on Mr Fani by informing him that they would come to the community on 11 March to handle the process of replacing the headman. They

<sup>10</sup>Conversation with Mr Penrose Ntamo in Cala Reserve.

<sup>11</sup>The author received two SMS messages from Mr Zwelakhe Moni on the 27<sup>th</sup> February who visited the traditional council for an application for a site for youth activities in Cala Reserve.

<sup>12</sup>*ibid.*

<sup>13</sup>Meeting the author had with Mr Moni on the 28/2/2013.

also warned him that they would come with the police to maintain law and order during the community meeting.<sup>14</sup>

The hostile reaction of the KTC members shows their disrespect for the views of local people and how keen the members were on imposing their views on the residents. The reaction also confirms the criticism about traditional leaders' lack of accountability (Hendricks and Ntsebeza, 1999; Ntsebeza, 1999; 2005; Jara, 2011).

In the same meeting, the PC members discussed preparations for the impending visit by members of the KTC. Participants in the meeting included Messrs Jongilizwe Fani, Gideon Sitwayi, Zoyisile Tyandela, Gagile Cuba and Mcebisi Ntamo; and Mrs Nomvuzo Nophothe. The behaviour of the KTC members hardened the attitude of the PC. Mrs Nomvuzo Nophothe's views, which were expressed in the same meeting, aptly capture the mood of the PC members. She pointed out that, "(W)e are in a struggle that needs us to constantly meet to strategise. Therefore, we should not waste time arguing about the attendance register. We need to think about how we engage in this struggle" (*Sisedabini, masihlale singqubana, sibonisana ngalomba. Akuzukusinceda ukuba sibesixoxa nge-register. Intoekufanele siyenze kukucinga ukuba elidabi siliilwanjani na*).<sup>15</sup> The reference to attendance register relates to a query by members of the KTC regarding the authenticity of participants in the community meeting. In appreciation of Nomvuzo's challenge, the PC members resolved to meet weekly to review developments and to plan their actions. They honoured this resolution, and the committee has been meeting weekly since 2013.

It also transpired in the meeting that the visit of the KTC delegation on 10 March had been postponed indefinitely. Although members of the PC suspected that the postponement was a ploy by the KTC to confuse the community and to disorganise the leadership, they decided to continue with the meeting in order to strategise. They also decided to notify the community about the postponement of the meeting. Thus, the PC members decided to organise a community meeting for the 13 March 2013, to brief the community.

The agenda of the community meeting on 13 March, which was attended by about 20 community members, had two items: a) report about the meeting of the KTC; and b) report on land allocations in Cala Reserve. Headman Fani reported about his hostile reception by members of the KTC. In view of the report, participants in the meeting concluded that the KTC members had adopted a confrontational approach. The discussions then focused on how to deal with the situation. It was agreed that the KTC delegation should not be allowed to have a separate meeting with the PC. Instead, the delegation should meet with the community. The aim was to avoid confusion and suspicions that members of the PC had been bought over by the KTC delegation.<sup>16</sup>

The meeting of the KTC delegates with Cala Reserve residents eventually materialised on 27 March 2013. From the onset, Chief Gecelo and his traditional council showed unwillingness to be held accountable. They unsuccessfully tried to block residents in the meeting from discussing the issue of headmanship. After the formalities, the chairperson of the meeting – Mr

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<sup>14</sup>Notes of the author who was a participant observer in the meeting, which was held in headman Fani's homestead.

<sup>15</sup>Notes of the author who was a participant observer in the meeting, which was held in headman Fani's homestead.

<sup>16</sup> Ibid.

Jentile – remarked that they did not intend to have a discussion, but came to introduce the person the royal family had chosen as the headman of Cala Reserve.

Indeed, when the chief spoke, he reiterated the chairperson's remarks that they came not to answer questions, but to announce the new headman of the area. He continued, asking "the man with spectacles in this house should stand up so that the people can see him" (*indoda eneglass aph' endlwini mayiphakame abantu bayibone*).<sup>17</sup> To the surprise of the residents, the person who stood up was Mr Ndodenkulu Yolelo, a taxi owner that has, until recently, mostly been based in Cape Town. Like the chief, he is an umGcina. The chief then asked whether the nominee accepted the nomination to be headman. When the person responded in the positive, the chief exclaimed: "I am done with what I came for" (*ndiyigqibile ke into ebendizokuyenza*).<sup>18</sup> Thereafter, the chief sat down without explaining what had happened to the name of the headman the residents had elected and submitted to the KTC.

