MEMORANDUM

TO : **PRINCE MANGOSUTHU BUTHELEZI**
DATE : **DECEMBER 2, 1996**
FROM : **MARIO G.R. ORIANI-AMBROSINI**

Enclosed is the portion of the draft for the House of Traditional Leaders which refers to the Ingonyama Trust Act. I will be waiting for information on the agenda to cover the other matters which might be discussed and to tailor the introductory remarks to the nature of the meeting as shaped by the agenda. I sent to Your Excellency this advanced portion because I have been urged by Mrs Felgate that there is time pressure on the translation.

I was wondering whether my presence is required during the meeting of the House of Traditional Leaders.

A few days ago I had a conversation with Inkosi NJ Ngubane, in his capacity of acting Premier. He indicated his strong support for the idea which was voiced that the province's name be changed to Kingdom of KwaZulu Natal during the upcoming session of the legislature.

HOUSE OF TRADITIONAL LEADERS OF THE KINGDOM OF KWAZULU NATAL
ADDRESS BY MANGOSUTHU BUTHELEZI MP,
CHAIRMAN OF THE HOUSE AND
UNDUNANKULU KAZULU

ULUNDI, DECEMBER 5, 1995

[INTRODUCTORY REMARKS TO BE ADDED]
[...]

On several occasions this House of Traditional Leaders has considered the vexed issue of the Ingonyama Trust Act. On several occasions we have discussed how this Act was adopted by the erstwhile KwaZulu Government to avoid that the ancestral land of the Zulu Nation administered by amaKosi for the benefit of the traditional communities, be transferred by the interim Constitution to the central Government and regarded as State property.

The Act established a statutory trust which became the title holder of our land, and has vested the paramount power of administration of the land in His Majesty the King of the Zulu Nation. The requirement that this power be exercised in terms of our indigenous and customary law and that no land be alienated without the written consent of the traditional authority concerned tried to fill the gap between the laws and customs of our Kingdom and the restraint of the Roman Dutch law in which we found ourselves operating.

In fact, it has always been our intention that in the end title to the land ought to vest in each of the traditional authorities, which should hold the land in terms of our indigenous and customary law as communal rather than private property, and for the benefit and enjoyment not only of the present but also of future generations. However, the legal environment in which we find ourselves operating

creates two major problems for the achievement of this final goal.

The first is that in order to transfer land to the traditional authorities this land must be surveyed. When I was its Chief Minister, the KwaZulu Government began the process of land surveyance which has been continued by the KwaZulu Natal Government. I understand that there have been logistical difficulties and human resources shortcomings in the finalisation of this process and that only seventy-seven percent of the land has actually been surveyed at this time.

The second difficulty which prevented us from transferring the land to traditional authorities is the fact that Roman Dutch law does not recognise communal property as a third gender of tenure in addition to private and public ownership. Therefore, the establishment of an Ingonyama Trust was a holding operation undertaken to preserve our control of our own land while these two problems were being addressed. The Act was adopted when it became clear that constitutional negotiations were not yielding a federal result in which provinces acting as the primary government of the people would be entitled to legislate on matters such as land and property rights.

I submitt that from our viewpoint the bottom line is that this land belongs to us and nobody else and that we as the trustees of our respective communities are charged with the task of administering it. It has been most unfortunate that there has been insufficient communication and co-operation between the government of KwaZulu Natal and His Majesty the King of the Zulu Nation who is the nominal trustee of the trust. In fact His Majesty has the power to alienate the land with the consent of the traditional community concerned. This power could have been exercised in the past two years

to transfer the land back to each of the traditional authorities with the exclusion of those tracts of land which rightfully ought to belong to municipalities, proclaimed townships and to the national and provincial government.

It should have been possible during the past two years to complete the surveying of the land so as to give title to traditional authorities which in the absence of a clear recognition of communal property could have held title as municiple public property. In the KwaZulu Natal Constitution which was adopted on March 15, 1996 there was a provision recognising communal property as a third gender of property rights. Even though this provision was subject to a so called to "sunrise" clause which made it ineffective and inoperative until a future time in which our province could exercise legislative powers on property rights, it became one of the grounds on which the Constitutional Court refused to certify the provincial constitution.

