

REPUBLIC OF SOUTH AFRICA

TRADITIONAL COURTS BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 40487 of 9 December 2016)
(The English text is the official text of the Bill)*

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

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BILL

To provide a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values; and to provide for matters connected therewith.

PREAMBLE

SINCE the remaining provisions of the Black Administration Act, 1927, and some provisions of former homeland legislation still regulate the resolution of disputes by the institution of traditional leadership, are in stark conflict with constitutional values;

AND SINCE there is a need to provide a legislative framework to replace the current inadequate legislative framework in order to—

- address certain abuses prevailing in some traditional courts as they currently exist;
- protect the public interest; and
- enhance accountability in the resolution of disputes in accordance with evolving customs and practices in the new constitutional dispensation;

AND SINCE the Constitution recognises the institution, status and role of traditional leadership in dispute resolution, as well as the application of customs and practices in traditional courts, subject to the Constitution;

AND SINCE it is necessary to replace the current legislative framework in terms of which disputes are resolved in terms of customary law, in line with constitutional imperatives and values, including the right to human dignity, the achievement of equality and the advancement of human rights and freedoms;

AND SINCE it is necessary to have a single statute applicable throughout the Republic, regulating the resolution of disputes in traditional courts in accordance with the Constitution;

AND RECOGNISING that the Constitution guarantees everyone the right of access to the courts as contemplated in Chapter 8 of the Constitution for purposes of resolving their disputes;

AND FURTHER RECOGNISING that customary law is premised on the principle and spirit of voluntary affiliation, and that its application is accessible to those who choose to live in accordance with the values of evolving customary law and abide by the practices and customs thereof;

AND FURTHER RECOGNISING that many citizens who subscribe to customs and practices embedded in customary law may voluntarily elect to have their disputes resolved in terms of their customs and practices in traditional courts, which are distinguishable from courts in the judicial system contemplated in Chapter 8 of the Constitution;

AND FURTHER RECOGNISING that customary law plays an integral role in the resolution of disputes in communities between members of those communities who voluntarily subject themselves to and observe, the accepted practices and customs applicable in those communities;

AND FURTHER RECOGNISING that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum;

AND FURTHER RECOGNISING that there are different levels of dispute resolution in terms of customary law, in addition to the role played by traditional courts,

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA therefore enacts as follows:—

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Definitions

- 1.** (1) In this Act, unless the context indicates otherwise—
- “**clerk**” means a clerk of a traditional court referred to in section 5(4);
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
 - “**court**” means any court established in terms of section 166 of the Constitution; 30
 - “**dispute**” means a dispute between parties of any nature, including a dispute arising out of customary law, which a traditional court is competent to deal with in terms of this Act;
 - “**Minister**” means the Cabinet member responsible for the administration of justice; 35
 - “**prescribed**” means prescribed by regulation in terms of section 17;
 - “**Provincial Traditional Court Registrar**” means a Provincial Traditional Court Registrar contemplated in section 10, and “**Provincial Registrar**” has a corresponding meaning;
 - “**restorative justice**”— 40
 - (a) means an approach to the resolution of disputes that aims to involve all parties to a dispute, the families concerned and community members to collectively identify and address harms, needs and obligations by accepting responsibility, making restitution and taking measures to prevent a recurrence of the incident which gave rise to the dispute and promoting reconciliation; 45

- (b) does not extend to measures which, in good faith, purport to give effect to the objectives contemplated in paragraph (a) but which, in fact, do not meaningfully restore the dignity of, or redress any wrong-doing against any, person involved in the dispute; and
- (c) results in redressing the wrong-doing in question and ensuring the restitution of the dignity of the person in question in a just and fair manner;

“**this Act**” includes any regulation;

“**traditional court**” means a customary institution or structure, which is constituted and functions in terms of customary law and custom, for purposes of resolving disputes, in accordance with constitutional imperatives and this Act, and which is referred to in the different official languages as—

- (a) “*eBandla*” in isiNdebele;
- (b) “*Huvo*” in Xitsonga;
- (c) “*Inkundla*” in isiZulu;
- (d) “*iNkhundla*” in siSwati;
- (e) “*iNkundla*” in isiXhosa;
- (f) “*Kgoro*” in Sepedi;
- (g) “*Kgotla*” in Sesotho;
- (h) “*Khoro*” in Tshivenda;
- (i) “*Kgotla*” in Setswana; and
- (j) a tribunal for Khoi-San communities; and

“**traditional leader**” means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position in accordance with an Act of Parliament.

- (2) For purposes of this Act the term “customary law” must be construed as the accepted body of customs and practices of communities which evolve over time in accordance with prevailing circumstances, subject to the Constitution.

Objects of Act

2. The objects of this Act are to—

- (a) affirm the values of customary law and customs in the resolution of disputes, based on restorative justice and reconciliation and to align them with the Constitution;
- (b) affirm the role of traditional courts in terms of customary law by—
 - (i) promoting co-existence, peace and harmony in the community;
 - (ii) enhancing access to justice by providing a forum for dispute resolution in accordance with the principle of voluntary participation by all parties; and
 - (iii) promoting and preserving those traditions, customs and cultural practices that are beneficial to communities and persons who elect to observe them, in accordance with constitutional values;
- (c) affirm—
 - (i) the consensual nature of customary law;
 - (ii) the principle and spirit of voluntary affiliation; and
 - (iii) the right to freely and voluntarily elect to or elect not to abide by the various applicable practices and customs;
- (d) create a uniform legislative framework regulating the structure and functioning of traditional courts in the resolution of disputes, in accordance with constitutional imperatives and values;
- (e) enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes; and
- (f) facilitate the full, voluntary and meaningful participation of all members in a community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution.

