

REPUBLIC OF SOUTH AFRICA

**PORTFOLIO COMMITTEE AMENDMENTS
TO
TRADITIONAL COURTS BILL**

[B 1—2017]

*(As agreed to by the Portfolio Committee on Justice and Correctional Services
(National Assembly))*

[B 1A—2017]

ISBN 978-1-4850-0591-6

No. of copies printed 400

AMENDMENTS AGREED TO

TRADITIONAL COURTS BILL

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CLAUSE 1

1. On page 4, in line 9, to omit “and custom”.
2. On page 4, from line 23, to omit “in accordance with an Act of Parliament”.
3. On page 4, in line 23, after “position” to insert “and is recognised in terms of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).”.
4. On page 4, after line 24, to insert the following:

“Traditional Leadership and Governance Framework Act”
means the Traditional Leadership and Governance Framework Act, 2003(Act No. 41 of 2003).”.

CLAUSE 2

1. Clause rejected.

NEW CLAUSE

1. That the following be a new Clause 2:

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 that recognises participation by all parties; and
 - (iii) promoting and preserving those traditions, customs and cultural practices that are beneficial to communities, in accordance with constitutional values;
 - (c) 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;
 - (d) enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes; and
 - (e) facilitate the full and meaningful participation without discriminating against any member of a community in a traditional court in order to create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution.

CLAUSE 3

1. On page 5, in line 23, to omit “and voluntary”.
2. On page 5, from line 31, to omit paragraph (d) and to substitute:

“(d) the principles applied in the resolution of disputes in terms of customary law in terms of this Act are not, in all respects, the same as those applied or understood in other courts in the judicial system; and”.

CLAUSE 4

1. Clause rejected.

NEW CLAUSE

1. That the following be a new Clause 4:

“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 presides over the traditional court may, where necessary, in the presence of members of the community in the traditional court, delegate a person or persons to preside over such a session and indicate who may participate therein.

(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.

(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 any other court; 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 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—

- (a) counselling, assisting or guiding a party to the dispute who has approached it; or
- (b) 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, 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).".

CLAUSE 5

1. On page 7, in line 6, to omit "Members of a" and to substitute "A"
2. On page 7, in line 9, to omit "convened" and to substitute "presided over".
3. On page 7, in line 49, to omit "convening" and to substitute "presiding over".

CLAUSE 6

1. Clause rejected.

NEW CLAUSE

1. That the following be a new Clause 6:

"Nature of traditional courts

6. (1) Traditional courts—

- (a) are courts of law the purpose of which is 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
- (b) function in accordance with customary law, subject to the Constitution.

(2) Traditional courts must be constituted and function under customary law so as to—

- (a) promote access to justice;
 - (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.

(3) The traditional court system is made up of the following levels of traditional leadership as contemplated in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) and recognised in terms of customary law:

- (a) a headman or headwoman's court;

- (b) a senior traditional leader's court; and
- (c) a king or queen's court, where available.”.

CLAUSE 7

1. On page 8, in line 45, to omit “Subject to the provisions of section 4(3)(d), proceedings”, and to substitute “Proceedings”.
2. On page 8, after line 55, to insert:

“(11) The Minister, in consultation with the Cabinet member responsible for traditional affairs and the National House of Traditional Leaders, may by notice in the *Gazette*, determine fees payable to a traditional court in terms of customary law.

(12) A member of the traditional court must declare any direct personal interest that he or she or his or her immediate family member may have in a dispute before a traditional court in which that member is participating, and where appropriate, withdraw from participating in the resolution of that dispute.”.

CLAUSE 8

1. On page 9, from line 34, to omit paragraphs (e) and (f) and to substitute:
 - “(e) an order accepting an unconditional apology where such an apology is a voluntary settlement between the parties themselves;
 - (f) an order reprimanding a party or parties to the dispute for the conduct complained of;”.

CLAUSE 10

1. On page 10, after line 52, to insert the following subsection:

“(4) In this section “public interest” means an outcome which affects any right of the public, public finances or the public good”.

CLAUSE 11

1. On page 11, from line 11, to omit paragraph (f) and to substitute:

“(f) one or both of the parties were not allowed to represent themselves or be represented by a person of their choice as contemplated in section 7(4);”.
2. On page 11, from line 20, to omit paragraphs (j) and (k) and to substitute:
 - “(j) an order was made contrary to the provisions of section 8;
 - (k) a member of the traditional court participated in the proceedings of the court contrary to the provisions of section 7(12);
 - (l) the provisions of section 3(3) have not been complied with or have been contravened; or
 - (m) any procedural shortcoming relating to the conduct of the traditional court in the resolution of the dispute.”.

