

REPUBLIC OF SOUTH AFRICA

**REPEAL OF BLACK
ADMINISTRATION ACT AND
AMENDMENT OF CERTAIN
LAWS BILL**

*(As introduced in the National Assembly as a section 76 Bill; explanatory summary of Bill
published in Government Gazette No 27845 of 28 July 2005)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 25—2005]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To repeal the provisions of the Black Administration Act, 1927, incrementally; to amend the Administration of Estates Act, 1965, so as to give the Masters of the High Courts jurisdiction over the property of all orphans and minors, including those who are governed by the principles of customary law; to amend the Traditional Leadership and Governance Framework Act, 2003, so as to regulate the liability of a traditional community in respect of the obligations of, or those incurred by, its traditional leadership; and to provide for matters connected therewith.

PREAMBLE

SINCE the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted so as to—

- establish a society based on democratic values, social and economic justice, equality and fundamental human rights;
- improve the quality of life of all citizens; and
- free the potential of each person by every means possible;

AND SINCE the Black Administration Act, 1927 (the Act), is regarded as a law that—

- is repugnant to the values set out in the Constitution, particularly section 1 and the Bill of Rights in Chapter 2 thereof;
- is reminiscent of past divisions and discrimination; and
- ought to be repealed as a matter of the utmost urgency;

AND SINCE the repeal of some provisions of the Act, in the interests of legal certainty and good governance, necessitates the incremental approach adopted hereunder, by repealing those provisions of the Act requiring legislative alternatives on a fixed and reasonably foreseeable future date or on such date as the legislative alternatives are implemented by the role players in question, whichever occurs earlier;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa,
as follows:—

Repeal of Act 38 of 1927 and savings

1. (1) Sections 1, 2(1), (2), (3), (5), (6) and (9), 3, 11(3)(a), 11A, 21A, 26(1), 27, 31, 33, 34, and the Second Schedule of the Black Administration Act, 1927 (Act No. 38 of 1927) (hereafter referred to as the Act), are hereby repealed. 5

(2) Section 2(7), (7)*bis*, (7)*ter* and (8) of the Act, the administration of which was not assigned to the relevant provincial authorities in the provinces of—

- (i) Gauteng;
- (ii) Western Cape; and 10
- (iii) Northern Cape,

by Proclamation No. 139 of 1994 of 9 September 1994 made under Item 14(5) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, is hereby repealed in as much as it applies in the said provinces.

(3) Section 2(7), (7)*bis*, (7)*ter* and (8) of the Act, the administration of which was 15 assigned to the relevant provincial authorities in the provinces of—

- (a) KwaZulu-Natal;
- (b) Free State;
- (c) Mpumalanga;
- (d) North West; 20
- (e) Limpopo; and
- (f) Eastern Cape,

by Proclamation No. 139 of 1994 of 9 September 1994 made under Item 14(5) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, is hereby repealed in as much as it applies in the said provinces on— 25

- (i) 31 December 2005; or
 - (ii) such date in each of the said provinces when such province repeals the said provisions or their equivalent in its area of jurisdiction and enacts and implements corresponding provincial legislation envisaged in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), 30
- whichever occurs first.

(4) Section 5(1)(a) of the Act is hereby repealed on—

- (a) 31 December 2005; or
- (b) such date as national and provincial legislative provisions dealing with the boundaries of traditional communities and the merging or division of 35 traditional communities referred to in the Traditional Leadership and Governance Framework Act, 2003, are implemented,

whichever occurs first.

(5) Sections 12(1), (2), (3), (4) and (6) and 20(1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act are hereby repealed— 40

- (a) on 31 December 2005; or
- (b) on such date as national legislation to further regulate the structure and functioning of traditional courts is implemented,

whichever occurs first.

