**PROPOSED AMENDMENTS**

**4. Civil Jurisdiction of Traditional Courts.**

(1) The Minister may, after consultation with the Premier of the province in question;

 (a) appoint or authorize any Traditional Leader or his or her deputy to hear and determine civil claims;

(i) arising out of customary law and custom;

(ii) the cause of action or part thereof arising within his or her area of jurisdiction;

(iii) brought before him or her against any person who resides, carries on business or is employed within his or her area of jurisdiction;

(iv) brought before him or her against any person, whether or not he or she resides, carries on business or is employed within the area of jurisdiction of such Traditional Leader, if the cause of action arose wholly within that area of jurisdiction;

(v) brought before him or her against any person who appears and takes no objection to the jurisdiction of the traditional court.

(b) may increase or decrease local limits of the area of a traditional court. The area of jurisdiction of a Traditional Leader’s court shall be the same as the area of any relevant traditional community which has been recognized by the Premier of a Province in terms of Section 2(2) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).The traditional communities existing immediately before the commencement of this Act shall be deemed to have been established areas of jurisdiction of traditional courts under this Act.

(2) The Minister may at any time revoke the appointment or authority granted to a Traditional Leader or his or her deputy in terms of subsection (1).

(3) A Traditional Leader shall not under this Section or any other law have power to determine;

(a) any matter relating to the validity or constitutionality of an Act of Parliament or a Provincial Legislature;

(b) any question of nullity, divorce arising out of a marriage, civil union or partnership whether under the Marriage Act, 1961 (Act No. 25 of 1961), a customary marriage under the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998) or under the Civil Union Act, 2006 (Act No. 17 of 2006);

(c) any matter relating to the custody or guardianship of minor children;

(d) any matter relating to the validity, effect or interpretation of a will or the distribution of testate or intestate deceased estates;

(e) any matter arising out of customary law and custom where the claim or the value of the property in dispute exceeds the amount determined by the Minister from time to time by notice in the Gazette;

(f) any matter relating to the liability of any person to maintain another;

(g) any matter relating to ejectment from any property or residence.

(h) any matter to which the Traditional Leader concerned or his immediate family has either direct or indirect interest.

(4) Nothing in this Section may be construed as limiting the role, recognized in customary law, of any person, including any traditional leader, in accordance with customary law, of any dispute or matter arising prior to the dissolution of a customary marriage by court in terms of Section 8(5) of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998).

(5) The Minister may in a Government Gazette determine the monetary jurisdiction of Traditional Courts from time to time and the procedure of execution of judgments given in the Traditional Courts.

(6) The seat of a Traditional Court and times of holding court sessions shall be determined by the Traditional Leader concerned in consultation with his or her council in accordance with customary law and custom.

**5. Criminal Jurisdiction of Traditional Courts.**

(1) The Minister may also, after consultation with the Premier of the province in question;

(a) confer upon any Traditional Leader, or his or her deputy, jurisdiction to try and punish any person who has committed, wholly or partly within the area of jurisdiction of that Traditional Leader:-

(i) any offence at common law or under customary law and custom other than an offence referred to in the Schedule to this Act; and

(ii) any statutory offence other than an offence referred to in the Schedule to this Act, as specified by the Minister.

(2) A Traditional Court shall not impose the following sentences or sanctions;

(a) any punishment which is inhumane, cruel or degrading including corporal punishment, or which involves any form of detention or imprisonment;

(b) any banishment or ejectment from a traditional community.

(c) any fine in excess of the amount determined by the Minister from time to time by notice in the Gazette.

(3) A Traditional Court shall not be competent to try any cases involving juveniles or children in conflict with the law. All such cases shall be referred to relevant Child Justice Court to be dealt with in terms of the Child Justice Act, 2008 (Act No. 75 of 2008). Despite rules of customary law a child becomes a major, whether male or female, upon reaching the age of 18 years in terms of Section 17 of the Children’s Act, 2005 (Act No. 38 of 2005).

