



## Office of the Chairperson

### Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs

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### NEGOTIATING MANDATE

**To** : The Chairperson: Select Committee on  
Co-operative Governance and Traditional  
Affairs

**Name of the Bill** : Traditional Leadership Governance  
Framework Amendment Bill

**Number of the Bill** : [B8B-2017]

**Date of Deliberation** : 09 November 2017

**Vote of the Legislature** :


The Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs (the Committee), after considering the Traditional Leadership Governance Framework Amendment Bill [B8B-2017] confers on the permanent delegate representing the Mpumalanga Provincial Legislature in the NCOP, the mandate to negotiate in favour of the Bill taking into consideration the views of the community members as contained in the attached report and the amendments proposed below:

**Clause 2: Amendment of section 3B of Act 41 of 2003, as inserted by section 6 of Act 23 of 2009**

On page 3, line 27, reference is made to “**principal traditional community**”. It is proposed that this term be defined accordingly.

**Clause 3(a): Amendment of section 28 of Act 41 of 2003, as amended by section 22 of Act 23 of 2009**

On page 3, line 47, the period be changed from [one year] to two years of the commencement of the Traditional Leadership and Governance Framework Amendment Act, 2017.



**HON BA MAJUBA  
CHAIRPERSON: PORTFOLIO COMMITTEE  
ON HUMAN SETTLEMENTS, CO-OPERATIVE GOVERNANCE AND  
TRADITIONAL AFFAIRS**

09/11/2017  
**DATE**

# **REPORT OF THE PORTFOLIO COMMITTEE ON HUMAN SETTLEMENTS, CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS ON TRADITIONAL LEADERSHIP GOVERNANCE FRAMEWORK AMENDMENT BILL, [B8B-2017]**

## **1. INTRODUCTION**

The Speaker referred the Traditional Leadership Governance Framework Amendment Bill, [B8B-2017] to the Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs (the Committee) for consideration and report back to the House in accordance with the Rules and Orders of the Mpumalanga Provincial Legislature.

In terms of section 118(1) of the Constitution of the Republic of South Africa, 1996, the Legislature has a mandate to facilitate public involvement in the legislative and other processes of the Legislature and its committees. It is against this background that the Committee conducted a public hearing to solicit inputs and views from members of the public on the above-mentioned Bill.

## **2. OBJECTIVES OF THE BILL**

The purpose of the Bill is mainly;

- To amend the Traditional Leadership and Governance Framework Act, 2003, so as to make provision for extended timeframes within which kingship or queenship councils and traditional councils must be established;
- To provide for extended timeframes within which community authorities have to be disestablished;
- To align the term of office of tribal authorities, traditional councils and kingship or queenship councils with the term of the National House of Traditional Leaders; and

- To provide for matters connected therewith.

### 3. METHOD OF WORK

The Committee met with the NCOP permanent delegate, Hon MT Mhlana, the Director from the National Department of Co-operative Governance and Traditional Affairs, as well as Mpumalanga Department of Co-operative Governance and Traditional Affairs on 24 October 2017 for a briefing on the Bill. The Committee then decided to conduct public hearings after publishing an invitation in the print media (Daily Sun), radio slots on (Moutse Community Radio Station), Ikwekwezi and Ligwalagwala FM radio stations in order to solicit inputs/comments from interested stakeholders and members of the public.

The Public hearings were conducted on Friday, 27 October 2017 and 03 November 2017, from 10h00 – 13h00 in the following Districts.

DISTRICT	VENUE AND DATES	No. of Attendees
Ehlanzeni	Mzinti Community Hall – Nkomazi Local Municipality (27/10/2017)	144
	Mapulaneng College – Bushbuckridge Local Municipality (03/11/2017)	82
Gert Sibande	Saul Mkhize Community Hall – Mkhondo Local Municipality (27/10/2017)	149
	Nhlazantshe Community Hall – Chief Albert Luthuli Local Municipality (03/11/2017)	152
Nkangala	Gamorwe Community Hall – Dr Js Moroka Local Municipality (27/10/2017)	173

The committee thereafter met on 09 November 2017 to consider the draft report and the negotiating mandate on the Traditional Leadership Governance Framework Amendment Bill [B8B-2017] and such negotiating mandate was duly submitted to the NCOP.