(6) Sections 22(7) and (8) and 23(1), (2), (3), (5), (6), (7)(b), (8), (9), (10)(a), (b), (c), 45 (e) and (f) and (11) of the Act are hereby repealed—

- (a) on 31 December 2005; or
- (b) on such date as national legislation to further regulate the customary law of succession is implemented,

whichever occurs first. 50

(7) Section 24 of the Act is hereby repealed on—

- (a) 31 December 2005; or
- (b) such date as provincial legislation in KwaZulu-Natal in order to further regulate the Code of Zulu Law is implemented,

whichever occurs first. 55

(8) Any—

- (a) proclamation made under section 25(1) of the Act, including a proclamation validated by an Act of Parliament, and in force immediately prior to the commencement of section 5 of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991), in an area, including a former 60 self-governing territory;

(b) regulation made under section 30(2) of the Act or any by-law made under section 30A(1) of the Act and in force immediately prior to the commencement of section 8 of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991), in an area, including a former self-governing territory, which has not been repealed in terms of section 87 of the said Abolition of Racially Based Land Measures Act, 1991, is hereby repealed on—

- (i) 31 December 2005; or
- (ii) such date as it is repealed by a competent authority,

whichever occurs first.

(9) Sections 32, 35, 36, 37, the long title and First Schedule of the Act are hereby repealed subject to the repeal of all the provisions referred to in subsections (1) to (8).

(10) (a) The repeal of sections 11A, 31, 34 and the Second Schedule of the Act must not be construed as derogating from any right acquired in terms of those sections prior to the repeal thereof by this Act.

(b) Any restrictive condition contained in a deed which was imposed by virtue of the operation of section 34 of the Act and contemplated in the Second Schedule thereto, is hereby withdrawn and the Registrar of Deeds having jurisdiction must, without charge, upon application by the owner of the land in question, remove such restrictive condition from the deed.

Amendment of section 4 of Act 66 of 1965, as amended by section 1 of Act 86 of 1983, section 26 of Act 57 of 1988, section 4 of Act 20 of 2001 and section 2 of Act 47 of 2002

2. Section 4 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) In respect of the property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie—

- (a) in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; and
- (b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person:

Provided that—

- (i) a Master who has exercised jurisdiction under paragraph (a) or (b) shall continue to have jurisdiction notwithstanding any change in the ordinary residence of the person concerned or in the situation of the greater or greatest portion of his or her property; and
- (ii) in the case of any mentally ill person who under the Mental Health Act, 1973 (Act No. 18 of 1973), has been received or is detained in any place, jurisdiction shall lie with the Master who, immediately prior to such reception or detention, had jurisdiction in respect of his or her property under paragraph (a) or (b).”.

Insertion of section 7A in Act 41 of 2003

3. The following section is hereby inserted in the Traditional Leadership and Governance Framework Act, 2003, after section 7:

“Liability of traditional community for obligation of traditional leader

7A. (1) An obligation incurred by a traditional leader of a traditional community does not bind that traditional community or land owned or rights in land held by that traditional community unless that obligation has been authorised or adopted by the traditional community in terms of subsection (2) and in the case of—

- (a) an obligation which relates to or impacts on that land or a right in that land, that obligation has thereafter been ratified in terms of section 24(2) of the Communal Land Rights Act, 2004 (Act No. 11 of 2004), by the Land Rights Board having jurisdiction or, in the absence of such a board, by the national Minister responsible for land affairs; or

- (b) any other obligation, that obligation has thereafter been ratified by the Member of the Executive Council in charge of traditional affairs in the relevant province where that traditional community has been recognised.
- (2) The decision by a traditional community in respect of an obligation contemplated in subsection (1) must be the informed and democratic decision of the majority of the male and female members of that traditional community who are 18 years or older and who are present or represented by a proxy at a general community meeting convened by the traditional council of that traditional community for the purpose of considering such obligation and of which adequate notice has been given.
- (3) A written certificate by the Chairperson of the Land Rights Board or by the national Minister responsible for land affairs or by the relevant Member of the Executive Council in the province, as the case may be, that the obligation has been authorised or adopted and ratified in terms of this section, shall be evidence of those acts.”.