**6. Composition of a Traditional Court.**

(1) Subject to Section 9 of the Constitution and Section 8 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), a Traditional Court shall be constituted in accordance with customary law and custom by the following;

(a) a Traditional Leader, or his or her deputy, as the presiding officer;

(b) members of the Traditional Council concerned, **who must include both men and women in its composition.** The number of members of the Traditional Council will depend on the circumstances of each traditional community, as to size and need, but at no stage shall a Traditional Council be constituted by less than four members.

(2) A Traditional Leader, or his or her deputy, who has been appointed as a presiding officer of a Traditional Court, must take a prescribed oath or affirmation that he or she shall uphold and protect the Constitution and all laws of the Republic of South Africa without prejudice, fear or any favour, before he or she performs any of the functions contemplated in this Act.

(3) Each member of a Traditional Council who constitutes a Traditional Court must also take a prescribed oath or affirmation that he or she shall give a true verdict according to the evidence in any matter to which he or she may be called upon to hear and determine.

(4) Oath of office of the Traditional Leader and members of the Traditional Council shall be commissioned before a magistrate of the magistrate’s court having jurisdiction over the traditional community concerned.

**7. Clerk of the Traditional Court.**

(1) Each and every Traditional Court must have a clerk of the traditional court appointed, designated or seconded in accordance with the laws governing the public service and who has powers, duties and functions as set out in this Act or as may be prescribed in the regulations.

(2) The role, functions and responsibilities of the clerk of the traditional court shall include the following;

(i) Issuing of the court process, including summonses, subpoenas and notices;

(ii) Keeping of registers of both civil and criminal cases reported to traditional courts;

(iii) Keeping files and records of all cases reported to the traditional court;

(iv) Keeping a court book and diary all of cases to be heard on a particular day;

(v) When the court is in session it shall be the duty of the clerk of the traditional court to call cases as they appear on the days court roll;

(vi) Preparation of court records for registration at the magistrate’s court or appeal;

(vii) Perform any other duty that may be assigned to him or her by the Traditional Leader or Provincial Registrar.

**8. Open Court and Legal Representation.**

(1) All proceedings of a Traditional Court, whether civil or criminal, must be held in open court with members of the public both male and female having easy access to the court room or structure where the court is held: Provided that proceedings of the court may be held *in camera* when one of the parties or a witness involved in the matter is a minor or juvenile.

(2) No party may be legally represented by a professional lawyer in any proceedings before a Traditional Court, but any party to the proceedings may be represented by any other person of his or her choice in accordance with customary law and custom. Juvenile plaintiffs or defendants must be assisted by a parent or a legal guardian.

**9. Civil Procedure.**

(1) Subject to subsection (2) the civil procedure at any traditional court and the manner of execution of court judgments or orders shall be in accordance with customary law and custom.

(2) (a)The proceedings shall be initiated by a demand, whether oral or in writing made by the plaintiff to the defendant.

(b) Where no settlement is reached after issuing a demand, as contemplated in subsection (2)(a), the plaintiff may escalate the matter to the induna (headman) for further negotiation and possible settlement.

(c) Should the matter not be settled before the induna (headman), the plaintiff may approach the clerk of the traditional court for issue of summons.

(d) Summons shall contain the following particulars;

(i) The name of the traditional court and the magisterial district to which it is situated;

(ii) The case number;

(iii) The particulars of both the plaintiff and defendant, including their full names and surnames, identity numbers (where available) and full residential addresses. Where one of the parties is a juvenile assisted by parent or guardian, full names;

(iv) The date, time and place of hearing;

(v) Particulars of the claim of the plaintiff. This should include the date and place of the cause of action, the cause of action or nature of the claim, the amount claimed in monetary terms, or the description of goods claimed and their value;

(vi)The summons must contain a warning that should the defendant fail to attend court on the date, time and place set down for the hearing of the matter, judgment by default may be granted against him or her without further notice, for the amount or goods claimed with costs;

(vii) Summons must have signature of the plaintiff, the date of issue and signature of the clerk of the traditional court, as per annexure A.

**10. Default Judgment.**

(1) If there is no appearance by or on behalf of the defendant at the time, date and place fixed for the hearing of the action, the Traditional Leader may, upon request of plaintiff and on being satisfied that summons commencing action was served to the defendant personally, give judgment in favour of such plaintiff for an amount, or such relief, not exceeding the amount or relief claimed by the plaintiff and costs of the action.