Guiding principles

- 3. (1) In the application of this Act, the following principles should apply:
 - (a) The need to align traditional courts with the Constitution in so far as they relate to the resolution of disputes, so as to embrace the values enshrined in the Constitution, including—
 - (i) the right to human dignity;

- (ii) the achievement of equality and the advancement of human rights and freedoms; and
 - (iii) the promotion of non-racialism and non-sexism and the freedom of sexual orientation and identity and religion;
 - (b) the promotion of restorative justice measures through mediation and conciliation; 5
 - (c) the development of skills and capacity of members of traditional courts in order to ensure the effective implementation thereof; and
 - (d) the need to promote and preserve values which are based on reconciliation and restorative justice. 10
- (2) In the application of this Act, the following should be recognised and taken into account:
- (a) The constitutional imperative that traditional courts, tribunals or forums, when—
 - (i) interpreting the Bill of Rights, must promote the values that underlie an open and democratic society, based on human dignity, equality and freedom; and 15
 - (ii) interpreting any legislation, and when developing the common law or customary law, must promote the spirit, purport and objects of the Bill of Rights; 20
 - (b) the existence of systemic unfair discrimination and inequalities or attitudes which are contrary to constitutional values or which have the propensity of precluding meaningful and voluntary participation in traditional court proceedings by any person or group of persons, particularly in respect of gender, sex, including intersex, gender identity, sexual orientation, age, disability, religion, language, marital status and race, as a result of unfair discrimination, certain belief systems and harmful practices, brought about by colonialism, apartheid and patriarchy; 25
 - (c) the provisions of subsection (3), setting out conduct which infringes on the dignity, equality and freedom of persons and which is prohibited; 30
 - (d) the proceedings and decisions of traditional courts are the outcome of collective deliberations of members of the traditional courts and are not presided over by judicial officers and, as such, the principles applied in the resolution of disputes in terms of customary law and customs in terms of this Act are not, in all respects, the same as those applied or understood in the courts in the judicial system contemplated in Chapter 8 of the Constitution; and 35
 - (e) a founding value on which customary law is premised, is that its application is accessible to those who voluntarily subject themselves to that set of laws and customs. 40
- (3) (a) Without detracting from the generality of the provisions of this Act, the conduct set out in Schedule 1 to this Act is intended to illustrate and emphasise some customs and practices which infringe on the dignity, equality and freedom of persons and which are prohibited.
- (b) The State must, where appropriate, ensure that legislative and other measures are taken to address the practices referred to in paragraph (a). 45
 - (c) The Minister must, on an ongoing basis, assess the relevance of the practices listed in Schedule 1 for purposes of making recommendations for the amendment of the list of practices.
 - (d) The list of practices in Schedule 1 is not conclusive and must be considered and revised on a continuous basis. 50

Institution of proceedings in traditional courts

- 4.** (1) (a) Any person may, subject to subsection (3), institute proceedings in respect of a dispute in any traditional court.
- (b) A traditional court may hold a session thereof at a place other than where sessions of the traditional court in question ordinarily take place and, for that purpose, the traditional leader who ordinarily convenes the traditional court may, where necessary, in the presence of members of the community in the traditional court, delegate a person or persons to convene such a session and indicate who may participate therein. 55
 - (c) Disputes may only be dealt with in the place contemplated in paragraph (b) with the consent of the parties to the dispute. 60