Short title

4. This Act shall be called the Repeal of Black Administration Act and Amendment of Certain Laws Act, 2005.

MEMORANDUM ON THE OBJECTS OF THE REPEAL OF BLACK ADMINISTRATION ACT AND AMENDMENT OF CERTAIN LAWS BILL, 2005

1. Purpose of Bill and background information

- 1.1 The Bill, which emanates from an investigation and report of the South African Law Reform Commission, is intended to repeal the Black Administration Act, 1927 (Act No. 38 of 1927) (the Act), on an incremental basis. Since not all the provisions of the Act can be repealed immediately, the Bill envisages the repeal of some of the provisions immediately, and others on a particular date in the near future or on the date of implementation of substitute statutory provisions by different role players in the national and provincial spheres of government, whichever occurs earlier.
- 1.2 There are certain provisions of the Act which can be repealed immediately without any implications, while others created a detailed system of governance, the outright repeal of which does not represent a satisfactory solution unless they are replaced by appropriate alternative provisions. Moreover, some provisions of the Act are administered by Government Departments other than the Department of Justice and Constitutional Development, namely the Departments of Provincial and Local Government and Land Affairs at national level, as well as different departments in the provincial sphere of government.

2. Objects of Bill

- 2.1 Clause 1 forms the crux of the Bill and, as mentioned above, intends to repeal the provisions of the Act on an incremental basis. It also contains some savings provisions. This clause attempts to categorise the different provisions of the Act that are intended for repeal, in such a manner that those provisions of the Act that —
 - can be repealed without any problem, are in fact repealed immediately; and
 - require alternative provisions in their place, are repealed when the different Departments and spheres of government have enacted and implemented such alternative provisions or on the date specified in the Bill (31 December 2005), whichever occurs first (a sunset clause).
- 2.2 Clause 1(1) deals with sections of the Act that can be repealed immediately without any implications. It seeks to repeal the following sections of the Act:
 - (a) Section 1, dealing with the powers of the Governor-General (the President or Premiers where assignments to provinces have taken place) as Supreme Chief of all Blacks;
 - (b) section 2(1), (2), (3), (5) and (6) dealing with the appointment of different categories of commissioners and tribal settlement superintendents;
 - (c) section 2(9), providing for the punishment of a person who obstructs any officer, chief or headman in the lawful execution of his duty;
 - (d) section 3, dealing with the circumstances when a “tribe” is bound by the personal obligations of its “chief” (this section is re-enacted with adaptations in clause 3 of the Bill);
 - (e) section 11(3)(a), which regulates the law to be applied in a Commissioner’s Court;
 - (f) section 11A, dealing with the legal capacity of Black women in relation to leasehold and ownership;
 - (g) section 21A, which empowers the Minister for Justice and Constitutional Development to confer certain judicial powers on persons in respect of the now defunct community councils;
 - (h) section 26(1), providing that a list of proclamations issued by the President under the authority of this Act must be tabled in Parliament;
 - (i) section 27, which empowers the President to make regulations in respect of a large range of issues relating to Black persons;

- (j) section 31, empowering the President to grant to any Black person a letter exempting the recipient from Black law and customs;
- (k) section 33, providing that no stamp duty or fee shall be payable in respect of any declaration made under the provisions of the Act;
- (l) section 34 and the Second Schedule to the Act, dealing with the extension of the operation of the Act to any area or piece of land in the district of Namaqualand which has been granted, set apart, reserved or made available for occupation by persons commonly described as “Hottentots or Bastards” or to the areas comprising the Fingo and the “Hottentot” villages in the Grahamstown urban area.

2.3 Clause 1(2) and (3) seeks to repeal the sections of the Act that are administered by the Department of Provincial and Local Government and the six provinces to which the administration thereof was assigned in 1994, namely section 2(7), (7)*bis*, (7)*ter* and (8).

2.3.1 Section 2(7) provides that the Governor-General may recognise or appoint and depose any person as a chief of a Black tribe and may make regulations prescribing the duties, powers, privileges and conditions of service of such persons. Section 2(7)*bis* provides that the Governor-General may, in certain circumstances, make an order awarding to, or imposing on, the person recognised or appointed as a chief, such of the property, rights or obligations of the previous chief as the Governor-General may deem just. Section 2(7)*ter* provides that any person affected by an order made in terms of section 2(7)*bis* may petition the Governor-General for the amplification, variation or interpretation of the provisions of the order, in respect of which the Governor-General may make such order thereon as he may deem fit. Section 2(8) provides that the Minister or his delegate may appoint any person as headman over a tribal settlement or as headman of the Blacks in any area and may appoint any person to act temporarily as a chief or headman in the place of or in addition to the ordinary incumbent of the post and may also depose such person.