#### **4. INTERACTION BY THE COMMITTEE WITH NCOP PERMANENT DELEGATE AND DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS ON THE BILL**

The permanent delegate representing Mpumalanga Provincial Legislature in the NCOP and the Director of National Department of Co-operative Governance and Traditional Affairs made a presentation regarding the Bill. The Committee made some comments, asked clarity seeking questions.

The permanent delegate and the Director of the National Department of Co-operative Governance and Traditional Affairs highlighted the background on the Bill as follows;

- In terms of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003)(Framework Act);
  - (a) tribal authorities had to be reconstituted as traditional councils within a certain timeframe;
  - (b) kingship and queenship councils have to be established within a certain timeframe; and
  - (c) community authorities had to be disestablished within a certain timeframe.
  
- In most instances, these timeframes were not met which means that the enabling provisions can no longer be used to achieve the establishment or disestablishment of the various structures.
  
- Since the Department of Traditional Affairs (DTA) became aware of these challenges a few years ago, appropriate provisions were included in the

Traditional and Khoi-San Leadership Bill which has been tabled in Parliament as [B23-2015]. Since this Bill has not yet been enacted, the challenges referred to require urgent and appropriate amendments to the existing Framework Act.

### **Challenges: Traditional Councils**

- In terms of section 28(4) of the Framework Act tribal authorities would be regarded as traditional councils as contemplated in section 3 of the Act, however with the proviso that they had to meet the requirements contained in section 3(2) of the Act. This had to be done within one year from the commencement of the Framework Act.
- The timeframe of one year was not met and the Framework Act was amended in 2009 to extend the timeframe to seven years. However, the seven years had to be calculated from the date of commencement of the original Act and therefore lapsed on 23 September 2011.
- The 2009-Amendment Act also introduced two new principles relating to the composition of traditional councils, namely that the number of members of a traditional council had to be determined by means of a formula to be issued by the Premiers and that such formula has to be “in accordance with” guidelines to be issued by the Minister.
- Unfortunately, in many instances, the extended timeframe was also not met.

Although there are instances where provinces attempted to reconstitute tribal authorities, various challenges have been identified. In some cases—

- (a) tribal authorities were not reconstituted at all;

- (b) the reconstitution took place after the expiry of the timeframe within which it had to be done;
- (c) no formula was issued;
- (d) where a formula was issued, it was not aligned with the Minister's guidelines; and
- (e) not all the requirements of the relevant provincial legislation were complied with.

As a result of the above-mentioned challenges, there is legal uncertainty with regards to the status of those tribal authorities that were not reconstituted as well as those who were reconstituted but did not meet all the statutory requirements.

Another challenge is that the terms of office of traditional councils must be aligned to the term of office of the NHTL. The term of office of the NHTL expired in August 2017. This means that all tribal authorities and traditional councils must be reconstituted in 2017, but the question is, in terms of which statutory provision.

### **Challenges: Kingship/queenship councils**

In terms of section 3A of the Framework Act, a kingship or queenship council must be established within one year from the date of recognition of the kingship or queenship. A number of kingships were recognised on 5 November 2010 (Government Notice 1027, Government Gazette 33732) and therefore their councils were supposed to be established by 4 November 2011. This was however not done for various reasons.

One of the reasons why kingship/queenship councils were not established, is the fact that section 3A(2)(a) of the Framework Act requires that a formula must be issued in respect of the number of members of such councils and that the kingship or queenship must be consulted before the formula is issued.

The development of the formula proved to be more complicated and time-consuming than originally anticipated. The consultations also proved to be challenging in the sense that the recognition of some of the kingships are disputed.

Therefore, even if the formula is officially issued, the kingship and queenship councils cannot be established because the one year timeframe has lapsed.

### **Challenges: Community authorities**

- Section 28(5) of the Framework Act determines that community authorities had to be disestablished in terms of provincial legislation and within five years from the commencement of the Framework Act, thus by no later than 23 September 2009.
- Not all relevant provinces made provision for this in their legislation. Furthermore, the timeframe of five years was not met.