After a brief moment of silence, as if people were still digesting what they had just heard, the hands of residents abruptly shot up. Participants wanted to comment or ask questions. The chairperson of the meeting unsuccessfully attempted to block discussions by once more, reminding the residents that his delegation was not there to respond to questions. He further indicated that he was also rushing somewhere. Eventually, he reluctantly allowed questions and comments, after people started grumbling.<sup>19</sup> One of the participants wanted to know whether the KTC delegation intended to disregard the views of residents concerning the name of the person they chose as the new headman. Another asked whether or not democracy applied to rural areas.

Like in other communities, the views of the residents in the meeting were not unanimous. Some residents took a different view to the majority of the residents. For instance, an elderly woman asked: "Why are you questioning decisions of the chief? I am really surprised at the lack of respect for the chief that I'm witnessing here". (*Kutheni niyixambulisa kangaka nje inkosi? Noko ndiyothuka yilento ndiyibonayo yokungahlonitshwa kwenkosi*). Another participant, Mr Madoda Nophothe demanded that the residents should stop the questions "which are a waste of people's time". He further pleaded with the residents to accept what the delegation had decided. He nearly did not finish his point as people shouted him down. Amid grumblings, Mr Mcebisi Ntamo furiously shouted: "(J)ust leave the meeting and not stop us if you have no questions. Don't decide for us". The tension in the room rose as other residents pointed out that there was nothing stopping people from asking the chief questions.<sup>20</sup>

In response, headman Jentile explained that things have changed with regard to the election of headmen by communities. According to him, "that practice has stopped since the new law which instructs that the royal family elects the headmen". In other words, he suggested that it was the prerogative of the chief to decide who the headman of Cala Reserve should be. He further pointed out that the community can only object to the chief's choice if there was evidence that the nominee was a criminal or a rapist. The headman of Mbhenge – headman Gecelo – concluded the discussion by arrogantly remarking that, "whether you like it or not, it is the royal family that decides on the headmen" (*nokuba niyathanda okanye anithandina*,

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<sup>17</sup>ibid.

<sup>18</sup>ibid.

<sup>19</sup>Notes of NomvuzoNophothe. Cala Reserve File, CALUSA office

<sup>20</sup>Author's observations and personal notes. See also notes of NomvuzoNophothe.

*yiroyal familyethatha izigqibo ngokubekwa kweenkosana*).<sup>21</sup> Thereafter, the chairperson requested that the delegation be released as some of them had already indicated that they had other commitments. He advised those who were unhappy to write to the traditional council, stating the reasons for their unhappiness.

This section has shown how traditional leaders rode roughshod over the residents and disregarded the views of the community with regard to the ascension to the position of headman. The traditional leaders disregarded the community's expressed wish to elect its headman, something which is a standing practice of the community. The actions of traditional leaders, which confirm Ntsebeza's (2005; 2013) argument that traditional leaders are unelected and thus undemocratic, left the residents of Cala Reserve very unhappy. It is this unhappy state of affairs that triggered a struggle that spread like a prairie fire from one village to another across the province. The section has also highlighted elements of agency on the part of the Cala Reserve residents as expressed through the Planning Committee (PC).

### **The response of the PC and other structures to the imposition of an unelected headman**

This section focuses on the response of the PC leaders, Siyazakha Land and Development Forum<sup>22</sup> structures and CALUSA members to the imposition of the unelected headman in Cala Reserve.<sup>23</sup> As will be seen below, the PC organised local meetings and kept the struggle alive through a range of activities, including approaching the lawyers. Siyazakha ensured the support of its members in the struggle of Cala Reserve. CALUSA members supported the residents of Cala Reserve by documenting the processes, providing transport, linking the PC members with the KTC and the regional structure of traditional leaders in Qamata, and facilitating communication with government (the Premier's Office, the Department of Co-operative Governance and Traditional Affairs) and the Legal Resources Centre (LRC). CALUSA members also raised the awareness of the communities through workshops and inputs in meetings.