2.3.2 Clause 1(2) seeks to repeal, with immediate effect, these four subsections at national level in the three provinces (Gauteng, Western Cape and Northern Cape) where they have no application, which is confirmed by the fact that the administration of these sections was not assigned to them shortly after the inception of the new constitutional dispensation in 1994.

2.3.3 Clause 1(3) seeks to repeal the same four subsections of the Act in the six provinces to which the administration of the provisions was assigned in 1994, namely Kwazulu-Natal, the Free State, Mpumalanga, North West, Limpopo and the Eastern Cape. The repeal of these provisions at provincial level can, however, only take place once suitable provincial substitutes are in place. The Traditional Leadership and Governance Framework Act, 2003, envisages the enactment of provincial legislation to regulate the matters currently contained in section 2(7), 2(7)*bis*, 2(7)*ter* and (8) of the Act. Clause 1(3) of the Bill consequently envisages that these subsections of the Act are repealed in the six provinces in question on 31 December 2005 or on such date in each province when such province repeals the said subsections in its area of jurisdiction and enacts and implements corresponding provincial legislation contemplated in the Traditional Leadership and Governance Framework Act, 2003, whichever occurs first.

2.4 Clause 1(4) seeks to repeal section 5(1)(a) of the Act. This section is also administered by the Department of Provincial and Local Government and makes provision for the Governor-General to define the boundaries of the area of any tribe or tribal settlement, divide any existing tribe into two or more parts, amalgamate tribes or parts of tribes into one tribe, or constitute a new

tribe, as necessity or the good government of Blacks may require. This subsection has not been assigned to any province. Again, this subsection can only be repealed once suitable substitute legislative measures are in place. Clause 1(4) of the Bill consequently provides that this subsection of the Act is repealed on 31 December 2005 or on such date when the national and provincial legislative provisions dealing with the boundaries of traditional communities and the merging or division of traditional communities referred to in the Traditional Leadership and Governance Framework Act, 2003, are implemented, whichever occurs first.

- 2.5 Clause 1(5) of the Bill deals with the repeal of sections of the Act that are administered by the Department of Justice and Constitutional Development, namely the remaining provisions of sections 12 and 20 and the Third Schedule to the Act, which regulate the judicial powers of traditional leaders and traditional courts. The repeal of these provisions can only take place once the Justice Department has promoted and implemented new legislation dealing with these issues. Clause 1(5) consequently provides that the remaining provisions of sections 12 and 20 and the Third Schedule to the Act are repealed on the date of implementation of national legislation to further regulate the structure and functioning of traditional courts or on 31 December 2005, whichever occurs first.
- 2.6 Clause 1(6) deals with the repeal of the remaining provisions of sections 22 and 23 of the Act, sections which are also administered by the Department of Justice and Constitutional Development and which relate to issues of marriage and the customary law of succession. The repeal of these provisions of the Act can only take place once new legislation dealing with these issues has been enacted and implemented. Clause 1(6) consequently provides that the remaining provisions of sections 22 and 23 of the Act are repealed on the date of implementation of national legislation to further regulate the customary law of succession or on 31 December 2005, whichever occurs first.
- 2.7 Clause 1(7) seeks to repeal section 24 of the Act, dealing with the Code of Zulu Law. Section 24 of the Act provides that, notwithstanding the repeal of Natal Law 19 of 1981 by section 1 of the Black Laws Amendment Act, 1976, the Schedule to that Act, as substituted by Proclamation R. 195 of 1967, shall remain of full force as law for Blacks in Natal, and the State President may from time to time by proclamation in the *Gazette* amend, repeal or substitute the provisions of that Schedule, which shall be known as the Code of Zulu Law. The proclamation containing the Code of Zulu Law was assigned to the province of KwaZulu-Natal in 1994. The repeal of section 24 of the Act is dependent on the Kwazulu-Natal Provincial Legislature enacting substitute legislation. Clause 1(7) consequently provides that section 24 of the Act is repealed on the date of implementation of provincial legislation by KwaZulu-Natal to further regulate the Code of Zulu Law or on 31 December 2005, whichever occurs first.
- 2.8 Clause 1(8) seeks to repeal subordinate legislation made under the Act. This subordinate legislation has been “kept alive” by virtue of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991). Clause 1(8) provides that any proclamation made under section 25 of the Act, any regulation made under section 30(2) of the Act or any by-law made under section 30A of the Act and which was in force prior to the commencement of the Abolition of Racially Based Land Measures Act, 1991, which has not yet been repealed, is repealed on 31 December 2005 or on such date as it is repealed by a competent authority, whichever occurs first. This approach has been followed in an attempt to create legal certainty since it has proved virtually impossible to try to identify the remaining subordinate legislation, let alone try to ascertain whether it is still being applied in practice.

