24/10/06 I PC HOME AFFAIRS

CONTRALESA

SUBMISSION DELIVERED

BY

NKOSI MWELO NONKONYANA (ZANEMVULA!), M.P.

GENERAL SECRETRARY - CONTRALESA - SOUTH AFRICA

AT

PUBLIC HEARINGS OF PARLIAMENTARY PORT FOLIO

COMMITTEE ON HOME AFFAIRS

CAPE TOWN, SOUTH AFRICA

TUESDAY 24 OCTOBER 2006

INTRODUCTION

The Congress of Traditional Leaders of South Africa "Contralesa" is the organisation of Traditional Leaders of South Africa whose main aims and objectives include the following:

- To reinstate, protect and promote the institution of traditional leadership, its traditional status and bonding function in the communities and the nation.

- To organise and unite all traditional leaders of our country.

- To take up and act on the demands and concerns of our communities jointly with them.

- To strive for the eradication of tribalism, ethnicity, violence and all apartheid and Xenophobic instigated conflicts.

- To build, develop and deepen the spirit of free exchange of cultural activities among the people in the pursuit of building up and developing a true South African culture and national talent.

- To educate our members and their people about the history of those traditional leaders and other patriots who engaged the colonial and apartheid forces in the wars and battles of resistance in defence of the land and the freedom of the people, and of those who made material contributions to the welfare and development of the people.

- To set up a scholarship fund which will enable the children of traditional leaders and of their communities to obtain an education which will enable them to cope with the fast developing trends of the modern world.

- To run projects and self-help schemes, together with like-minded organisations, which will advance all communities and enhance the good image of Contralesa.

- To encourage and promote education of our cultural norms and moral values in society and in public institutions.

- To assist members to gain restoration of their lands of which they were dispossessed by colonialist and/or apartheid regimes.

- To set up a register of the genealogical trees of traditional leaders in our respective communities.

- To participate in economic development including the formation of commercial entities such as companies, close corporations and trusts to achieve its objectives.

- To participate in restructuring of state owned enterprises and to this end to form joint ventures with the other commercial entities as equity partners.

- To strive for unity of traditional leaders in the SADC region and African Continent.

- Generally to take all action necessary to attain the aims and objectives of Contralesa.

The institution of Traditional Leadership is the sole and authentic voice of the overwhelming majority of the people of South Africa leaving in traditional communities. Although our government has tried to better their lives for more than a decade now may of our communities have no basic services. For this reason and more although we appreciated the public

hearings of this Committee many people would have liked to attend the public hearings but could not do so.

Due to the fact that they are fundamentally opposed to the idea or notion of a man marrying another man or a woman another woman as contemplated by the Bill before this Committee, we have been mandated to make this submission to our Parliament, hoping and praying that the voice of the people will be heard to give meaning to what our forebears wished as far back as 1955 i.e. that the people shall govern:

SUBMISSION

CONSTITUTION OF SOUTH AFRICA

The Constitution of our country is the supreme law all other laws are subordinate to it and must be consistent with its provisions. It was adopted on 08 May 1996 and amended by the Constitution of Assembly on 11 October 1996 after the Constitution Court directed that certain provisions be amended to be in accordance with constitutional principles agreed upon at the Constitution lacks.

Our Constitution is now the Constitution of the Republic of South Africa, Act No. 108 of 1996 and came into operation in 1997.

See: **Section 243 of Constitution, Act No. 108 of 1996**

When the Final Constitution was negotiated we made various submissions that were largely ignored. We then objected to its certification on various grounds. The same Constitutional Court that has directed our Parliament to amend marriage legislation to legalise same-sex marriage in the same way as heterosexual marriages in rejecting our submissions remarked as follows:

"A. NT 8(2): Horizontal application

[53] NT 8(2) provides: 'A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposes by the right'.

Objection was taken to this provision on the ground that it would impose obligations upon persons other than organs of state, that is, it permitted what has been referred to in South African jurisprudence and academic writing as the 'horizontal application' of bills of rights. The objection was grounded, first, on the basis that the horizontal application of fundamental rights is not universally accepted. That is so, but as stated above, the requirement of universal acceptance in CP II does not preclude the CA from including provisions in the NT which are not universally accepted.