Soon after the meeting of the KTC members, the agitated local leaders (members of the PC) briefly met and resolved to take further steps regarding the issue of headmanship in their community. The resolve of the leaders to pursue the matter is captured by Mr Mcebisi Ntamo's remark that, "it is now time for cowards to move backwards" (*Ngoku kufuneka amagwala ayekulonina*).<sup>24</sup> The remark is indicative of the determination of the PC members not to give up the fight to defend the democratic rights of the community. Thus, after the events at the meeting of the KTC delegation with the residents of Cala Reserve, the PC members decided to challenge the imposition of an unelected headman. Importantly, the decision to challenge the imposition of an unelected headman marked the beginning of the struggle for the democratisation of rural governance in Cala Reserve.

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<sup>21</sup> Personal notes the author took in the meeting.

<sup>22</sup> Siyazakha is a local rural people's organisation that was formed in 2007 to act as a voice for rural people in the Sakhisizwe municipality and other neighbouring local municipalities. Siyazakha is part of a national rural movement called Inyanda Land National Movement.

<sup>23</sup> CALUSA, is a locally-based non-governmental organisation (NGO) that has been in existence since 1983.

<sup>24</sup> Author's observations and notes. As the member of CALUSA, the author also led the programme for the Democratisation of Rural Governance of the NGO.

A number of actions were identified to take the struggle forward. The first move of the PC was a meeting with representatives of CALUSA on 2 April to formulate a response to the developments. The PC was represented by Mr Mcebisi Ntamo, Mrs Nomvuzo Nophothe, Mrs N. Zenzile, Mr Lungile Gezani, Mr Penrose Ntamo and Mr Gideon Sitwayi. They met with Mr Siphso Tabo, Mrs Nombuso Nyangwa, Mr Siphiso Liwani and the author.<sup>25</sup> In the meeting the PC members also handed in a formal request for support from CALUSA; a request that was accepted by the NGO.<sup>26</sup> Members of the KTC were also informed that the author would lead the NGO's work in this regard. Flowing from discussions in the meeting, it was agreed to mount the struggle on three fronts; i) engaging and putting pressure on the chief and the KTC members to reverse their decision, ii) exerting pressure on the Premier and the Member of the Executive Council (MEC) to intervene, and iii) mounting a legal challenge.<sup>27</sup>

The initial strategy for putting pressure on the chief and KTC members was to bombard the KTC members and Chief Gecelo with a flurry of letters. Letters were also sent to the Regional Traditional Council in Qamata. The first of the letters was written to the KTC on 2 April. In the letter, the PC members sought to persuade the KTC members to reconsider their stance with regard to the community views about Mr Yolelo. Copies of the letters were also sent to the MEC for COGTA and to the Premier's Office. The only response to the letters was from the Premier's office which indicated that the matter had been referred to COGTA for consideration.

Furthermore, CALUSA members advised the PC leaders to ensure that the residents were mobilised around the headmanship issue. The aim was to ensure that the struggle does not become the concern of the PC leaders only. In line with this, Siyazakha had to be approached for support.<sup>28</sup> Indeed, Siyazakha did support the struggle by teaming up with the PC leaders to organise a protest march to Chief Gecelo's place, where a petition was handed over in early November 2013.<sup>29</sup> Representatives from groups in the villages of Sifonondile, Mnxe and Lumphaphasi also participated in the march, as members of Siyazakha. The presence of Siyazakha member groups in the march was significant as it showed that Siyazakha's support for the struggle stretched far deeper than just its leadership. Two weeks after the march, Chief Gecelo and his council responded by indicating that the regional structure of traditional leaders would respond on their behalf. However, the chief's response did not excite the PC members and CALUSA because the regional structure had already been unsuccessfully lobbied to intervene in the issue and it was clear that the regional structure supported Chief Gecelo's actions (Ncapayi, 2013).

Besides the march, the PC members conducted door-to-door visits in the community to explain what the struggle was about. During the door to door visits, the PC members also collected signatures from the residents to demonstrate community support for the struggle. Copies of the forms were also sent to residents who were migrant workers in urban centres such as Johannesburg and Cape Town. These efforts culminated in the solicitation of about 300 signatures of local residents and migrant workers who pledged their support to the struggle.<sup>30</sup>

<sup>25</sup> The author was part of the representatives of CALUSA.