 (2) If there is no appearance by or on behalf of the plaintiff at the time, date and place fixed for the hearing of the matter, the Traditional Leader may, upon request of the defendant, dismiss plaintiff’s claim with costs of the action.

(3) Default judgment shall be entered by the Traditional Leader by making a minute of record thereof.

**11. Rescission of Default Judgment.**

(1) Any party to an action against whom a default judgment is given may within thirty days after such judgment has come to his or her knowledge, apply to the traditional court that gave such judgment for rescission of that judgment.

(2) Before dealing with the application for rescission of judgment, notice should be given to the other party.

(3) A Traditional Leader has a discretion on whether to grant rescission of default judgment or not, depending on whether;

(a) the applicant was or was not in willful default to appear at the time, date and place fixed for the original hearing of the matter, and

(b) the applicant has a reasonable good cause or *prima facie* case or defence on the merits of the matter, or

(c) the party in whose favour the default judgment was granted consents in writing that judgment be rescinded

(4) The rescission of judgment shall be entered by the Traditional Leader by making a minute of record thereof.

(5) Once default judgment has been rescinded the matter will proceed to hearing in the ordinary way.

**12. Criminal Procedure.**

(1) Subject to subsection (2) the criminal procedure at any traditional court and the manner of enforcement of sentences, sanctions or orders shall be in accordance with customary law and custom.

(2) The proceedings shall be initiated by the party who reports a charge or criminal wrongdoing to the induna (headman). The induna (headman) must do preliminary investigation and attempt to mediate and achieve a settlement, if possible. Should mediation attempts fail, the induna (headman) may either give the accused a verbal warning to appear before a traditional court on a date, time and place which he or she may specify, or a summons in the form of annexure B may be issued by the clerk of the traditional court.

(3) The summons shall contain the following particulars;

(i) The name of the traditional court and the magisterial district to which it is situated.

(ii) The case number.

(iii) The particulars of the accused, including his full name, identity number (where available) or his or her age, and full residential address.

(iv) The date, time and place of trial.

(v) The particulars of the charge; including the date and place where it was committed, full description of the crime, how it was allegedly committed and the name of the complainant.

(vi) The summons must contain a warning to the accused that, should he fail to attend court on a date, time and place specified in the summons, a warrant of arrest may be authorized against him and he or she may be liable to conviction and sentence for failure to attend court.

(vii) The summons must contain a date of issue and signature of the clerk of the traditional court.

**13. Securing Attendance of Witnesses.**

(1) The parties may secure attendance of their witnesses to attend court verbally, in accordance with customary law and custom, or

(2) The clerk of the traditional court may, at the request of the party concerned, issue a notice (*Subpoena)* for a witness to attend proceedings in the form of Annexure C.

**14. Service of the Traditional Court process.**

(1) Summons, notices or subpoenas may be served in the prescribed manner by the messenger or traditional constable of the traditional court concerned.

(2) Service shall be effected by delivery of a copy of the said process to the affected party and explaining the nature and content thereof to him or her.

**15. Trial Procedure.**

(1) A traditional court is obliged to follow trial procedure which is prescribed by customary law and custom of the area of its jurisdiction.

(2) The trial or hearing is inquisitorial and not accusatorial or adversarial. The members of the tribunal, that is, the traditional council members, the traditional leader, and sometimes certain members of community present, participate fully in the hearing. They freely question witnesses and call witnesses in order to ventilate matters and find the truth. The Traditional Leader takes charge and control of the proceedings as a presiding officer.

(3) The following procedure, which is of general application in the traditional courts, is recommended at the hearing in order to achieve uniformity, without prescribing;

(a) The induna (headman) to whom the matter was reported and who tried to mediate between the parties briefly lays down the plaintiff’s claim or the charge and also what the defendant’s or accused’s response is. In this way the induna (headman) outlines what are the issues in dispute between the parties. If any of the parties has made concessions or admissions, the induna (headman) will also outline those admissions or concessions.

(b) The parties are asked by the Traditional Leader to confirm, correct or add to the statement of the induna (headman). Once the issues in dispute have been identified, the parties either testify or call witnesses.