- (2) (a) A traditional court may, subject to subsection (3), only hear and determine a dispute contemplated in Schedule 2—
- (i) that is not being dealt with by any other person or structure recognised in terms of customary law for purposes of the resolution of disputes; or
 - (ii) that has been dealt with by any person or structure in terms of subparagraph (i) but there has not been any resolution of that dispute; and
 - (iii) if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute by the traditional court in question.
- (b) A traditional court may not hear and determine a dispute which—
- (i) is being investigated by the South African Police Service;
 - (ii) is pending before any other traditional court or a court contemplated in section 166 of the Constitution; or
 - (iii) has already been finalised by a court, which means that a verdict has been given in a criminal matter or final order has been made by the court in a civil matter.
- (3) (a) Any person who has been summoned to appear before a traditional court who, for any reason, elects not to have his or her dispute heard and determined by that traditional court or to appear before that traditional court must, within 14 days or such longer period as may be necessary, duly assisted or accompanied by any person of his or her choice in whom he or she has confidence, should he or she so wish, inform the clerk of his or her decision accordingly.
- (b) A person may not, in any manner whatsoever, intimidate, manipulate, threaten or denigrate a person who exercises his or her decision contemplated in paragraph (a).
- (c) The clerk must ascertain from the person referred to in paragraph (a) whether that person is willing to have the dispute dealt with in any other traditional court, court or forum and, if so, request the traditional court to facilitate the transfer of the dispute to that other traditional court, court or forum.
- (d) Despite the provisions of this subsection, nothing precludes a traditional court from—
- (i) counselling, assisting or guiding the party before the traditional court; or
 - (ii) facilitating the referral of the dispute to an appropriate institution or organisation.
- (e) Any party who consents to have a dispute resolved by a traditional court may, subject to section 14, not abandon or withdraw from the proceedings after such proceedings have commenced, unless he or she—
- (i) has compelling grounds to do so; and
 - (ii) informs the traditional court accordingly.
- (f) A traditional court may only determine or make an order in terms of section 8 in respect of any matter referred to in Schedule 2 to this Act: Provided that if a person approaches the traditional court for any relief in respect of any matter not referred to in Schedule 2 and the matter is placed before the court, nothing precludes such a traditional court from—
- (i) counselling, assisting or guiding a party to the dispute who has approached it; or
 - (ii) facilitating the referral of the matter to another traditional court, court or an appropriate institution or organisation,
- and provided it is done in a manner that does not have the potential of influencing the proceedings or outcome of the matter in a court or forum which has jurisdiction to hear the matter.
- (4) (a) The clerk of the traditional court must, if a party, after having been duly summoned to appear in and attend the proceedings of the traditional court, and without having exercised his or her rights under subsection (3)(a), fails to so appear and attend such proceedings, make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963.
- (b) The role of the justice of the peace referred to in paragraph (a) is to facilitate compliance with the summons and for this purpose the justice of the peace has the following powers:
- (i) If non-compliance is not due to fault on the part of the party against whom the summons was issued, the power to negotiate with the party to comply with the summons; and

- (ii) if non-compliance is due to fault on the part of the party against whom the summons was issued, the power to request the traditional court to have the matter transferred to the Magistrate's Court having jurisdiction, as contemplated in section 14(1)(a).

Composition of and participation in traditional courts 5

- 5. (1) Members of a traditional court must—**
- (a) consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution; and
- (b) be convened by a traditional leader or any person designated by the traditional leader. 10
- (2) Traditional courts must promote and protect the representation and participation of women, as parties and members thereof.
- (3) (a) The Cabinet member responsible for the administration of justice must—
- (i) put measures in place in order to promote and protect the fair representation and participation of women, as parties and members in traditional courts in order to create an environment that facilitates and promotes the meaningful and voluntary participation of women in accordance with the constitutional value of non-sexism; 15
- (ii) put measures in place in order to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity; and 20
- (iii) by not later than 30 September of every year, submit a prescribed report to Parliament containing the information contemplated in subparagraphs (i) and (ii). 25
- (b) The Commission for Gender Equality referred to in Chapter 9 of the Constitution must, in its report to Parliament each year, report on the participation of women and the promotion of gender equality in traditional courts and may, to this end, make recommendations on legislative and other measures.
- (4) (a) For every traditional court there must be a clerk of a traditional court who is appointed, designated or seconded in accordance with the laws governing the public service and who has the powers, duties and functions as set out in this Act or as may be prescribed. 30
- (b) The role, functions and responsibilities of the clerk of a traditional court include the following: 35
- (i) Issuing summonses;
- (ii) keeping an attendance register of sessions of traditional courts;
- (iii) keeping records of proceedings of traditional courts;
- (iv) keeping record of all cases reported to traditional courts;
- (v) filing decisions of traditional courts with the Provincial Registrar; 40
- (vi) advising traditional courts on cases that should be referred to any other customary institution or structure or court or forum;
- (vii) transferring disputes to any other traditional court, court or forum;
- (viii) dealing with, recording and filing the information received in the prescribed manner; and 45
- (ix) submitting prescribed reports at the end of each quarter of a financial year to the Provincial Registrar to be dealt with in the prescribed manner.
- (5) Before commencing any session of a traditional court the traditional leader convening the traditional court or the person designated by him or her must say the prescribed pledge that he or she will promote and protect the values enshrined in the Constitution and this Act. 50

Nature of traditional courts

- 6. (1) Traditional courts—**
- (a) are courts of law under customary law which are intended to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and custom; and 55
- (b) function in accordance with customary law, subject to the Constitution.
- (2) Traditional courts, recognising the consensual nature of customary law, must be constituted and function under customary law and customs so as to—
- (a) promote access to justice; 60

- (b) prevent conflict;
- (c) maintain harmony; and
- (d) resolve disputes where they have occurred,

in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation, in accordance with constitutional imperatives and the provisions of this Act. 5

(3) The traditional court system is made up of such different levels as are recognised in terms of customary law and custom.

Procedure in traditional courts

7. (1) Sessions of a traditional court are held at the time and at a place which is accessible to members of the community in question. 10

(2) Subject to subsection (3), the procedure at any proceedings of a traditional court, including the notice to attend the proceedings of that traditional court and the manner of preserving the dignity of the traditional court and the manner of execution of any order imposed by it, must be in accordance with customary law and custom. 15

(3) During its proceedings, a traditional court must ensure that—

(a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:

(i) That women, as parties to any proceedings or members of the traditional court, are afforded full and equal participation in the proceedings, as men are; and 20

(ii) that vulnerable persons, with particular reference to children, the elderly, the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity, are treated in a manner that takes into account their vulnerability; and 25

(b) the following rules of natural justice are adhered to:

(i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and 30

(ii) that any decision by the traditional court must be impartial.