<sup>26</sup> See copy of the letter dated 2/4/2013.

<sup>27</sup> Notes of the author in the meeting

<sup>28</sup> Siyazakha Land and Development Forum is a conglomeration of local development initiatives such as agricultural projects, land reform groups and other local community development initiatives. The different initiatives form Siyazakha as a local rural movement.

<sup>29</sup> Author's notes about the meeting he also chaired.

<sup>30</sup> Answering Affidavit of Penrose Ntamo, 2014.



Moreover, the PC members <sup>31</sup>organised a community meeting in December 2013 to brief locals and migrant workers about developments in the village.<sup>32</sup> Some of the migrants even pledged financial support that assisted with the payment of transport costs when the PC members attended the High Court in Bisho. The initiative of holding meetings in December has since become an annual community meeting that is held in December when the migrant workers are around (see CALUSA Annual Report, 2014). Noteworthy here is the rural-urban linkage the initiative also promotes.

### ***The legal route and the spread of the campaign beyond Sakhisizwe***

When lobbying the traditional leaders and the government did not yield results, the PC and CALUSA resolved to take the struggle to the courts as – as the next phase of the strategy. Working with CALUSA, the PC members approached the Legal Resources Centre (LRC) to mount a legal challenge in the High Court in Bisho (CALUSA, 2013; 2014). As is already known, the legal challenge led to two High Court judgements in Bisho. The first judgement by Acting Judge Nhlangulela in the lower division of the High Court, in October 2014, found the Premier to have erred in recognising the nomination of Mr Ndodenkulu Yolelo as the headman of Cala Reserve. The judge reasoned that the recognition disregarded the customary practice of not only the village, but also of the entire former Xhalanga magisterial district. According to the judge,

*(T)he respondents could pitch their argument no higher than the contention that the Governance Act places the identification of a headman in the hands of the Royal Family only. I have already found that the statement is wrong to the extent that the Royal Family and the Premier failed to take into account the applicable customary law in the Cala Reserve Community as proven in the doctoral thesis of Professor Ntsebeza. In the light of this failure, I find the respondents acted in breach of section 18 of the Governance Act... Consequently, the applicants must succeed (pg. 23).*

To our astonishment, the Premier's Office, the MEC for COGTA, the Eastern Cape House of Traditional Leaders (ECHTL) and the KTC Royal Family appealed the judgement. The involvement of the provincial government in the appeal was surprising considering that all provincial political leaders are elected. It seems they think rural people do not deserve to have elected leaders.

Nonetheless, from the beginning of 2014 the judgement became an organising tool for CALUSA and the PC members. CALUSA members, working with Siyazakha, attempted to ensure that the struggle was not confined to Cala Reserve. In a message communicated to rural residents through the local community radio – Vukani Community Radio – we pointed out that the judgement meant that rural residents can challenge the imposition of headmen in their areas. The responses of listeners during the radio presentations gave an indication of the number of communities with similar challenges. Thus, a co-ordinating structure called the Democratisation Task Team (DTT), consisting of three representatives from Cala Reserve, Indwana, Mnxe, Sifonondile and Tsengiwe, was established. The representatives shared information about governance issues in their areas and also devised strategies for dealing with the identified challenges. The DTT also resolved to ensure that the struggle is shared more widely than within Sakhisizwe only.

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<sup>31</sup> Personal notes of the author as a participant-observer in the struggle

<sup>32</sup> The author was invited to address participants, including the migrants in the meeting on 22/12/2013.

There were fears that the struggle would be isolated or marginalised. This is reflected in the internal documents of CALUSA and the discussions of the author with various members of the organisation.<sup>33</sup> The members of CALUSA also realised that the court process had to take place in conjunction with the mobilisation of rural residents. Workshops, seminars, dialogues, as well as electronic and print media became the tools to spread the message and to mobilise rural residents. Workshops involving members of the DTT and the leadership of Siyazakha were used as a space for discussing the experiences of rural residents in relation to rural governance and the legislation that impacts on it.