(c) It is recommended that witnesses should be made to take an oath or affirmation before they testify. The oath to be taken by any witness shall be administered by the Traditional Leader presiding in such proceedings in the usual form as follows;

***“I swear that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.” Or***

***Affirmation;***

***“I affirm that the evidence I shall give, shall be the truth, the whole truth and nothing but the truth.”***

(d) A witness is then allowed to give the initial statement of what he or she knows, without questioning or interruption.

(e) After the witness has made his or her initial statement, he may be and is generally questioned by the traditional leader, any council member, parties, accused person and their adherents.

(f) Having heard the parties, the witnesses or spokesperson, or as many of them as necessary to enable him or her to come to a finding, the traditional leader in consultation with council members gives judgment. This must be in accordance with recognized customary law and custom on the point in dispute. If there is no customary law and custom covering the point in dispute, the traditional leader and his or her council members may use common sense to come to a finding.

(g) A traditional leader may adjourn the hearing of any action or suit as circumstances of the case require. A case may continue a number of days; throughout the hearing, the traditional leader and council members must be present.

(h) The traditional court should at all times strive for expeditious disposal of cases. If a traditional leader unduly delays the hearing, the aggrieved party may apply to the magistrate’s court having jurisdiction for relief.

 (i) There is no specific standard of proof, but to conform to the provisions of the Constitution in a criminal case, the accused should always be regarded as innocent until he or she is proven guilty.

**16. Court Orders.**

(1) The Traditional Leader may give the following judgments or orders in a civil matter;

(a) If the plaintiff has proven his or her claim, judgment may be given for the plaintiff for an amount of money or relief claimed not in excess of the claim itself.

(b) The order should specify the amount of money granted or the number of items or livestock and their description to be delivered as the case may be.

(c) If the plaintiff has not proven his or her case, judgment is granted for the defendant.

(d) In civil matters the court’s judgment is followed by an order for costs, which usually favours the winning party.

(2)(a) If the evidence in a criminal case proves that the accused is guilty, the traditional court may enter a verdict of guilty; but if the evidence proves otherwise, the accused may be found not guilty of the charge he or she faced.

(b) The accused may be sentenced to payment of a fine not exceeding the amount prescribed by the Minister in a Gazette, or

(c) The court ma caution and discharge the accused.

**17. Recording of Evidence.**

In the interests of justice, all proceedings including evidence adduced before the court should be reduced to writing, either by the traditional leader or the clerk of the traditional court.

**18. Language of Traditional Courts.**

(1) The proceedings of the traditional court and records thereof must be in the vernacular language which is most widely spoken in the area of the court’s jurisdiction.

(2) If any of the parties or witnesses does not understand the language of the court, an interpreter must be provided.

(3) The provisions of this Act must be made available in all eleven official languages.

**19. Registration of Judgments or Orders at the Magistrate’s Court.**

(1) Immediately after pronouncement of judgment or order, including default judgment, the traditional leader or the clerk of the traditional court shall prepare a written record in quadruplicate, containing the following particulars;

(a) The Name and address of the Traditional Leader and magisterial district;

(b) Case number;

(c) The Full names and surnames, identity numbers (where available) and addresses of the plaintiff and defendant (in civil cases) or the complainant and accused (in criminal cases);

(d) The particulars of claim (in civil cases) or the charge (in criminal cases);

(e) Particulars of defence or plea;

(f) Judgment, verdict or order of the court;

(g) Sentence (in criminal matters);

(h) Receipt number and date issued for fines paid (in criminal matters);

(i) Date of judgment, signature of the traditional leader and witnesses. See Annexure D for civil cases and E for criminal case.

(2) The first copy (the original copy) must be delivered to the clerk of the magistrate’s court having jurisdiction in the area within thirty days of the date of such judgment or order for registration.

(3) The second copy must be handed to the losing party who may be the plaintiff, defendant or accused. The third copy must be handed to the winning party.

(4) The fourth copy is retained by the clerk of the traditional court as a record.

(5) If the written record is not delivered to the clerk of the magistrate’s court, as required in subsection (2), the judgment, conviction or order lapses and becomes null and void.