[54] The second ground for the objection was that in rendering the chapter on fundamental rights binding on private persons, the NT is inconsistent with CP VI which requires that there be a separation of powers between the Legislature, the Executive and the Judiciary. The argument was that the effect of horizontality is to permit the Courts to approach upon the proper terrain of the Legislature, in that it permits the Courts to alter legislation and, in particular, the common law. However that argument has two flaws. First, it falls to acknowledge that Courts have always

been the sole arm of government responsible for the development of the common law. There can be no separation of powers objection, therefore, to the Courts retaining their power over the common law. Second, the objectors also fail to recognise that the Courts have no power to 'alter' legislation. The power of the judiciary in terms of the NT remains the power to determine whether provisions of legislation are inconsistent with the NT or not, not to alter them in ways which it may consider desirable. In any event, even where a bill of rights does not bind private persons, it will generally bind a legislature. In such circumstances all legislation is subject to review. The argument, then, that a 'horizontal' application is subject to review. The argument, then, that a 'horizontal' application of the Bill of Rights will inevitably involve the Courts in the business of the Legislature to an extent that they would not be involved were the Bill of Rights to operate only 'vertically', is misconceived.

[55] A further argument raised by the objectors was that NT 8(2) would bestow upon Courts the task of balancing competing rights which, they argued, is not a proper judicial role. This argument once again fails to recognise that even where a bill of rights binds only organ of State, Courts are often required to balance competing rights. For example, in a case concerning a challenge to legislation regulating the publication

and distribution of sexually explicit material, the Court may have to balance freedom of speech with the rights of dignity and equality. It cannot be gainsaid that this is a difficult task, but it is one fully within the competence of Courts and within the contemplation of CP I. That the task may also have to be performed in circumstances where the bearer of the obligation is a private individual does not give rise to a conflict with the CP's.

[56] The objectors also argued that imposing obligations upon individuals in the Bill of Rights is in breach of CP II which contemplates that individuals would be beneficiaries only of universally accepted fundamental rights and freedoms. They argued that as bearers of obligations, individuals would necessarily suffer a diminution of their rights in a manner that is contrary to the contemplation of CP II. This argument, too, cannot be accepted. As long as the bill of rights binds a legislature, legislation which regulates the relationships between private individuals will be subject to constitutional scrutiny. In Germany and similar European countries where there is general codification of private law and constitutional reviews, the codes have to comply with constitutional standards. And even in the United States, the Bill of Rights affects private law. As stated in the previous paragraph , such *** will often involve a court in balancing competing rights. It is

> also implicit in the indirect horizontal application of the rights required by IC chap 3, to which the CA had to pay 'due regard'. CP II implicitly recognises that even if only the State is bound, rights conferred upon individuals will justifiably be limited in order to recognise the rights of others in certain circumstances. The fact that horizontal application may also lead to justifiable limits on the rights of individuals does not means that CP II has been breached."

Notwithstanding our objection to the Constitution, it also guarantees both the rights of traditional Communities their culture and also granted for the first time Customary Indigenous Law status can and the so-called common law of South Africa i.e Roman-Dutch equal law.

We maintain that throughout Africa the indigenous people have had their traditions, cultures and languages invaded by foreign elements that have used force to disorient them and prevent them from utilising their own traditional norms and values to maintain peace and order in their communities. Africa has paid a heavy price. Unfortunately, as African majority governments have been voted into power using euro-centric "democratic" constitutions, they have generally refused to give recognition to their own traditional norms and values. The tragic consequences can be seen in the wars, strife and moral degeneration that are pervasive throughout the continent. Africans need access to systems of governance, particularly at the local community level which they know and understand. We appeal to the Parliament to set aside borrowed euro-centric thinking and approach this issue as Africans. It is a matter of the greatest consequence to rural communities. Their wishes must not be ignored in what appears to be a determined effort to impose foreign ethical norms and values at any cost in South Africa.

It would appear that applicants were challenging the Constitutional validity of the Roman-Dutch legal system that regulated Civil marriage only. This may explain why the overwhelming majority of people who are married in terms of customary / indigenes legal were not cited as necessary parties in the case.