CLAUSE 12

1. Clause rejected.

NEW CLAUSE

1. That the following be a new Clause 12:

“Referral of matters from traditional courts to Magistrates’ Courts

12. (1) A party who is aggrieved by a decision or order of a traditional court on grounds other than those referred to in section 11(1) may, after exhausting all traditional court system appeal procedures available in terms of customary law as contemplated in section 6(3), refer that decision or order to the Magistrate’s Court having jurisdiction, in the prescribed manner and period.

(2) A Magistrate’s Court to which a matter has been referred in terms of subsection (1), may—

- (a) hear any evidence and, for that purpose, may summon any person to appear to give evidence or to produce any document or article; and
- (b) give any order or decision it deems competent to give in the matter.”.

CLAUSE 13

1. On page 11, in line 49, after “**13.**”, to insert “(1)”.
2. On page 12 in line 2, to omit “convening” and to substitute “presiding over”.
3. On page 12, in line 3, to omit “and custom”.
4. On page 12, after line 4, to insert the following subclause:

“(2) The record contemplated in subsection (1) must be accessible to the public under the supervision of the clerk of the traditional court at convenient times, as prescribed”.

CLAUSE 14

1. On page 12, in line 22, to omit “and custom”.
2. On page 12, in line 28, to omit ”, should the parties agree,”.

CLAUSE 16

1. On page 12, in line 54, to omit “Member of the Executive Council” and to substitute “House of Traditional Leaders”.
2. On page 12, in line 55, to omit “who” and to substitute “which”.
3. On page 13, in line 2, to omit “Member of the Executive Council” and to substitute “Provincial House of Traditional Leaders”.
4. On page 13, from line 9, to omit paragraphs (f) and (g) and to substitute:
 - “(f) attendance of a specific training course;
 - (g) being relieved of the role in the traditional court for the duration of his or her rehabilitation; or
 - (h) any other appropriate corrective measure.”.

CLAUSE 17

1. On page 13, from line 14, to omit paragraph *(b)* and to substitute:

“*(b)* the pledge to be said or affirmation to be made by the traditional leader presiding over the traditional court or the person designated by him or her in accordance with customary law as contemplated in section 5(5);”.
2. On page 13, from line 25, to omit paragraphs *(g)* to *(l)* and to substitute:

“*(g)* the time period and manner orders or decisions of a traditional court may be referred to a Magistrate’s Court, as contemplated in section 12(1);

(h) the manner in which the records of proceedings of traditional courts must be dealt with, as contemplated in section 13;

(i) 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);

(j) the manner in which to report alleged breaches of the code of conduct, as contemplated in section 16(5)(a);

(k) the training of traditional leaders and persons designated by traditional leaders to preside over traditional courts;

(l) the involvement and training of paralegals and interns in the functioning of traditional courts; and

(m) any other matter which is necessary or expedient to prescribe in order to give effect to this Act.”.

CLAUSE 19

1. On page 13, in line 57, to omit “2017” and to substitute “2019”.

PREAMBLE

1. On page 2, in the seventh line, to omit:

“• address certain abuses prevailing in some traditional courts as they currently exist;”.
2. On page 2, after the twenty third line, to insert:

“**AND RECOGNISING** that the Constitution recognises customary law as a legal system that lives side by side the common law and legislation;”.
3. On page 2, from the twenty fourth line to the thirty second line, to omit:

“**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;”.

4. On page 3, in the third line, to omit “voluntarily subject themselves to and”.
5. On page 3, in the third line, after “observe” to omit the comma.
6. On page 3, after the fourth line to insert:

“AND FURTHER RECOGNISING that the flexibility of customary law provides for consensus seeking and the prevention of and resolution of disputes and disagreements;”.

ARRANGEMENT OF SECTIONS

1. On page 3, in line 16, to omit “Escalation of matters from traditional courts” and to substitute:

“Referral of matters from traditional courts to Magistrates’ Courts”.

SCHEDULE 2

1. On page 15, in the fourth line, to omit “R 5000.00” and to substitute “R15 000.00”.
2. On page 15, in the sixth line, to omit “R 5000.00” and to substitute “R15 000.00”.
3. On page 15, in the tenth line, to omit “R 5000.00” and to substitute “R15 000.00”.
4. On page 15, in the twelfth line, to omit “R 5000.00” and to substitute “R15 000.00”.