- 2.9 Clause 1(9) deals with the repeal of sections, 32, 35, 36, 37, the long title and the First Schedule of the Act, which respectively provide for penalties in the event of a breach of any proclamation, rule or regulation made under the authority of the Act (section 32), definitions (section 35), the repeal of laws (section 36), the short title of the Act and the commencement thereof (section 37), the long title and the First Schedule thereto which deals with the laws the Act repealed at its commencement. This subclause envisages the repeal of these sections once the other provisions of the Act have been repealed, that is all the provisions referred to in clause 1(1) to (8).
- 2.10 Clause 1(10) contains savings provisions. Clause 1(10)(1)(a) makes provision for the protection of vested rights and provides that the repeal of sections 11A, 31, 34 and Second Schedule to the Act by the Bill does not affect any rights acquired in terms of those sections prior to their repeal. Clause 1(10)(b) gives effect to a request of the Department of Land Affairs that a provision be built into the Bill to provide that any restrictive condition contained in an existing deed, which was imposed by virtue of section 34 and Schedule 2, is withdrawn and that the relevant Registrar of Deeds must, without charge, and on application by the owner of the land in question, remove such restrictive condition from the deed.
- 2.11 Clause 2 of the Bill seeks to amend section 4(2) of the Administration of Estates Act, 1965 (Act No. 66 of 1965), the aim of which is to ensure that all orphans and minors are treated in the same manner. Section 4 of the Administration of Estates Act, 1965, deals with the jurisdiction of Masters of the High Courts, subsection (1) thereof dealing with the jurisdiction of Masters in the case of deceased estates. Section 4(2) deals with the jurisdiction of Masters in respect of property belonging to minors. This amendment is proposed in order to bring about legal certainty, leaving no doubt that the property of all orphans and minors, including the property of those orphans and minors who are governed by the principles of customary law, enjoy the protection of the High Courts as upper guardians of all minors.
- 2.12 Clause 3 of the Bill envisages an insertion in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003). This clause, in essence, constitutes a re-enactment, with some adjustments, of section 3 of the Act (which is being repealed by clause 1(1) of the Bill). It deals with the liability of a traditional leader in respect of personal obligations and is intended to protect a traditional community from liabilities incurred by a wayward traditional leader. (The wording of clause 3 is almost identical to that of section 3 of the Act, the changes thereto, being changes which are required for changed circumstances). The section still serves a purpose and ought to be retained in some form or other.

3. CONSULTATION

The South African Law Reform Commission, during the course of its investigation, consulted with relevant roleplayers and the Department of Justice and Constitutional Development, when evaluating the report of the Commission, consulted with the Departments of Provincial and Local Government and Land Affairs.

4. IMPLICATIONS FOR PROVINCES

The six provinces to which the administration of some of the provisions of the Act were assigned will be required to enact and implement provincial legislation as contemplated in the Traditional Leadership and Governance Framework Act, 2003, prior to a date set in the Bill before some of the provisions of the Act can be repealed, failing which the said provisions will be repealed.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

- 6.1 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 (that is indigenous law and customary law, subject to Chapter 12 of the Constitution).
- 6.2 The State Law Advisers are of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003, since it contains provisions pertaining to customary law or customs of traditional communities.