

OFFICE OF THE SPEAKER

12/10/22
Security

Enq: Adv B Mdluli
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Tuesday, 30 October 2012

The Chairperson
Select Committee on Security & Constitutional Development
Honourable TMH Mofokeng
CAPE-TOWN
8000

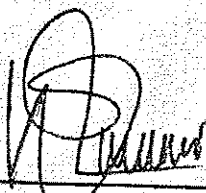
Dear Hon. Mofokeng

NEGOTIATING MANDATE: TRADITIONAL COURTS BILL, B1-2012

Attached herewith please find negotiating mandate from the
Mpumalanga Provincial Legislature.

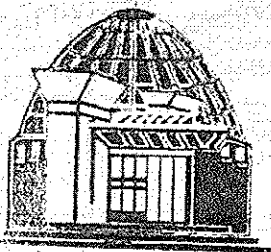
I trust that the above shall be received in order.

Yours sincerely



HON. SW LUBISI, MPL
SPEAKER: MPUMALANGA
PROVINCIAL LEGISLATURE

01/11/2012
DATE



MPUMALANGA
PROVINCIAL LEGISLATURE

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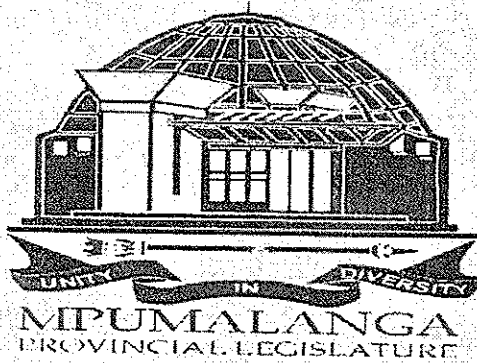
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**"We are about : Law making, oversight,
public participation and involvement"**



Office of the Chairperson

Portfolio Committee on Public Works, Roads and Transport; Community Safety, Security and Liaison

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NEGOTIATING MANDATE

To: The Chairperson: Select Committee on Security and
Constitutional Development

National Council of Provinces

Name of the Bill: Traditional Courts Bill

Number of the Bill: [B1-2012]

Date of Deliberation: 26 October 2012

Vote of the Legislature: The Portfolio Committee on Public Works, Roads and Transport; Community Safety, Security and Liaison, after considering the Traditional Courts Bill, 2012 ("the Bill"), confers on the permanent delegate representing the Province of Mpumalanga in the NCOP, the mandate to negotiate on the Bill in accordance with the views of members of the Committee and also taking into account the proposed amendments stated below.

The following comments and amendments were emphasised by the Committee:

1. Short title of the Bill

The Bill should be called the "Restorative Justice and Reconciliation Bill" instead of Traditional Courts Bill in order to include all parts of the South African community. This change would make the Bill more encompassing and also bring it in line with the objects of the Bill which advocate a traditional system that is embedded on restorative justice and reconciliation.

2. Application of the Bill

The Bill should apply to all South Africans residing in rural and urban areas, regardless of whether they do not fall within the jurisdiction of a traditional leader. It is believed that South Africans who are residing in townships, for instance,

may also wish to have their disputes resolved by means of the application of customary law, and the current restriction would constitute denying them access to justice.

3. Clause 4: Designation and training of traditional leaders / Presiding officer

- a) The designation of persons as traditional leaders should not be limited to kings, queens and senior traditional leaders, but should be extended to any persons that the Minister may appoint. This could be any person who is regarded as being of good standing in the community such as a priest or school principal.
- b) Further, *tindvuna* or headmen/women should also be designated as alternate presiding officers. This is important because a senior traditional leader may for instance be having 13 villages falling within his or her jurisdiction. In such a case, it would not be practically possible for one presiding officer to preside over matters for all 13 villages.
- c) Linked to the above, it is a fact that most headmen/ women are elderly people most of whom are illiterate, and therefore, they should be trained to preside over cases by means of oral examination, as is the case when illiterate persons test for their learner driver's licences. Training should also be extended to officials appointed to serve in the traditional courts.

4. Clause 6: Settlement of certain criminal disputes by traditional court

The Bill must be explicit and not create room for doubt, and it must be clearly stated that traditional courts cannot hear rape cases, for instance. It is proposed that a Schedule explaining offences that cannot be heard by a traditional court be included in the Bill.