(4) (a) Subject to paragraph (b), a party to a dispute before a traditional court may be assisted by any person of his or her choice in whom he or she has confidence.

(b) No party to any proceedings before a traditional court may be represented by a legal practitioner acting in that capacity.

(5) (a) Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply. 35

(b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines:

(i) The system of customary law applicable in the area of the traditional court should take precedence over any other system of customary law; or 40

(ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection.

(6) Traditional courts must be open to all members of the community.

(7) Subject to the provisions of section 4(3)(d), proceedings of traditional courts must be conducted in the presence of both parties to the dispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9(3) of the Constitution. 45

(8) The customary law of procedure and evidence applies in traditional courts. 50

(9) Subject to the provisions of subsection (10), the proceedings and records of traditional courts, as contemplated in section 13, must be in the language most widely spoken in the area of the traditional court in question.

(10) If any of the parties does not understand the language used in the traditional court, an interpreter must be provided. 55

Orders that may be made by traditional courts

8. (1) A traditional court may make any of the following orders after having deliberated on a dispute before it:

- (a) An order in favour of the party who instituted proceedings in terms of section 4(1), expressed in monetary terms or otherwise, including livestock—
- (i) accepting a settlement between the parties to the dispute;
 - (ii) for the payment of any damages in respect of any proven financial loss;
 - (iii) for the payment of compensation; or
 - (iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the traditional court or a traditional leader:

Provided that any such order expressed in monetary terms or otherwise, including livestock, may not exceed the value of the damage giving rise to the dispute in question or the amount determined by the Minister from time to time by notice in the *Gazette*, for this purpose, whichever is the lesser;

- (b) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render to the aggrieved party some specific benefit or service instead of compensation for damage or pecuniary loss, with the consent of both parties;

- (c) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render without remuneration some form of service—

- (i) for the benefit of the community; or
- (ii) for the benefit of any person or persons in the community in need who, in the opinion of the members of the traditional court, are deserving of that service,

under the supervision or control of a person or group of persons identified by the traditional court who, in the opinion of the traditional court, promote the interests of the community and who must upon the completion or otherwise of the service in question report to the traditional court thereon: Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court;

- (d) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;

- (e) an order that an unconditional apology be made;

- (f) an order directing that a party or parties to the dispute be reprimanded for the conduct being complained of;

- (g) an order requiring a party or parties to keep the peace;

- (h) an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law and customary practices, the Constitution and this Act and does not include any form of detention or deprivation of any customary law benefits;

- (i) an order requiring any party to the dispute to make regular progress reports to the traditional court regarding compliance with any condition imposed by the traditional court;

- (j) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; or

- (k) an order, containing a combination of any of the orders contemplated in paragraphs (a) to (i), except where the matter is referred to the national prosecuting authority under paragraph (j), in which event the decision of the national prosecuting authority prevails.

(2) A traditional court may order that any payment contemplated in subsection (1) be paid in full or instalments and at a time or times it deems just.

(3) A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action in any court in order to recover damages for the injury he or she sustained.

Enforcement of orders of traditional courts

9. (1) If an order made by a traditional court is not satisfied within the period determined by the traditional court, the party in whose favour the order was made, may bring the matter to the attention of the clerk.

(2) The clerk must inquire into or cause to be inquired into, the reasons for non-compliance with the order and make a determination as to whether the non-compliance is due to fault on the part of the party against whom the order was made. 5

(3) If the clerk finds that the non-compliance is not due to fault on the part of the party against whom the order was made, he or she must assist the party to comply with the order on such conditions as may be agreed upon between the parties. 10

(4) (a) If the clerk finds that the non-compliance is due to fault on the part of the party against whom the order was made, he or she must make a determination to that effect and must thereafter refer the matter to a justice of the peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oaths Act, 1963 (Act No. 16 of 1963), for purposes of this Act, who must deal with the matter in terms of the powers and duties as may be conferred or imposed on him or her under section 3 of the Justices of the Peace and Commissioners of Oaths Act, 1963. 15

(b) The role of the justice of the peace referred to in paragraph (a) is to facilitate compliance with the order made by the traditional court and for this purpose the justice of the peace has the following powers: 20

- (i) If non-compliance is not due to fault on the part of the party against whom the order was made, the power to negotiate with the parties on how and when the order will be complied with and to make a determination in accordance therewith; and
- (ii) if non-compliance is due to fault on the part of the party against whom the order was made, the power to summons the party to appear in the traditional court again in order to have the matter transferred to the Magistrate's Court having jurisdiction, as contemplated in section 14(1)(a), to be dealt with afresh. 25

Provincial Traditional Court Registrars

10. (1) (a) In provinces where there are traditional courts, the Minister must, after consultation with the Cabinet Member responsible for traditional affairs, and subject to the laws governing the public service, designate, second or appoint persons as Provincial Traditional Court Registrars in respect of each province. 30

(b) A Provincial Traditional Court Registrar must have the qualifications and experience for that position, as prescribed. 35

(2) The role, functions and responsibilities of Provincial Registrars are as may be prescribed, in addition to the following:

- (a) Compiling and maintaining a prescribed register of all traditional courts in the province;
- (b) referring and reporting on cases of public interest, in the prescribed circumstances and prescribed manner, to the High Court having jurisdiction for review in order to contribute to jurisprudence or enhance the reform of customary law, and the High Court, for this purpose, has the powers as set out in section 11(2); 40
- (c) assisting parties in taking a matter on review as contemplated in section 11; 45
- (d) guiding and supervising the functioning of traditional courts; and
- (e) keeping the Member of the Executive Council responsible for traditional affairs informed about the functioning of the traditional courts in the province in question.