### **Framework Amendment Bill: Content**

The Traditional Leadership and Governance Framework Amendment Bill addresses all the challenges referred to earlier by –

- (a) extending all the timeframes and by determining that the calculation of such extended timeframes will be from the date of commencement of this Amendment Bill and not from the date of commencement of the original Act;
- (b) determining how to deal with instances where the extended timeframes are not met by provinces;



- (c) determining that in instances where a province has not issued a formula in respect of the number of members of a traditional council, the Minister's guidelines will be used as if it is such a formula;
- (d) providing provinces with an alternative method to disestablish community authorities in instances where they have not yet made provision for it in provincial legislation; and
- (e) providing clarity on how the members of the 40% component of a kingship or queenship council or of a principal traditional council must be elected.

The proposed amendments are therefore of a technical and operational nature. Provinces are the main implementers of the traditional leadership legislation. The challenges referred to were all discussed with representative from the provinces during a meeting a meeting of the Traditional Affairs Technical and Governance Forum (TATGOF) held on 19 and 20 May 2016; a special meeting held on 8 July 2016; and the TATGOF held on 25 and 26 August 2016. Provinces indicated their support for the option of amending the Framework Act.

The Committee welcomed the presentation and wanted to know if the formula to be used in the same in all the provinces. The Committee also raised a concern that the Kings are treated differently and requested that there should be an equal treatment of kings councils, queens councils and traditional councils in the country. The National Department responded by indicating that a ministerial guideline is used and the formula takes into cognizance geographical area and how many members of the community are within the particular area.

The Committee further wanted to know from the Provincial Department of Co-operative Governance and Traditional Affairs (COGTA) on what are the challenges faced by the Provincial Department in terms of tribal authorities having to be reconstituted as traditional councils. In its response the Department reported that there are challenges regarding areas of jurisdiction for some traditional leaders. Out of 60 traditional councils, only 47 will be reconstituted due to the fact that there are some traditional leaders that do not have areas of jurisdiction. The Committee further wanted to know how the Department, will deal with the thirteen (13) traditional councils who could not be reconstituted; how does the Department plan to deal with the issue of stipends for members of the traditional council vs budgetary constraints.

The Committee further wanted clarity on what measures have been put in place to ensure that proper processes are followed by the Department. The National Department of Co-operative Governance and Traditional Affairs reported that the non-implementation of the law will not address the issue of the budget. The Committee emphasised that the Department should ensure that monitoring is done and that the Department should also ensure that times frames are adhered to. Also clarity was sought on whether the one year extension period is reasonable for the reconstituting of the traditional councils as proposed in the Bill taking into account issues of the budget, boundary challenges and the fact that the seven year period that was extended by the 2009 Amendment Act was still not adhered to.

## **5. INTERACTION BY THE COMMITTEE WITH STAKEHOLDERS ON THE BILL**

The following stakeholders were invited by the Committee to attend the public hearing held on 27 October 2017 and 03 November 2017. Some made oral and others submitted written submissions

- Community Members
- Department of Co-operative Governance and Traditional Affairs
- Chairperson of Mpumalanga House of Traditional Leaders (HTL) and local houses
- Public Service Commission (PSC)
- South African Local Government Association (SALGA)
- Speakers of the local municipalities in the Districts
- Ward Committees
- Community Development Workers
- Headmen of traditional villages
- South African Police Service (SAPS)
- Nkomazi Observer
- Mpumalanga News

Written submissions were from the following stakeholders:

- Mpumalanga House of Traditional Leaders
- Land Access Movement of South Africa (Lamosa)
- Alliance for Rural Democracy

During the public hearings, members of the committee explained the Bill thoroughly in the local languages spoken in each of the communities where the public hearings took place. The legislative processes and timeframes for processing the Bill through the relevant channels of the National Council of Provinces (NCOP) were also explained. The public was made to understand their Constitutional rights in relation to them making inputs in the processing of bills by the Legislature. The Committee also reported that the Bill under review had some implementation challenges hence the proposed amendments. The Committee also responded to the questions of clarity raised thereafter. The community members and stakeholders who were present at the public hearing generally supported the Bill; it was only in Nkangala District where the Bill could not be supported. Most people raised concerns which were also related to the Bill as follows:

- Community Members and all the relevant stakeholders were not given enough time to consider the Bill; public education was not done on the Bill.
- Request for thorough processes of public consultation on the Bill.
- The Bill is not written in a language that they understand (official languages eg. IsiNdebele, Xitsonga or any other African language).
- Traditional councils must be given equal opportunity, nor equal recognition like municipal council and the respect that is due to them.
- Chapter 12 of the Constitution, Section 211(1); "The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution". Section 212(1) – "National legislation **may** provide for a role for traditional leadership as an institution at local level on matters affecting local communities."
- The Constitution negotiators gave Government a choice, and it is now a proven fact that Government is choosing to ignore the people and their dreams of a democratic country, and want to lock them under untransformed authorities.
- Traditional leaders and Government officials often only read the sections selectively yet the Constitution recognises customary law – the law of the community and the rule of **Give and Take** – first and foremost. Traditional leaders are not only bound by the Constitution but also by the customary law of their communities. They are not the ones to make customary law. It is developed by the people, it comes from the practice, in the past and present
- The people know their born leaders, only the people, especially the royal family can confirm their history of existence, their succession processes often the rightful royal heir – not the Premier, not the Minister and definitely not the

President e.g. Withdrawal of King Ndzundza not been given his certificate. A clear example of imposing chiefs to the people and undermining the people's choice.

- **TLGFAB together with Traditional Leadership and Khoisan bill (TKLB)** are seen by many people living in traditional council areas to be crucial for accountability by Traditional leaders, Government and private institutions. For example, people of Bapong ba Mogale, Bakgatla Ba Kgafela, Mapela and many others in the former homelands demand accountability and consultation in decisions about the management of revenues and other benefits flowing from the commercial and industrial use of their land. The level of public concern is now evident in part in the growing frequency and intensity of protests against mines and leaders along the platinum belt that stretches across the provinces of Limpopo and North West. Many of these concerns were also voiced during public hearings of the High Level Panel on the Assessment of Key Legislation and Acceleration of Fundamental Change, chaired by former President Kgalema Motlanthe.
- The TLFG Amendment Bill tries to legitimise currently illegitimate and invalid traditional councils because they failed to hold elections as provided by the TLFGA of 2003 and meet number requirements for selected 60% , 40% elected and 30% women members.
- The Bill hides an additional attempt to validate contested commercial deals made by invalid traditional councils without the consent of land owners and users.
- The memorandum to the TLGFA Amendment Bill that is currently before Parliament admits that 13 years after the Traditional Leadership and Governance Framework Act of 2003 (TLGFA) commenced, traditional councils have largely still not met the composition requirements.

- TLFGA of 2003 provided for Code of Conduct and minimal sanctions, and the amendment bill turns a blind eye to those.
  - Rather than being a technical “stopgap” as the Department of Traditional Affairs claims, the Amendment Bill is likely to exacerbate existing confusion and abuses around governance in traditional areas.
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- Section 28 should be revised as follows; 40% selected, 60% elected and 50% of women and youth. Recognition of Khoisan nation, their language and land rights through this amendment.
  - Section 4 (3): a traditional council must meet at least once a year with its community to give account of its activities, finances, levies received. The community indicated that this is demanded including the right to be heard at meetings of traditional councils.
  - Section 4 requires provincial legislation to provide for auditing of financial statements, keeping records, disclosing gifts.
  - Code of Conduct for traditional councils and traditional leaders should enable ordinary community members to report allegations of misconduct.
  - There must be proper customary law processes that recognize customary law, including consultation, accountability mechanisms, Free Prior and Informed Consent when land rights are threatened.
  - Senior Traditional Leaders are given more power than the Kingship.
  - Traditional councils are experiencing serious challenges daily.
  - The Department of COGTA and municipalities were not actively involved with Communities in relation to existing conflicts between the chiefs and communities regarding traditional leadership issues

There should be a 50/50 representation for selected and elected members of the traditional councils. The current composition of 60% for selected members and 40% for democratically elected members is unfair since the community forms the majority of members as opposed to members of the royal family. This proposal has also taken into account the fact that ward councillors do not normally have a say in traditional leadership issues.