Although participants were mostly from Sakhisizwe, Emalahleni and Engcobo local municipalities, one of the workshops also included representatives of Ilizwi Lamafama from the Amathole District Municipality; the Rural People's Movement, and the Unemployed People's Movement from the Sarah Baartman district municipality; and Makukhanye in the Nelson Mandela Metro. The first two workshops, which preceded the High Court judgement in October 2014, focused on the legislation related to traditional authorities, while the third workshop, held after the conclusion of the court case, discussed the implications of the judgment (CALUSA Report, 2014).

After the first judgment, CALUSA and members of the PC established links with other rural communities in other parts of the Eastern Cape. In April 2014 CALUSA accepted an invitation to a seminar organised by the Border Rural Committee (BRC) and Ntinga Ntaba kaNdoda, where the implications of the High Court judgement were discussed. Members of Vulamasango Singene Campaign (a rural movement of betterment land claimants in the Eastern Cape) and representatives and rural communities where Ntinga Ntaba kaNdoda operates also attended the event. In his presentation to the seminar, the author not only updated participants, but also discussed implications of the judgement for residents in areas under traditional leaders (BRC, 2015). When the BRC and Ntinga members heard that traditional leaders and political leaders appealed the judgement, they resolved to support the struggle of the residents of Cala Reserve. In line with the resolution, participants in the seminar were encouraged to picket outside the High Court on the dates of the case. Indeed, there were pickets outside the High Court whenever the case was heard. To keep the picketers informed, there were briefings about the case after each court sitting.

Information on the struggle was also shared through newspaper articles.<sup>34</sup> In an opinion piece (*Rural South Africans not part of new democracy*), in the Daily Dispatch, (2/7/2014), the author warned that rural people were being denied their democratic right to elect and be elected into decision-making structures in rural areas. Since this is a provincial newspaper that served people in urban and rural communities across the Eastern Cape, the information was widely distributed. In the Chris Hani District Municipality, information was shared through Vukani Community Radio. There were also weekly radio presentations to update members of the public about the struggle and progress of the case.

The Full Bench of the High Court listened to the appeal in August 2015. In their appeal, the advocate for the appellants argued that

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<sup>33</sup> See CALUSA operational plan for 2014.

<sup>34</sup> See also Legal Resources Centre. Cala Reserve: What does this judgment mean for rural democracy and governance? <http://lrc.org.za/lrcarchive/other-news/3439-cala-reserve-what-does-this-judgment-mean-for-rural-democracy-and-governance>. Accessed 14/5/2017.

*while the royal family is granted the power to decide a person who qualifies to be appointed with regard to customary law, there is no requirement that the royal family 'must take into account the popular views of the community and no community consultation is envisaged in s 18 of the Governance Act (pg. 26).*

As the extract shows, the Premier, the MEC for COGTA and traditional leaders do not see the point of consulting rural residents about the determination of local leaders. In other words, the views of rural residents do not matter to the government and traditional leaders. However, the Full Bench judges disagreed that rural residents do not have to be consulted. To the judges: “(T)he facts set out in Professor Ntsebeza’s affidavit establish a practice of long duration. That practice, judging from the community of the Cala Reserve’s response to the retirement of Fani, is the current practice” (pg. 17). The judges further argued that the election of headmen:

*...is a reasonable practice in that it is not in conflict with legislation or the Constitution. Indeed, it is a practice that is in consonant with the value of democratic governance, aimed at achieving accountability, responsiveness and openness, that is one of the Constitutions founding values. It is also consistent with various fundamental rights, such as the right to dignity, the right to freedom of opinion, the right to freedom of association and the right to make political choices (pg. 17-18).*

Thus, the judges delivered what has become a “Landmark judgement” by dismissing the appeal on 18 August 2015 (see Daily Dispatch, 20 August 2015).

Once more, the conclusion of the court case was followed by a flurry of newspaper articles which not only informed the public, but also helped to mobilise rural residents. Commenting on the judgment, Wilmien Wicomb of the Legal Resources Centre, wrote: “(B)eing able to vote for our leaders is what it means to live in a democracy. Yet the Eastern Cape government tried to block a rural community from electing their leader” (see Daily Maverick, 20 August 2015). In another opinion article (*Seize opportunity to get full rights in rural areas*), in Daily Dispatch, (5/5/2015), the author encouraged rural residents to use the judgement as an opportunity to claim their democratic right to elect their local leaders.