(3) A Provincial Registrar shall, at all times, and for purposes of carrying out his or her role, functions, powers and responsibilities in terms of this section, have access to any traditional court within the province in question and to the records thereof. 50

Review by High Court

11. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds: 55

- (a) The traditional court was not competent to deal with the matter as contemplated in section 4(3)(f);

- (b) the traditional court was not properly constituted as contemplated in section 5;
 - (c) the requirements relating to the pledge or affirmation contemplated in section 5 were not complied with;
 - (d) the provisions of section 7(3)(a), affording—
 - (i) women, as parties to any proceedings or members of the traditional court, full and equal participation in the proceedings; or
 - (ii) vulnerable persons treatment that takes into account their particular vulnerability, were not complied with;
 - (e) the provisions of section 7(3)(b), were not complied with;
 - (f) one or both of the parties were not allowed to be represented by a person of their choice as contemplated in sections 4(3)(a) and 7(4);
 - (g) the proceedings of the traditional court were not open to all members of the public, contrary to the provisions of section 7(6);
 - (h) the proceedings of the traditional court were not conducted in the presence of both parties, contrary to the provisions of section 7(7);
 - (i) the proceedings of the traditional court were conducted in a language which one or both of the parties did not understand without the intervention of an interpreter, contrary to the provisions of section 7(9) or (10);
 - (j) an order was made contrary to the provisions of section 8; or
 - (k) the provisions of section 3(3) have not been complied with or have been contravened.
- (2) (a) The division of the High Court reviewing the proceedings of a traditional court as contemplated in subsection (1) may, at any sitting thereof, hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or article.
- (b) The division of the High Court reviewing the proceedings of a traditional court, whether or not it has heard evidence, may—
- (i) confirm, alter, set aside or correct the order made by the traditional court in terms of section 8;
 - (ii) set aside or correct the proceedings of the traditional court;
 - (iii) generally make such order as the traditional court ought to have made on any matter which was before it; or
 - (iv) remit the case to the traditional court with instructions to deal with any matter in such manner as the division of the High Court may think fit.
- (3) Any request for review as contemplated in subsection (1) after the expiry of the period determined in the regulations may be condoned by the division of the High Court in question on good cause shown.
- (4) An order of a traditional court in respect of which the matter is taken on review in terms of this section, is suspended until the review has been decided on.
- (5) At the conclusion of the matter before the traditional court, the traditional court must advise the parties of their right to take the matter on review and of the grounds for such review as contemplated in this section.

Escalation of matters from traditional courts

12. A party who is aggrieved by a decision or order of a traditional court may, on grounds other than those referred to in section 11(1), escalate his or her matter to a customary institution or structure in accordance with customary law and custom.

Record of proceedings

13. A traditional court must, in the prescribed manner, record or cause to be recorded in the language contemplated in section 7(9)—

- (a) a file number of the dispute;
- (b) the date on which the dispute was dealt with;
- (c) the nature of the dispute;
- (d) a summary of the facts of the dispute;
- (e) the names and addresses of the parties and their witnesses;
- (f) the decision of the traditional court, including the decision or order of the traditional court;
- (g) a list of exhibits; and

- (h) an indication that the prescribed pledge or affirmation was taken by the traditional leader convening the session of the traditional court or by a person designated by him or her in accordance with customary law and custom, as contemplated in section 5(5).

Transfer of disputes 5

14. (1) (a) If a traditional court is of the opinion that a dispute before it is not a matter which it is competent to deal with, as contemplated in section 4, or if the matter involves difficult or complex questions of law or fact that should be dealt with in a Magistrate's Court or a small claims court or if it is a matter as contemplated in section 4(4)(b)(ii) or section 9(4)(b)(ii), the traditional court may, in the prescribed manner, transfer such dispute to the Magistrate's Court or small claims court having jurisdiction and notify the parties to the dispute of the transfer. 10

(b) If proceedings are transferred from a traditional court to a Magistrate's Court in terms of this section, the Magistrate's Court must commence proceedings afresh.

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her— 15

(a) in the case of a dispute of a civil nature— 20

(i) is a matter that can be dealt with more appropriately in terms of customary law and custom in a traditional court; and

(ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act; or

(b) in the case of a dispute of a criminal nature, is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act, 25

the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may, should the parties agree, facilitate the transfer of the dispute to the traditional court and notify the parties to the dispute of the transfer.

Limitation of liability of members of traditional courts 30

15. A member of a traditional court is not liable for anything done or omitted in good faith—

(a) in the performance of any function under this Act; or

(b) in the exercise of any power under this Act.