As we know the central Government has always regarded our land as State property. The only extent to which it has recognised communal property is within the framework of the recently adopted Communal Property Association Act which establishes communities in terms of a constitution drafted and ratified by the Department of Land Affairs which also supervises its implementation. The end result of this legislative framework is that the powers of land administration of traditional leaders are replaced with the structures established by the constitution of the association and by the powers of officials of the Department of Land Affairs.

During the past two years we have sought ways and means to reconcile this diametrical divergence

of perspective between our Kingdom and the central Government. Some nine months ago this House met to consider a Bill sent to it by the Speaker of the provincial legislature aimed at re-enacting the Ingonyama Trust Act as a law of our province to avoid its repeal by the central Government. We endorsed the re-enactment which took place causing a string of constitutional litigation. The province entered into a settlement with the Minister of Land Affairs which was not brought to the attention to this House of Traditional Leaders. In terms of this settlement the re-enactment of the Ingoyama Trust Act by the provincial legislature was repealed by a provincial law which also was not referred to our House for our comments. However in pursuit of the terms of the settlement a long process of negotiation developed between the provincial Government and the Minister of Land Affairs.

I understand that a few months ago this House received a report on the status of this negotiation from Senator BJ Bhengu who was assisted in his presentation by my ministerial advisor. I was informed that they related to the members of this House the long tale of legal battles fought in the Senate to improve the amendments which the central Government wants to make to our Ingoyama Trust Act. We have always agreed with some of these amendments while others were totally unacceptable to us. The legal battles we fought in the Senate gave us the required leverage to force the Minister of Land Affairs to seek reconciliation on this issue on the basis of genuine compromises and give and take.

During this process of negotiation the Minister indicated that he wished to accommodate the interest of the province of KwaZulu Natal across party lines. I understand that the process of consultations

with the various political parties and stakeholders in KwaZulu Natal ran alongside the process of negotiations with the Minister of Land Affairs. I believe that the version of the Bill which was finally approved by the Senate contains important gains for traditional leaders of this province. However it also contains concerning shortcomings which we must bring to the attention of the Minister of Land Affairs so that negotiations may continue while the Bill is being examined by the National Assembly. This Bill is now before this House of Traditional Leaders which in terms of the interim Constitution is exercising a consultative role in lieu of the national Council of Traditional Leaders which has not yet been established.

In reviewing this Bill we must appreciate that it is the result of a give and take which is somehow necessitated by the fact that His Majesty has not yet transferred the land to traditional authorities. The Bill replaces the Ingonyama as the administrator of the trust with a Board. The composition of this Board is still very problematic. The Minister of Land Affairs has agreed in principle that the composition of the Board should reflect the notion of a joint effort between the provincial and the national government. However there has been no consensus on how this agreed principle should be implemented in actual legislative text.

In the end Minister Hanekom indicated to our negotiators that he would be willing to consider any text which carries the imprimatur of the two major political parties of KwaZulu Natal. As it stands the central Government has the upper hand on the nomination of the members of the Board which administers the trust. Many formulation have been discussed by those negotiating and a possible compromise has emerged on the following formulation which if supported by the province as a

whole, could be introduced in the National Assembly. This formulation would rephrase Section 2 A(4) as follows:

> *"The nominated members shall consist of*
> *(a) four members appointed by the Minister after consultation with the Ingonyama, the Premier, and the Chairperson of the House of Traditional Leaders of KwaZulu Natal; and*
> *(b) four members appointed by the Minister with due regard to regional interest and in consultation with the Premier who shall consult with the Ingonyama and the Chairperson of the House of Traditional Leaders of KwaZulu Natal in this regard,*
> *provided that if a vacancy or vacancies exist in respect of the members referred to in subsection (b) as a result of the failure by the Premier to make a nomination within thirty days of the request of the Minister, the Minister may choose and appoint the member or members concerned."*

This formulation would effectively give four members each to the provincial and national levels of government while providing a guarantee to the Minister of Land Affairs that the province of KwaZulu Natal would not have the legal power to hinder the process. There are other provisions in this Bill which are of concern. For instance you might have noticed that several provisions of the Ingonyama Trust Act have been amended to shift the emphasis from the tribe to the "members of the tribe," thereby suggesting that decisions ought to be made by means of majority rule rather than on the basis of our consensus seeking procedures in which traditional leaders operate as catalysts of unanimity.