The judgement of the Full Bench and the newspaper articles triggered reactions from various rural communities as well as from civil society organisations across the province. They led to the development of a campaign locally and provincially to democratise rural governance. Locally, there was more demand from various rural residents to CALUSA to assist in rural governance-related challenges, following the second High Court victory. Thus, Siyazakha and CALUSA resolved to broaden the Democratisation Task Team (DTT) by incorporating representatives from communities with similar governance challenges and had also shown interest in being part of the campaign. Consequently, the DTT’s members increased from five to 12 communities that came from Emalahleni, Engcobo and Sakhisizwe municipalities.<sup>35</sup> Moreover, the judgement was translated into isiXhosa and its copies circulated in Cala Reserve. The youth of Siyazakha also had to be involved in popularising the court judgment by circulating and explaining it to the households beyond Cala Reserve (CALUSA, 2014; 2015).

In addition, Siyazakha and CALUSA initiated discussions with members of the DTT on what it means to have democratised rural communities. Workshops were then organised in 2015 and

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<sup>35</sup> See CALUSA reports from 2015 onwards.

2016 to clarify the matter. The experiences of African states such as Guinea Bissau and Mozambique, who established liberated zones during their struggles for liberation, were shared with participants in the workshops. In the context of Guinea Bissau liberated zones, which were areas that were won over by the liberation forces from colonial rule, set up alternative socio-economic and political systems to mark the break with the colonial past (Chabal, 1983; Davidson, 1984). According to Chabal (1983:107), village committees were set up in the liberated zones as part of their political re-organisation. The committees served as the “political and administrative nerve centres” of the liberated zones. Economic reconstruction of the liberated zones was also undertaken. This involved dismantling the colonial agricultural model of export-oriented agriculture. Production of cash crops, for instance, was done away with in favour of production of food. Such information was shared with participants in the workshops. Consequently, the participants agreed in the workshops that democratised communities should: i) have democratically elected leaders; ii) have leaders that are accountable to the residents rather than upwards; iii) have leaders that respect the residents they lead and; iv) have residents that actively participate in development as well as in decision-making processes (CALUSA, 2015). The workshops drew participants from areas such as Bengu, Guba Hoek, Machubeni, Mbinzana and Mgwala in Lady Frere (Emalahleni municipality); Qhumanco and Beyele in Engcobo; Cala Reserve, Draaifontein, Indwana, Mnxe and Mthingwevu in Cala (Sakhisizwe municipality).

At the same time, there were regular presentations by various leaders of the DTT on Vukani Community Radio on the democratisation of rural governance. These initiatives popularised the struggle for democratisation of rural governance. The radio presentations reached other rural communities in the Chris Hani District Municipality. For instance, during the radio presentations there were telephone calls from people in Whittlesea who indicated that they also had serious problems of governance in their areas (CALUSA, 2015). When following up the calls, it emerged that more than 12 communities in Whittlesea have governance-related problems. Giyose’s research with members of the people’s organisation in Qhumanco and Beyele – Sikhulule Bawo – paints Chief Mgudlwa as a dictatorial leader who treats the residents as servants and does not allow them “any free will” (2017:13). Thus, the dictatorial tendencies of the chiefs are at the centre of the struggles in rural communities.

There is a downside to this story of growing mobilisation beyond Cala Reserve though more reliance of the PC members on the legal system as the struggle went on. Consequently, there has been failure on the leaders to organise the residents, thus losing significant support. This happened because legal processes take time, and the longer the legal process took, the more the imposed headman was able to entrench himself in the community. Moreover, as Gloppen (2005:) points out,

*(L)itigation on its own has limited potential to change the situation on the ground, but creates opportunities for other actors. With a ‘receptive apparatus’ in place litigation seems to be effective in bringing out facts that can be used for advocacy purposes, fed into social and political discourses and directly inform policy processes.*

The PC support dwindled in Cala Reserve as the elderly leaders struggled to win the youth over to their cause. Promises of job opportunities from the imposed headman swayed the youth to his side and away from the PC. Furthermore, the inability of the PC members to counter the support that government departments and the local municipality gave to Mr Yolelo helped to entrench his position in the community. For instance, despite the fact that there was a court challenge to his ascension to leadership, government institutions continued to treat him as their

extension arm in the community. In the absence of a convincing counter programme, the elderly PC members allowed a section of the residents to believe that Mr Yolelo's appointment was final and official. Thus, the support base of the PC dwindled and the meetings they organised were gradually restricted to meetings among themselves as PC members.