Code of conduct and enforcement thereof 35

16. (1) (a) The Minister, in consultation with the Cabinet member responsible for traditional affairs and after consultation with the National House of Traditional Leaders, must compile a code of conduct for all persons who have a role in terms of customary law for the effective functioning of traditional courts, including persons who facilitate sessions of a traditional court on behalf of traditional leaders, clerks of traditional courts and interpreters, which must be submitted to Parliament for approval 60 days prior to publication thereof in the *Gazette*. 40

(b) If the code of conduct is not approved within the 60 day period referred to in paragraph (a), it shall be deemed to have been approved by Parliament.

(2) The code must be reviewed at least once in every three years by the Minister, acting in consultation with the Minister responsible for traditional affairs and after consultation with the National House of Traditional Leaders, and the result of such review, including any proposed amendment to the code must be tabled in Parliament for approval as contemplated in subsection (1). 45

(3) The code serves as the prevailing standard of conduct which must be adhered to by the persons contemplated in subsection (1). 50

(4) The code and every subsequent amendment must be published in the *Gazette*.

(5) (a) Any breach of a provision of the Code must be reported, in the prescribed manner, to the Member of the Executive Council responsible for traditional affairs in the province in question, who must cause the alleged breach to be investigated. 55

(b) Any investigation in terms of paragraph (a) must be in accordance with the rules of natural justice, after following due process.

- (6) Any one or a combination of the following remedial steps may be imposed by the Member of the Executive Council in question in respect of a member of the traditional court who is found to have breached a provision of the Code:
- (a) Apologising to the complainant, in a manner specified;
 - (b) a reprimand; 5
 - (c) a written warning;
 - (d) any form of compensation;
 - (e) appropriate counselling;
 - (f) attendance of a specific training course; or
 - (g) any other appropriate corrective measure. 10

Regulations

17. (1) The Minister must make regulations regarding the following:
- (a) The role and responsibilities of clerks as contemplated in section 5(4);
 - (b) the pledge to be said or affirmation to be made by the traditional leader convening the traditional court or the person designated by him or her in accordance with customary law and custom as contemplated in section 5(5); 15
 - (c) the qualifications and experience required to be appointed or designated as a Provincial Registrar as contemplated in section 10(1)(b);
 - (d) the register to be kept by Provincial Registrars of Traditional Courts of all traditional courts as contemplated in section 10(2)(a); 20
 - (e) the manner and circumstances in which Provincial Registrars of Traditional Courts may refer matters on review, as contemplated in section 10(2)(b);
 - (f) the time period and manner for taking proceedings of a traditional court on review to the High Court, as contemplated in section 11(1);
 - (g) the manner in which the records of proceedings of traditional courts must be dealt with, as contemplated in section 13; 25
 - (h) the manner in which a matter may be transferred from a traditional court to a Magistrate's Court or small claims court, as contemplated in section 14(1);
 - (i) the manner in which to report alleged breaches of the code of conduct, as contemplated in section 16(5)(a); 30
 - (j) the training of traditional leaders and persons designated by traditional leaders to convene traditional courts;
 - (k) the involvement and training of paralegals and interns in the functioning of traditional courts; and
 - (l) any other matter which is necessary or expedient to prescribe in order to give effect to this Act. 35
- (2) Any regulation envisaged under this section must be—
- (a) made after consultation with the Cabinet member responsible for traditional affairs, the Members of Executive Councils of provinces responsible for traditional affairs and the National House of Traditional Leaders; and 40
 - (b) submitted to Parliament for approval.

Transitional provisions and repeal of laws

18. (1) The following Acts, if they have not been repealed before the commencement of this Act, are hereby repealed:
- (a) The Regional Authorities Courts Act, 1982 (Act No. 13 of 1982) (Transkei); 45
and
 - (b) the Chiefs Courts Act, 1983 (Act No. 6 of 1983) (Transkei).
- (2) Any authorisation by the Minister under section 12 of the Black Administration Act, 1927 (Act No. 38 of 1927), to hear and determine certain civil claims, any conferment of power by the Minister under section 20 of the Black Administration Act, 1927, to try certain criminal offences, and any other similar authorisation or conferment of power under any other law is of no force and lapses upon the commencement of this Act and the provisions of this Act apply. 50
- (3) Any proceedings pending before a traditional court at the commencement of this Act must be continued and concluded as if this Act had not been passed. 55

Short title and commencement

19. This Act is called the Traditional Courts Act, 2017, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1

**PROHIBITED CONDUCT WHICH INFRINGES ON THE DIGNITY,
EQUALITY AND FREEDOM OF PERSONS**

(Section 3(3))

Conduct of any nature which tends to—

- (a) discriminate against the dignity of members of the Lesbian, Gay, Bisexual, Transgender and Intersexed community;
- (b) promote homophobia;
- (c) denigrate, or discriminate against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer's disease;
- (d) discriminate against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;
- (e) discriminate against persons with albinism; and
- (f) discriminate against unmarried persons.

Schedule 2

(Section 4(2)(a))

Matters which traditional courts are competent to deal with in terms of this Act:

- (a) Theft where the amount involved does not exceed R5 000-00.
- (b) Malicious damage to property where the amount involved does not exceed R5 000-00.
- (c) Assault where grievous bodily harm is not inflicted.
- (d) Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute where the amount involved does not exceed R5 000-00.
- (e) Receiving any stolen property knowing it to be stolen where the amount involved does not exceed R5 000-00.
- (f) Crimen injuria.
- (g) Advice relating to customary law practices in respect of—
 - (i) ukuThwala;
 - (ii) initiation;
 - (iii) customary law marriages;
 - (iv) custody and guardianship of minor or dependent children;
 - (v) succession and inheritance; and
 - (vi) customary law benefits.
- (h) Any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette* and different amounts may be determined in respect of different categories of disputes.
- (i) Altercations between members of the community.

