

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)

[B 1—2017]

ISBN 978-1-4850-0341-0

No. of copies printed800

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; 5

“**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— 10

- (a) “*eBandla*” in isiNdebele;
- (b) “*Huvo*” in Xitsonga;
- (c) “*Inkundla*” in isiZulu;
- (d) “*iNkhundla*” in siSwati; 15
- (e) “*iNkundla*” in isiXhosa;
- (f) “*Kgoro*” in Sepedi;
- (g) “*Kgotla*” in Sesotho;
- (h) “*Khoro*” in Tshivenda;
- (i) “*Kgotla*” in Setswana; and 20
- (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. 25

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; 30
- (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; 35
- 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; 40
- (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; 45
- (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 50
- (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: 55
- (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