### *Spreading the struggle provincially*

The Border Rural Committee (BRC), CALUSA and Ntinga Ntaba kaNdoda led the struggle provincially. The three organisations have made a concerted effort to link up with other NGOs, rural movements and communities with similar concerns. Building linkages among communities, NGOs and rural movements constitutes attempts to ensure that the struggles are not isolated, as some scholars argue was the weakness of rural struggles in the 1950s and 1960s (Ntsebeza, 2011).

The collaboration culminated in a decision to elevate the campaign for the democratisation of rural governance to a provincial level. The decision was followed by a series of provincial workshops and seminars that brought together more than 30 rural organisations across the province. A number of workshops, seminars and dialogues were organised in 2015 on the democratisation of rural governance with the Cala Reserve case being the reference point (CALUSA, 2015). As already indicated, one of the seminars was the one organised by the BRC and Ntinga Ntaba kaNdoda in East London on 9 April 2015. The seminar involved community representatives from various villages in Keiskamahoe, Stutterheim and Cala Reserve, as well as representatives of the Vulamasango Singene Campaign (BRC, 2015). Professor Wotshela from the University of Fort Hare, Ms Wicomb from the Cape Town office of the Legal Resources Centre and the author made presentations. It also emerged in the seminar that there was contestation of power between local headmen in various communities such as Amahlathi in the Stutterheim area, Ncerhana in Centane, Dwesa-Cwebe in Willowvale, and Xolobeni in Mbizana.

Additionally, the three organisations resolved to visit the communities that have governance challenges to explain the implications of the second judgement for their governance challenges. Representatives of CALUSA, LRC and BRC visited communities in the district municipalities of Sarah Baartman (Prudhoe next to Mpekweni); Amathole (eight villages led by the Amahlathi Crisis Committee around Stutterheim, Tshabo next to Berlin; three villages in Ncerhana under the Ncerhana Action Committee around Centane); and Chris Hani (12 villages under the Hewu Development Forum around Whittlesea, Sikhulule Bawo covering Qhumanco and Beyelein Engcobo). In addition to these villages, Xolobeni (in Mbizana) under the Alfred Nzo District Municipality and Dwesa-Cwebe under Amathole also have governance challenges. Visits to all these communities were no easy task as the villages are spread across the Eastern Cape but they were important as they helped the organisations gauge the mood of rural residents. The visits also confirmed that rural residents in the visited communities wanted to have a voice in who leads, and how land and natural resources in their communities are managed.<sup>36</sup>

The collaborative interventions of the three organisations became more co-ordinated subsequent to the visits. For instance, the organisations decided to mobilise the communities they work with to intervene in a Provincial Roundtable at the Eastern Cape House of

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<sup>36</sup> Notes of the author who was part of the delegation that visited the communities in October 2015.

Traditional Leaders (ECHTL) organised towards the end of 2015. The three organisations with the communities they work with also intervened in the Provincial Conference on Communal Land Tenure organised by the ECHTL, the South African Local Government Association (SALGA), and the Women's Investment Portfolio Holdings Limited (WIPHOLD) in June 2016 (Jara, 2016; see also CALUSA, 2015). In the roundtable, traditional leaders argued for the registration of land in their names but they were divided in the second gathering (Jara, 2016). In his opening remarks, Prince Burns-Ncamashe cautioned against the wrong assumption that traditional leaders owned land as this was not a historical fact. However, some traditional leaders differed with him. They also dismissed the idea of Communal Property Associations (CPAs) as land holding entities. Chief Mwelo Nonkonyane, for instance, warned the Conference that “such structures (*CPAs*) will never be allowed in the land of amaBhala”. On the other hand, community representatives fearlessly argued for the registration of land in their names or for structures decided by the residents (see Jara, 2016).<sup>37</sup>