MEMORANDUM OF OBJECTS ON THE TRADITIONAL COURTS BILL, 2017

1. PURPOSE AND BACKGROUND

The aim of the Traditional Courts Bill, 2017 (“the Bill”), is to replace the current legislative framework in terms of which disputes are resolved in terms of customary law, in line with constitutional imperatives and values.

2. OBJECTS OF BILL

- 2.1 The objects of the Bill, as set out in **clause 2** of the Bill, are among others, to—
- (a) affirm the values of evolving customary law and customs in the resolution of disputes, based on restorative justice and reconciliation and to align them with the Constitution;
 - (b) affirm the role of traditional courts in terms of customary law;
 - (c) affirm, among others, the right to freely and voluntarily elect to or elect not to abide by the various applicable practices and customs;
 - (d) create a uniform legislative framework regulating the structure and functioning of traditional courts in the resolution of disputes, in accordance with constitutional imperatives and values;
 - (e) enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes; and
 - (f) facilitate the full, voluntary and meaningful participation of all members in a traditional community in a traditional court.
- 2.2 **Clause 3** sets out the guiding principles which must be borne in mind when implementing the legislation. Recognition is given to the fact that persons who subscribe to customs and practices embedded in customary law voluntarily elect to have their disputes resolved in terms of their customs and practices in traditional courts, which are distinguishable from courts in the judicial system contemplated in Chapter 8 of the Constitution.
- 2.3 **Clause 4** deals with the institution of proceedings in traditional courts. Proceedings may not be instituted if the dispute in question is being dealt with at another level in the traditional justice system or if the matter is pending or has been finalised by a court in the judicial system or is being investigated by the South African Police Service. A traditional court may, furthermore, only hear a matter if the party against whom the proceedings are instituted, agrees to the resolution of the dispute in that traditional court. This will ensure that the right to voluntarily elect to or elect not to abide by the traditional justice system is protected. A person who elects not to have a matter dealt with in that traditional court must give reasons for that decision to the clerk of the traditional court. If this happens the traditional court is empowered to assist the remaining party although the traditional court may not make an order against the absent party. This clause, read with Schedule 2, sets out the matters which traditional courts are competent to deal with, namely less serious disputes which disturb harmonious relationships within communities. The Bill makes no distinction between civil and criminal jurisdiction as this differentiation does not exist at customary law. Clause 4 also puts in place a mechanism to deal with the situation where a person is summonsed to appear before a traditional court and fails to so appear.
- 2.4 **Clause 5** contains provisions to ensure equal access and participation by women, as litigants and members of the traditional court. A traditional court must be constituted of women and men pursuant to promoting the right to equality as contemplated in section 9 of the Constitution. The traditional courts are required to promote and protect the representation and participation of women, as parties and members of the courts. This clause requires the Cabinet member responsible for the administration of justice and the Commission for Gender Equality to put measures in place to promote gender equality in these courts and to report annually on these measures to Parliament. Before any proceedings of a court may begin, the traditional

leader convening the court or person delegated by the traditional leader must say the prescribed pledge that he or she will protect and promote the values enshrined in the Constitution. In terms of clause 5, the effective functioning of traditional courts is enabled by clerks of traditional courts who must, among others, issue summonses, keep an attendance register of all sessions of traditional courts and keep cryptic records of proceedings.

- 2.5 **Clause 6** states that traditional courts are courts of law under customary law with a specific purpose of promoting the equitable and fair resolution of disputes, in a manner that is underpinned by the value system applicable in customary law and custom, and function in terms of the Constitution. The focus of these courts is on preventing conflict, maintaining harmony and resolving disputes in a manner that promotes restorative justice, social cohesion and reconciliation.
- 2.6 **Clause 7** states that proceedings must be in accordance with customary law and custom. It requires traditional courts to ensure that women are afforded full and equal participation, both as parties to any proceedings and as members of the traditional court. It also allows parties to be represented by 'any person of his or her choice' and prohibits legal representation. This clause further provides that traditional courts are open to all members of the community. Proceedings must be conducted in the presence of both parties and the court must allow the 'full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9(3) of the Constitution'. Vulnerable parties receive specific reference, namely women, children, the elderly, the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity.
- 2.7 **Clause 8** sets out the orders that a traditional court may make. The type of orders provided for in this clause is restorative in nature, for instance compensation and redress, which are aimed at restoring relations between parties and promoting harmony. The payment of compensation may, however, not exceed the value of the damage giving rise to the dispute or the amount determined by the Minister by notice in the *Gazette* from time to time, whichever is the lesser.
- 2.8 **Clause 9** provides for the enforcement of orders made by traditional courts. If an order of a traditional court is not complied with, the party in whose favour it is made may escalate the matter to the clerk of the traditional court who must try and resolve the matter. If this is unsuccessful, the clerk must submit the order to a justice of peace appointed by the Minister in terms of section 2 of the Justices of the Peace and Commissioners of Oath Act, 1963 (Act No. 16 of 1963). The justice of the peace will then deal with the matter in terms of his or her powers and duties as may be conferred under section 3 of the Justice of the Peace and Commissioners of Oath Act, 1963, including the facilitation of compliance with the order of the traditional court.
- 2.9 **Clause 10** provides for the appointment or designation of Provincial Traditional Court Registrars and sets out their role and responsibilities.
- 2.10 **Clause 11** allows for the review of procedural short-comings in the High Court, for instance if the court was not properly constituted or the parties were not allowed to be represented by persons of their choice. The High Court can confirm, alter, set aside or correct the order made by the traditional court, or remit the matter to the traditional court to deal with it in the manner ordered by the High Court.
- 2.11 **Clause 12** deals with the escalation of matters from traditional courts to a customary institution or structure in accordance with customary law and custom. This ensures that the resolution of disputes remains within the traditional justice system.