In the second case known as Equality Project case, the Lesbian Equality Project challenges the validity of section 30 (1) of the Marriage Act, by contending that the reference to husband and wife unconstitutionally excludes same - sex couples. It is gratifying to note that the State consistency opposed the relief sought by the above complainants. It is further worth nothing that this is the law that was passed by the Apartheid regime.

We have reason to believe that Civil Union Bill purports to be the Parliament's response to the Constitutional Court in Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs and Others reported in 2001 (1) SA 824 (CC) and 200 (3), BCLR 355 (CC). It would seem that in "Force case" both mesdames Fourie and Bonthuys objected to the fact that the law excludes them from publicity celebrating their love and commitment to each other in marriage. They contended that their exclusion comes from the Common Law definition which state that marriage in South African is a union of one man with one woman, to the exclusion, whilst it lasts, of all others.

By December 1, 2006, Parliament has been ordered by the Constitutional Court to amend marriage legislation to legalise same-sex marriages in the same way as heterosexual marriages. This embarrassing and divisive task has been passed over by the eminent court to Parliament as the representative of the people.

We do not know of any political organisation which has tabled the matter of homosexuality, let alone same-sex marriages, at any general meeting, be it at branch, regional or national level, for debate, discussion and resolution.

The constitution outlaws unfair discrimination, promotes equal treatment of persons regardless of sexual orientation, among others. In this case the operative word is 'unfair'. Since all political parties embrace the constitution, their parliamentary representatives having taken an oath to uphold it, it is fair to assume that the provision prohibiting discrimination against gays and lesbians enjoys their support.

Parliaments are known to have passed laws in order to achieve certain goals, only to find that, upon subjection to judicial scrutiny and interpretation, they bring about undesirable and unintended consequences. We submit that the Constitutional Assembly, which drafted and adopted the constitution, never contemplated that the provision prohibiting unfair discrimination against homosexuals could ever be construed as legalizing same-sex marriages. The judgment of the Constitutional Court is a classic case of an undesirable and unintended consequence.

We, like millions of other South Africans, are puzzled by the reported approval by cabinet of an Amendment Bill which seeks to give effect to the directive of the Constitutional Court. Cabinet, as an integral feature of Parliament, should know that the Court is, with respect wrong in its interpretation of the relevant section of the constitution. We consequently submit that was never the intention of the law-makers.

It should, nonetheless, be fortunate that the matter is still to be subjected to parliamentary debate and resolution. This provides the people of South Africa, through their public representatives, with the opportunity to write the law in terms precise enough to obviate an incorrect interpretation of their true intentions when they decree that there be tolerance of all forms of sexual orientation. In other words, the constitution must be amended accordingly, for it is on the basis of its liberal interpretation of our basic law that the Court has found the prohibition of same sex marriages to be unconstitutional.

The convention in parliament has up to now been for members to vote according to their party directives even when their consciences, convictions and beliefs tell them otherwise. The

maturity and stability of our democratic order should, at least, over this matter, give the political parties enough confidence to allow their public representatives to follow their consciences as they pass the appropriate legislation by the end of the year.

We are reluctant to begin to outline the bases on which we assert that it is wrong to legalise same-sex marriages. There are things in life which do not merit justification for them to be valid. Opposition to same-sex marriage is one such thing. Same sex marriage is against nature, culture (all types of culture), religion and common sense, let alone decency.

Importantly, though, is the need to avoid placing children in situations where they find themselves under the influence of the phenomenon. Our children are our future. What type of society are we creating for the future? The Bill has a potential of violating rights of our children and also confusing them!

As traditional leaders we have had occasion to raise the matter of homosexuality in several of our forums. Even at the level of the Southern African Development Community Council of Traditional Leaders the matter has been raised as part of our human rights seminars. While admitting of the existence of the problem, all those present were agreed that homosexuality is neither condoned nor promoted by any of their cultures. The question of same-sex marriages does not even arise, as it negates the very idea of a marriage.

In most African societies marriage is not just a matter for the two individuals concerned. Marriage is between two families, two clans, two tribes and even two nations. It is about the establishment of blood ties between the two entities through, among others, the birth of children. A same-sex marriage cannot bring about the birth of children.