- Another view was that community representation on traditional councils should increase to 60% and the royal family representation 40% (selected members) to ensure that the community is more involved and their interests are well-represented.
- Some of the community members who have been working for the royal family since 1992, reported that the Department of COGTA did not recognize/respect traditional councils. The community subsequently was not taking the chief seriously.
- The Department of COGTA needs to improve with regards to public education and advocacy about traditional affairs.
- Another community member from Mzinti said that there was confusion in reporting lines; at times they did not know whether to report matters to the Chief or municipality.
- There should be clear definition of the role of Traditional Leadership on service delivery.
- After resolving the issue of the unacknowledged Traditional Leaders, the public must be informed of the outcome;

- Before the elections, there should be an announcement that addresses the then elected traditional councillors so as to clear any confusion that may arise in the process or after the elections;
- There should be clear Traditional Leadership jurisdiction before the election process starts, this to empower the communities;
- There should be clear key performance areas for both the Ward Councillors and the Traditional Councillors; the criteria used to elect the Traditional Councillors should consider skills and merit.
- Section 3(a) should read that the one year is not adequate therefore we recommend that it must read within **two years** of the commencement of the Act.
- Boundary issues in traditional Council areas.
- Speed up the process of gazetting areas of jurisdiction in areas of Amakhosi
- Ensure that there is adequate budget for the reconstitution of traditional or tribal authorities.
- Make provision for the compensation and capacity building programmes of members after the reconstitution of traditional or tribal authorities.

## **6. OBSERVATIONS AND FINDINGS MADE BY THE COMMITTEE**

1. The Bill deals with technical amendments relating to the alignment of the term of office of traditional councils to be in line with National House of Traditional Leaders and to extend the time frames and for the calculation of such extended timeframes to be from the commencement of the Amendment Bill and not the date for the coming into operation of the principal Act.



2. The time frame to deal with the reconstitution of the traditional councils in terms of clause 3(a) is inadequate and should instead be two years.
3. The Bill is very important for the citizens of Mpumalanga being a rural province and the majority of people pay allegiance to traditional leaders. The time frame for facilitating public involvement on the Bill for purposes of submitting the negotiating mandate to the NCOP was too short – nonetheless the Committee is convinced that it did its best to facilitate public involvement within the limited period.
4. Written and oral submissions that were made by the public were considered accordingly. Other submissions that do not talk to the content of the Bill will be dealt with in different ways including in the Regulations and by the provincial department of COGTA by ensuring that critical matters regarding the publishing of a Provincial Gazette on the jurisdictions or boundaries of traditional councils, payment of stipends for members of the traditional councils and allocation of a budget for the implementation of the Amendment Bill once it is signed into law.
5. Generally, members of the public were in support of the Bill except for the community members of Nkangala District in a public hearing conducted at Gamorwe Community Hall on 27 October 2017 who rejected the Bill.

## 7. RECOMMENDATIONS

The Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs after considering the Bill confers on the permanent delegate representing the Province of Mpumalanga in the NCOP, the mandate to negotiate in favour of the Bill considering the proposed amendments made by the community members of the Bill.

## 8. CONCLUSION

The Chairperson wishes to thank all members of the public for their worthwhile participation in the public hearings and for the inputs or comments they have made. A word of gratitude to the NCOP Permanent Delegate, Hon Mhlanga, the Director from the National Department of Co-operative Governance and Traditional Affairs, Mpumalanga Department of Co-operative Governance and Traditional Affairs, South African Local Government Association (SALGA), Speakers of the Local Municipalities, Members of the Portfolio Committee on Human Settlements, Co-operative Governance and Traditional Affairs for their efforts in ensuring that the committee meets its obligation and the support staff who contributed to the success of the public hearings and the production of this report.



**HON BA MAJUBA**

**CHAIRPERSON: PORTFOLIO COMMITTEE**

**ON HUMAN SETTLEMENTS AND CO-OPERATIVE GOVERNANCE  
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