5. Clause 9: Procedure of traditional court

- a) Although, clause 9(2)(a)(i) advocates for the respect of the human rights of women, the Committee's view is that such a clause was **broadly** drafted and would not address the challenges encountered by rural women at the hands of some traditional leaders. In some traditional courts, the current practice is that men still continue to treat women like perpetual minors or persons of inferior status and women who are in mourning are also precluded from participating in the processes of traditional courts or councils. Therefore, clause 9(2)(a)(i) needs to be drafted in such a manner that ensures that the rights of women are protected.
- b) Other vulnerable groups such as children, the elderly and the persons with disabilities should be treated in a manner that takes into account their vulnerability and should not be discriminated against. For instance, children appearing before the traditional court either as a complainant or accused should be assisted by their parents or guardians. Interpreters and language

practitioners and other assistive devices should be made available to assist persons with disabilities and the aged [clause 9(2)(a)(ii)].

- c) The prohibition of legal representation before traditional courts, including criminal matters, is in direct conflict with the Constitution. As such, this provision deprives accused persons of their constitutional right to be represented by a legal representative of their choice. It is therefore, the Committee's view that the Bill would be good for the country without clause 9(3)(a).

Alternatively, should legal representation be prohibited in the final draft of the Bill, the procedure that is followed in the small claims courts when resolving civil disputes should also be adopted in the traditional courts when dealing with criminal and civil matters and each party should be allowed to represent him or herself.

- d) A clause should be included in the Bill where the rights of the accused, as stipulated in the Constitution and the Criminal Procedure Act are incorporated in the Bill. This would make the Bill constitutional and this is critical since the Bill affects traditional communities where some members of the community, including traditional leaders are not sophisticated and do not have a comprehensive understanding of their fundamental rights.
- e) It is not expressly articulated whether the Bill allows a person to opt out of the jurisdiction of a traditional court, in favour of a magistrate's court even where such a person resides within the jurisdiction of the traditional court. This current situation in the Bill may be open to abuse, and if a party fails to appear before a traditional court when summoned, the presiding officer, who would be the senior traditional leader, may later impose any punishment as he or she sees fit when the party subsequently appears.
- f) With regard to clause 9(5)(a)(ii), all revenue collected by the traditional court should be deposited into the account of the relevant traditional council and be used to develop the community as well as assist in the running of the traditional council.

- 6. Clause 10: Sanctions and orders that may be imposed by traditional court**
- Clause 10(2)(l) of the Bill is too wide, and the manner in which it is currently drafted gives traditional courts unfettered discretion to impose any order that they would deem fit. The above-mentioned clause provides that a traditional court may, in the case of both civil and criminal disputes make *"any order that the traditional court may deem appropriate and which is consistent with the provisions of the Act"*. Most importantly, clause 10(2)(l) is not appealable in terms of clause 13(1). Clause 10(2)(l) should therefore be deleted from the Bill since it is not only open to abuse by traditional courts, but is also

unconstitutional as it deprives a party of his or her constitutional right to appeal or review in terms of section 35(3)(o) of the Constitution.

7. Clause 19: Transfer of cases

The jurisdiction of traditional courts versus the magistrates' courts should be clearly defined, particularly the process to be followed when it comes to the transferring of cases from a traditional court to a magistrate or small claims court. Of particular importance, the Bill should clearly state what happens in a situation where a party raises a point that a traditional court lacks jurisdiction to hear his or her matter.

8. Clause 23: Transitional provisions and repeal of laws

The Black Administration Act should be repealed, but the Traditional Courts Bill should not form the basis for its repeal hence it was proposed in paragraph 1 above that the Bill should be called the Restorative Justice and Reconciliation Bill.

9. General

- a) There is an indication that, normally, traditional leaders do not operate in the same way, and the Bill should make provision that traditional courts may be allowed to operate according to their custom.
- b) Resources and oversight are essential in ensuring that traditional courts are capacitated and developed into more functional and constitutionally just institutions that truly dispense restorative justice whilst serving the needs of their communities. The financial implications and resources that will be required for the successful implementation Bill should be taken into account during the drafting of the Bill and its regulations.


SIGNATURE

HON JL MAHLANGU

CHAIRPERSON: PORTFOLIO COMMITTEE ON PUBLIC WORKS, ROADS AND
TRANSPORT; COMMUNITY SAFETY, SECURITY AND LIAISON

2012/10/30
DATE