One of the ironies of our open style of democracy is the pervasive fear that seems to engulf the citizenry of the land when it comes to dealing with some of the new oddities that freedom has brought about. Even though there is obvious opposition to the promotion of homosexual

behaviour, you find a great deal of reluctance by people to openly express their views on the matter.

Ever since the judgment was delivered and publicised, we have received numerous calls and approaches from people who say the Court's decision must be vigorously opposed because it offends family, societal, cultural and religious values as we have come to know them.

The most worrying fact of all, though, is the seeming acceptance of this oddity to the extent that it appears to be a norm. There does not seem to be any attempts being made to help the afflicted to get remedy. The practitioners are having the field all to themselves, ready at a moment's whim to brand those who don't understand this oddity as being homophobic. For the record, we are not homophobic. We know and even respect some people who happen to be homosexual. We simple don't understand why there would be people who deem it appropriate that Parliament should be called upon to make a law to effectively say homosexuality is such a normal norm, that marriage as we have come to know it, should also include same-sex intimate relations.

In view of the aforesaid and many objections raised by other organizations, we feel it is in the Public interest as well as the interest of Gays and Lesbians that the Bill should not be passed.

CONCLUSION

In conclusion the Congress of Traditional Leaders of South Africa (Contralesa) want to emphasize that the judgment of the Constitutional Court which directs Parliament to pass a law to give Gays and Lesbians rights to marry one another does not and must not be understood to mean that this Parliament should slavishly abide by it. Our parliament is Sovereign and to sub-ordinate it to the Constitutional Court will, in our respect full submission, not be appropriate.

We are totally apposed to the idea or notion that men should marry one another and women should likewise be permitted to do so.

We acknowledge that Gays and Lesbians are human beings and as such should treated with human dignity.
However to accord them rights to marry each other will offend and render useless the cultural norms and values which are also enshrined in the Constitution of the Republic of South Africa.

In our societies the basis of any society is a family that much be constituted by a husband and a wife i.e. a man and a woman. The procreation of children is essential to each family hence we have clan names that are firmly entrenched in our societies.

Furthermore payment of lobolo or bogadi is only having a meaning if a male marries a female. Such custom and necessary rituals will be seriously violated underived if the Bill which purports to give persons with same sex a right to marry each other is passed by Parliament.

We also allocate land to husband and wife to enable them to feed their children. It is well known that a marriage of male or female persons would not be able to contribute to the population. Our land tenure system will be rendered meaningless by the recognition of such marriages.

We have noted that some Gays and Lesbian rights groups have argued that they can adopt children born to couples of opposite sexes. We are concerned about this as this may inculcate an undesirable moral norm and value as the child may suffer disastrous consequences once he or she interacts with other children in Public Schools that have parents of opposite sexes. The child may then realise that the persons are not his or her biological parents and this may have a negative effect. Their rights will no doubt cause a negative effect in the child's life as well.

We objected to the certification of the Constitution on the basis that it is Eurocentric and will lead to undesirable consequences such as the Constitutional court judgement in question. The court's decision is in our view telling the Parliament which passed our Constitution in 1996 to lie on the bed it has made for itself.

We consequently call upon our Parliament not to pass the Bill in question instead to amend the Constitution to cure the unintended consequences of extending the rights to marry same sex partners or to refer this matter to a National Referendum.

Once more we thank you all for affording us this opportunity. We trust that the traditional leaders of this country having spoken, even those who were supporting the Bill should not pursue this matter in their interest and that of our beloved country. Last but not least the ANC is the political party that was formed by our forebears and, as legitimate heirs of the founders of the ANC in Government, we urge it to heed to our advice as set out herein. We like the IsiZulu when the people say: Umlomo weNkosi awuqambi Manga.

In accordance with African Tradition having listened to all the debates since 1st December 2005, we trust that our Public Representative that have been voted by us will not disappoint us by succumbing to the views of those who want Parliament to pass this deal. BILL

In our view no form of any amendment could ever cure such an objectionable and offensive piece of legislation. Like apartheid it can not be reformed. The only step that Parliament should take is for it to reject it in its entirety.

Baie Dankie Voorsitter

RE YA LEBOHA!