The Bill contains provisions with which we may agree, such as those which exclude from the scope of application of the Trust the proclaimed townships. However we must register that these provisions are somehow shortsighted because the operate in a mechanistic fashion without providing for necessary mechanisms of dispute resolution for instance with respect to areas in which a

concurrent claim exists of a municipality and a traditional authority. The amendments introduced in the Senate by Senator BJ Bhengu provided for this type of conflict resolution mechanisms but unfortunately within the context of the necessary give and take those valuable suggestions were not taken on board by the Minister.

The most important concession we received is the reformulation of clause 2 which preserves section 2 of the principal Act requiring that land can not be encumbered, pledged, leased, alienated or otherwise disposed of without the written consent of a tribal authority. In the original Bill formulated by the Department of Land Affairs this guarantee was eliminated, and therefore we must praise the negotiators under the skilful and wise guidance of our Premier for having brought back this important gain for traditional leaders. With respect to this provision one might want to suggest that instead of talking about "tribal authorities"the Bill should refer to " traditional authorities" which are the proper entities to express the required consensus, for the term tribal authority is very ambiguous.

We should also suggest that it is improper to force the Ingonyama to be the Chairman of a statutory Board which would be a diminution of his status and royal position. The Board ought to be Chaired at the discretion of the Ingonyama by his chosen representative. Another significant amendment relates to the rephrasing of the definition of township which no longer allows the Board to exclude land from the application of the Trust merely by declaring it to be a township at its own will, and on the grounds of possible future use for residential, commercial or similar purpose. This provision could have been abused as any tract of our land could have been regarded at any time as potentially

usable for residential development and hence automatically taken out of the protection of the Ingonyama Trust Act.

Additional concerns relate to the "validation clause" which may create conflicts with traditional authorities having claims with respect to land subject to such validation. Furthermore the practical and legal import of clause 2(g) of the Bill relating to the applicability of "land programmes" is not clear, for one can hardly understand how land programmes could apply to our land which is perfectly redistributed and allocated. As a product of compromise the Bill has also drafting shortcomings, as for instance it does not identify the considerable administrative capacity necessary to implement it. However, another major gain has been the elimination of the express language which had the import of making the laws governing public and state land applicable to the land held by the Ingonyama Trust Act. The language resulting after negotiations is somehow ambiguous and in this ambiguity the hope exists that one might not construe the legislative scheme as equating our land to state owned public property.

I feel that along with our comments, this House of Traditional Leaders should send a very clear message to the Minister of Land Affairs that this matter is at the core of the interest of our Kingdom and we are ready to defend the prerogatives and the duties we have inherited from our forefathers who command us to protect and respect our land as the essence of our national unity. It must be stressed that even with the additional amendments which are suggested the end result of this give and take creates an unsatisfactory situation in which the central Government has a very significant say in the administration of our land. We are proud of the results we have achieved in negotiation

but we should remain vigilant because in the end the protection of our land will rely not on legal technicalities but on our capability of mobilising our people against any interference with the rights of our communities.

In closing my presentation on this matter I must relate that I have been personally informed of the enormous amount of work and attention that both our Premier Dr FT Mdalose and our Minister of Traditional Affairs and Environment Inkosi NJ Ngubane have put into these negotiations which testifies to the sense of importance and respect to which they hold the interest of traditional leaders.

[...]

[TO BE CONTINUED WITH OTHER AGENDA ITEMS AND CLOSING REMARKS]

----------ooOoo----------

1748.DOC