2.12 **Clauses 13 and 14** deal with the record of proceedings of traditional courts and the transfer of disputes from traditional courts to Magistrates' Courts and vice versa.

2.13 **Clause 15** deals with the limitation of liability for members of traditional courts for anything done in good faith, while **clause 16** deals with the code of good conduct and the enforcement thereof. **Clause 17** empowers the Cabinet member responsible for the administration of justice to make regulations on various matters required under the Bill, including regulations on the training of traditional leaders and members of traditional courts and the involvement of paralegals.

2.14 **Clause 18** deals with transitional provisions. Among others, this clause repeals all existing former homeland legislation regulating traditional courts.

2.15 **Clause 19** contains the short title and commencement.

3. BODIES, DEPARTMENTS AND PARTIES CONSULTED

The Department held consultative meetings with representatives of traditional leaders and members of civil society. A National Dialogue, where all the stakeholders referred to above were present, was convened on 4 December 2015. Also, a Reference Group, consisting of representatives from government, traditional leadership and members of civil society, was established for the purpose of soliciting views on the principles which were to form the basis of the proposed legislation on the transformation of the traditional justice system.

4. IMPLICATION FOR PROVINCES

The proposed legislation will be applicable in all the provinces where traditional courts exist.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill will result in additional organisational/personnel implications. Clause 10 requires Provincial Traditional Court Registrars to be appointed or designated in all provinces in which there are traditional courts. The implications in this regard are outlined in paragraph 6 below.

6. FINANCIAL IMPLICATIONS FOR THE STATE

The Bill has been subjected to a costing exercise by the Costing Unit in the Department. During this costing exercise it was suggested that existing resources should, as far as possible, be used in the implementation of the Act. The main financial implications for the State will be in the form of personnel and goods and services, related to the Provincial Registrars and their support staff, as well as training. It is envisaged that the Provincial Registrars should, at least, be officials at the level of Director. Existing resources will be used for this purpose.

7. PARLIAMENTARY PROCEDURE

7.1 In essence, an ordinary Bill must be classified as section 76 if it in a substantial measure affects any of the functional areas listed in Schedule 4 of the Constitution.¹ In **Tongoane and Others v National Minister for Agriculture and Land Affairs and Others**² the key issue concerned the proper classification of the Communal Land Rights Act, 2004 (Act No. 11 of 2004)

¹ Woolman et al *Constitutional Law of South Africa* (2013) 2 Ed,RS3, 05-11, ch17-p88.

² *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214. (CC).

(“CLARA”), which had been processed in terms of section 75. The Constitutional Court rejected the “pith and substance” test and endorsed the substantial measure test instead. Ngcobo CJ held as follows:

“[60] The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill should be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.” (Our underlining)

- 7.2 The court then examined the CLARA to determine the extent to which its provisions regulated “indigenous law” and “traditional leadership”, which are two clauses listed in Schedule 4 to the Constitution.³ The court held that any Bill whose provisions substantially affect the interests of provinces must be tagged as a section 76 Bill. This would include Bills over which provinces have concurrent jurisdiction but would go further. The question whether a Bill should be tagged as such is determined in two ways. First, by the list of matters contained in section 76(3)(a) – (f) of the Constitution. Second, by whether the provisions of the Bill in substantial measure fall within a concurrent provincial legislative competence.⁴
- 7.3. As stated in the long title of the Bill, the Bill seeks to provide for a uniform legislative framework for the structure and functioning of traditional courts, in line with constitutional imperatives and values; and to provide for matters connected therewith. Taking into account the purpose and effect of the Bill, we are of the opinion that the provisions of the Bill in a substantial measure deals with cultural matters, indigenous law and traditional leadership which are all items listed in Part A of Schedule 4 to the Constitution. Schedule 4 to the Constitution deals with matters which fall within a functional area of concurrent national and provincial legislative competence.
- 7.4. Since the provisions of the Bill in substantial measure fall within a concurrent provincial legislative competence and affect the interests, concerns, and capacities of provinces, we are of the opinion that the Bill must be classified as a section 76 Bill.
- 7.5 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by subsection (1) or (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution, being indigenous law and customary law.
- 7.6 The State Law Advisers are also of the opinion that the Bill must be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions relating to customary law or custom of traditional communities.

³ Schedule 4 deals with functional areas of concurrent national and provincial legislative competence.

⁴ *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* at paragraph 72.