(6) Only after the judgment, conviction or order has been registered with the clerk of the magistrate’s court can it be enforced in terms of section 21.

 (7) The clerk of the magistrate’s court having jurisdiction in the matter shall, as soon as, the written record is delivered to him or her, stamp the written record as proof of receipt and thereafter enter it in his register as per Annexure F and G.

**20. Court fees.**

Fees payable and recoverable in connection with any proceedings in the traditional court shall be in accordance with a scale of fees published by the Minister in a Gazette.

**21. Execution of Judgments.**

**(1) Civil Judgments.**

(a) Once a judgment has been given and registered with the clerk of the magistrate’s court, it must be enforced without delay.

(b) Where the party against whom the judgment has been given, does not satisfy the judgment of the court within a reasonable time, a successful party may approach the clerk of the magistrate’s court having jurisdiction for the issue of process in execution of the said judgment. As soon as that process is issued the rules of procedure for execution of judgments in the magistrate’s court will apply in terms of Rule 36 of the Magistrate’s Court Rules.

**(2) Enforcement of Criminal Fines.**

(a) The clerk of the traditional court who fails to recover from a convicted person any fine or portion thereof within a reasonable time, shall apply to the magistrate’s court having jurisdiction for the issue of a warrant of arrest against that person. The application shall be supported by an affidavit of the clerk of the traditional court to the effect that the accused has not paid the stipulated fine in terms of the sentence which has been registered accordingly.

(b) The magistrate to whom the application for a warrant of arrest is brought must satisfy himself that the fine was duly and lawfully imposed; that it is still unpaideither wholly or in part, and there is no appeal pending, grant a warrant of arrest against that accused person.

(c) When the accused person is brought before the magistrate, the magistrate may order such an accused person to pay such an outstanding fine thereof forthwith and if such accused person fails to comply with such order, sentence him or her to imprisonment for a period not exceeding three months.

**22. Offences.**

(1) If any person willfully insults a traditional leader presiding during his or her sitting or a traditional council member or a clerk of the traditional court during his or her attendance at such sitting, or willfully interrupts the proceedings of the court, or otherwise misbehaves himself or herself in the place where such court is held, he or she shall be guilty of an offence and liable to be sentenced to a fine not exceeding R2 000.00 or in default of payment to imprisonment for a period not exceeding six months.

(2) The offence in subsection (1) may only be tried at the magistrate’s court.

(3) If any person who was duly summonsed in a criminal matter or a witness subpoenaed, fails to appear, without just cause, before the traditional court on a date, time and place fixed for the hearing of the matter, he or she shall be guilty of an offence and liable to be sentence summarily to a fine not exceeding R300.

**23. Appeals**

(1) All appeals, whether civil or criminal, from any traditional court shall lie to the magistrate’s court having jurisdiction over the area of the traditional court concerned.

(2) Any person who is dissatisfied with the judgment or order or sentence of a traditional court, shall within thirty days from the date of judgment or order or sentence, note an appeal by notifying the clerk of the magistrate’s court having jurisdiction of his or her intention to appeal. The notice of appeal shall set out clearly and specifically the grounds upon which he or she notes an appeal. No appeal shall lie from default judgment given by the traditional leader in terms of Section 10 unless and until an application for rescission of such judgment has been refused.

(3) The magistrate may, on good cause shown, extend the period prescribed in subsection (2) for noting of an appeal, on application for condonation by the affected party.

(4) As soon as the appellant has notified the clerk of the magistrate’s court of his or her intention to appeal in terms of subsection (2) and has deposited with the clerk of the said court prescribed fees, the appeal shall be deemed to have been properly noted: Provided that if the judgment, order, or sentence has subsequently lapsed in terms of Section 19(4) the appeal shall also lapse.

(5) The clerk of the magistrate’s court to whom the notification referred to in subsection (2) is made shall;

(a) forthwith record or note the appeal by making an entry on the register Annexure H.

(b) fix the time and date for the hearing of the appeal and notify the appellant thereof;

(c) issue a notice for service on the respondent or prosecutor , as the case may be, in which it shall be set forth the information contained in the notice of appeal and also the time and date fixed for the hearing. In a criminal case, the prosecutor should then draw a charge sheet and attach the particulars of the traditional court case on annexure.