The arguments of the community representatives in the conference were in line with the demands that rural residents expressed during the government's public hearings on the Traditional and Khoi-San Leadership Bill that was held towards the end of 2016 and the beginning of 2017. As Claassens (2014: not numbered) points out that decision-making over land should be vested in “small social units such as families, clans and user communities”, community representatives at the public hearings in Mthatha, East London, Graaf Reinet, Port Elizabeth and Kokstad want the registration of communal land to be in the names of households or elected community structures. The demands confirm Mafeje's (2003) argument about landholding in African societies. According to him, chiefs were never holders of community land, but it was the prerogative of households, clans or communities. Nonetheless, sentiments expressed by communities about rural governance were echoed in the community and district workshops that the three organisations organised in 2016 and 2017 to discuss the Traditional and Khoi-San Leadership Bill. Members of the three organisations criss-crossed the province explaining the Bill and getting views of communities during the workshops. The role of traditional leaders in the governance of rural areas, management of resources and ownership of land dominated the concerns of rural residents. In Centane, participants in the community workshops rejected the provisions of the Bill which they viewed as a means to grant more power to traditional leaders on governance matters.

## **Towards conclusion**

This paper has reflected on contemporary struggles of rural residents who want their voices heard. What started out as a local struggle in Cala Reserve has spread into a provincial campaign as interest mushroomed in communities in various parts of the Eastern Cape where residents are taking up the struggle to democratise rural governance. As Claassens (2014: not numbered) puts it, there is widespread “contestation concerning the content of chiefly power over communal land...”. Indeed, the struggle is about the democratisation of governance in rural areas. The struggle manifests as demands for space in decision-making by rural residents. Central to this are demands for rural residents to have voice in decisions about their leaders, initially, but also on the governance of land and other natural resources in rural communities.

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<sup>37</sup> The author was an active participant in the Provincial Conference on Communal Tenure in East London.

Two issues come to the fore in this paper regarding the provincial mobilisation for the democratisation of rural governance. The first, is the utilisation of the judgement as an organising instrument for civil society organisations and rural residents in the struggle to democratise rural governance. The second point relates to the role played by civil society organisations in co-ordinating rural struggles locally and provincially. These co-ordinated interventions have managed not only to bring together rural residents, but have also enabled rural residents to express themselves on decisions about leadership, the ownership of land as well as the governance of land and other resources in rural areas. Thus, a combination of social mobilisation and the use of the legal system (the High Court in particular) has been instrumental in the development of the campaign.

And, as shown earlier, the struggle was started by the members of the PC in Cala Reserve who organised local people to challenge the imposition of an unelected headman. Although it had limited success in organising at local level, the PC-led struggle served as an inspiration to other communities. Rural residents gained confidence when they witnessed the way in which the PC members challenged traditional authorities, something that is very rare if not unheard of. The mushrooming of the number of communities that took up the challenge was due to the realisation that it is possible to challenge the power of traditional authorities as the PCs actions and the Cala Reserve court case clearly demonstrated.

At the same time, the experience of Cala Reserve shows that, indeed, the legal system on its own has limitations. Although there have been elements of this strategy in the current struggle, organisations are mindful that the strategy has not worked well in Cala Reserve where local leaders relied too heavily on the legal system rather than on mobilising the residents. As Gloppen (2005) warns, legal processes have to be accompanied by social mobilisation and local struggles to achieve success. Heywood (2009) concurs with this view and shows that, in the context of the Treatment Action Campaign's (TAC) struggle for access to medicines for HIV positive people, a combination of mobilisation, awareness raising and litigation were key to the success of the struggle. However, in the bigger picture of the democratisation of rural governance campaign, the Cala Reserve case, despite its reliance on the legal system proved to be a useful organising tool and serves as an inspiration to other rural residents that are faced with similar challenges of governance.

The current struggles clearly reflect the rejection of the imposition of unelected traditional leaders or put differently a demand for self-determination by rural residents. The system of traditional authorities is a system that has come to characterise governance in post-independence Africa, according to Mafeje (2001). He points out that post-independence African states saw advantages in the introduction of governance systems that are unaccountable to the local people, promote the arbitrary use of power and lack transparency. But, as the democratisation campaign develops and some communities elect their local leaders, a number of questions will arise. The questions relate to the nature of the communities that will develop out of the democratisation processes; the impact of such a development on the power of traditional leaders (especially chiefs and kings); the implications of the democratisation of governance on local political processes as they relate to local government electoral politics.

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