(d) issue a notice to the traditional leader who heard the case that an appeal has been lodged and calling upon him or her to supply his or her reasons for judgment in terms of subsection (6) and inform him or her to suspend any action which might have been taken by him or her of enforcing the order or sentence.

(6) The traditional leader shall as soon as possible, but not later than fourteen days after receiving notification referred to in subsection (5)(b) furnish the clerk of the court with written reasons for his judgment, order or sentence. When the reasons for judgment, order, or sentence have been furnished, the clerk of the court shall pay over to the traditional leader the fees deposited with him or her under subsection (4).

(7) If the traditional leader fails to furnish his reasons for judgment, the magistrate may issue an order calling upon him to do so within a stated time and adjourn the hearing until such time as he or she complies with such order.

(8) Notwithstanding anything contained in subsection (6) the magistrate may in his or her discretion proceed with the hearing without such reasons for judgment, order or sentence.

**24.** **Hearing of Civil Appeals at the Magistrate’s Courts.**

(1) The plaintiff in the traditional court may, not less than seven days before the date fixed for the hearing of the appeal, file with the clerk of the magistrate’s court and serve upon the defendant, a written statement amplifying his or her claim in the traditional court.

(2) The defendant in the traditional court may, not less than seven days, before the date fixed for the hearing of the appeal, file with the clerk of the magistrate’s court and serve the plaintiff a written statement of his defence to the claim and may also raise a counterclaim notwithstanding that such claim was not in the traditional court.

(3) The magistrate’s court may at or before the hearing of the appeal allow the statement of claim, defence or counterclaim referred to in subsections (1) and (2) to be then there recorded notwithstanding that the same may not have been submitted within the time hereinbefore mentioned and require the plaintiff to plead to the counterclaim.

(4) Upon the day fixed for the appearance of the parties, the magistrate’s court shall proceed to rehear and retry the case as if it were one of first instance in that court and may give such judgment or make such order thereon as provided in section 48 of the Magistrate’s Court Act, 1944 (Act No. 32 of 1944). The successful party may take out the process of such magistrate’s court for the execution of such judgment or order.

(5) The clerk of the magistrate’s court shall immediately after the appeal has been heard issue a notice to the Traditional Leader against whose judgment the appeal was lodged, informing him of the result of such appeal and, in the case, of noting of any further appeal to the high court, of such further appeal, and in due course of the outcome thereof.

**25.** **Hearing of Criminal Appeals at the Magistrate’s Courts.**

(1) The magistrate on the date of trial proceeds with the case afresh (*de novo*) in terms of section 309A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) after the plea of the accused.

(2) Section 309A of Act 51 of 1977 provides as follows:

***“309A Appeal against conviction and sentence of chiefs, headmen and chiefs' deputies***

***(1) In hearing any appeal to him under the provisions of section 20 of the Black Administration Act, 1927 (Act 38 of 1927), the magistrate shall hear and record such available evidence as may be relevant to any question in issue and shall thereupon either-***

 ***(a) confirm or vary the conviction and-***

***(i) confirm the sentence imposed by the chief, headman or chief's***

 ***deputy and order that the said sentence be satisfied forthwith or***

 ***(ii) set aside the sentence imposed by the chief, headman or chief's deputy and in lieu thereof impose such other sentence as in his opinion ought to have been imposed; and***

 ***(iii) impose a sentence of imprisonment for a period not exceeding three months on default of compliance forthwith with the order or sentence made or imposed under subparagraph (i) or (ii); or***

***(iv) set aside the sentence imposed by the chief, headman or chief's deputy and in lieu thereof impose a sentence of imprisonment for a period not exceeding three months without the option of a fine; or-***

 ***(b) uphold the appeal and set aside the conviction and sentence.***

 ***(2) The magistrate shall issue in respect of any person who has been sentenced to imprisonment under subsection (1), a warrant for his detention in a prison.”***

(3) Reference to chiefs, headmen and chiefs' deputies should be read as reference to a Traditional Leader. The same as reference to the Black Administration Act, should be read as reference to the Traditional Courts Act.

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