

PURSUANT TO PORTFOLIO COMMITTEE DISCUSSIONS ON 15 MAY 2018, 16
MAY 2018 AND 21 AUGUST 2018

POSSIBLE INSERTIONS ARE INDICATED BY WAY OF DOUBLE UNDERLINING

POSSIBLE DELETIONS ARE INDICATED BY WAY OF STRIKETHROUGH

REPUBLIC OF SOUTH AFRICA

TRADITIONAL COURTS BILL

(As amended by the Portfolio Committee on Justice and Correctional services)
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

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 exist¹;~~
- 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;

¹ Deleted as instructed by the Portfolio Committee (PC).

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 of law as contemplated in Chapter 8 of the Constitution for purposes of resolving their disputes;

AND RECOGNISING that the Constitution recognises customary law as a legal system that lives side by side the common law and legislation²;

~~**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 thereof³;~~

~~**AND FURTHER RECOGNISING** that many citizens who subscribe to customs and practices embedded in customary law may voluntarily elect to have their disputes~~

² This was stated by the Constitutional court in the case of Mayelane.

³ Deleted on the instruction of the PC.

~~resolved in terms of their customs and practices in traditional courts⁴, which are distinguishable from courts in the judicial system contemplated in Chapter 8 of the Constitution⁵;~~

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~~⁶ observe, the accepted practices and customs applicable in those communities;

AND FURTHER RECOGNISING that the flexibility of customary law provides for consensus seeking and the prevention of and resolution of disputes and disagreements⁷:

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 of law, 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

⁴ Deleted on the instruction of the PC.

⁵ Inclusion of the latter part of this statement in the preamble.

⁶ Deleted on the instruction of the PC.

⁷ As stated by the Constitutional court in the case of Mayelane.

follows:—

ARRANGEMENT OF SECTIONS

Sections

1. Definitions
 2. Objects of Act
 3. Guiding principles
 4. Institution of proceedings in traditional courts
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 6. Nature of traditional courts
 7. Procedure in traditional courts
 8. Orders that may be made by traditional courts
 9. Enforcement of orders of traditional courts
 10. Provincial Traditional Court Registrars
 11. Review by High Court
 12. ~~Escalation~~Referral of matters from traditional courts to magistrates' courts⁸
 13. Record of proceedings
 14. Transfer of disputes
 15. Limitation of liability of members of traditional courts
 16. Code of conduct for members of traditional courts
 17. Regulations
 18. Transitional provisions and repeal of laws
 19. Short title and commencement
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Schedule 1

Schedule 2

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;

"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;

"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"—

- (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;
- (b) does not extend to measures which, in good faith, purport to give effect to the

⁸ PC instructed that escalation be substituted with "appeal" as there is no such word as "escalation" at

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;

"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~~⁹, for purposes of resolving disputes, in accordance with constitutional imperatives and this Act, and which is referred to in the different official languages as—

- (a) *"eBandla"* in isiNdebele;
- (b) *"Huvo"* in Xitsonga;
- (c) *"Inkundla"* in isiZulu;
- (d) *"iNkhundla"* in siSwati;
- (e) *"iNkundla"* in isiXhosa;
- (f) *"Kgoro"* in Sepedi;
- (g) *"Kgotla"* in Sesotho;
- (h) *"Khorro"* in Tshivenda;
- (i) *"Kgotla"* in Setswana; and
- (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, and is¹⁰ recognised in terms of the Traditional Leadership and Governance Framework Act; ~~in accordance with an Act of Parliament; and~~

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

(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.

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 of ~~voluntary~~ that recognises participation by all parties; 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;
 - ~~(c) affirm—~~
 - ~~(i) the consensual nature of customary law;~~
 - ~~(ii) the principle and spirit of voluntary affiliation; and~~

⁹ Deleted at the instruction of the PC.

- ~~(iii) — the right to freely and voluntarily elect to or elect not to, abide by the various applicable practices and customs¹¹;~~
- ~~(dc)~~ 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;
- ~~(ed)~~ enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes; and
- ~~(fe)~~ facilitate the full, ~~voluntary~~ and meaningful participation without discriminating against any member¹² ~~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:

- (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;

¹⁰ The insertion is a proposal of the National House of Traditional Leaders and approved by the PC.

- (b) the promotion of restorative justice measures through mediation and conciliation;
- (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.

(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
 - (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;
- (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;

¹¹ This paragraph is deleted at the instruction of the PC.

- ~~(c) the provisions of subsection (3), setting out conduct which infringes on the dignity, equality and freedom of persons and which is prohibited;~~¹³
- ~~(dc) 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,~~¹⁴ 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 other courts in the judicial system contemplated in Chapter 8 of the Constitution; and~~
- ~~(ed) 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.~~

(3) (a) Without detracting from the generality of the provisions of this Act, the conduct set out in Schedule 21 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).

(c) The Minister must, on an ongoing basis, assess the relevance of the practices listed in Schedule 2 1 for purposes of making recommendations for the amendment of the list of practices.

(d) The list of practices in Schedule 2 1 is not conclusive and must be considered and revised on a continuous basis.

¹² Insertion proposed by the CGE

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~~ presides over¹⁵ 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~~ preside over such a session and indicate who may participate therein.

~~(c) Disputes may only be dealt with in the place contemplated in paragraph (b) with the consent of the parties to the dispute.~~¹⁶

(2) (a) A traditional court may, subject to subsection (3), only hear and determine a dispute contemplated in Schedule 42 —

- (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;
- and
- ~~(iii) if the party against whom the proceedings are instituted agrees freely and voluntarily to the resolution of the dispute by the traditional court in question~~¹⁷.

(b) A traditional court may not hear and determine a dispute

¹³ Consequential amendment to the deletion of subclause (3)

¹⁴ Deleted at the instruction of the PC.

¹⁵ PC instruction.

¹⁶ This para has been deleted on the strength of the PC stance that the provisions dealing with opting out of the traditional justice system must be deleted from the Bill.

¹⁷ Deleted as per PC instruction on the right to opt out the traditional justice system

which –

- (i) is being investigated by the South African Police Service;
- (ii) is pending before any other traditional court or a any other court contemplated in section 166 of the Constitution¹⁸; 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) ~~Any person who has been summoned to appear before a traditional court who, for any reason, elects not to have his or her dispute heard and determined by that traditional court or to appear before that traditional court must, within 14 days or such longer period as may be necessary, duly assisted or accompanied by any person of his or her choice in whom he or she has confidence, should he or she so wish, inform the clerk of his or her decision accordingly.~~

(b) ~~A person may not, in any manner whatsoever, intimidate, manipulate, threaten or denigrate a person who exercises his or her decision contemplated in paragraph (a).~~

(c) ~~The clerk must ascertain from the person referred to in paragraph (a) whether that person is willing to have the dispute dealt with in any other traditional court, court or forum and, if so, request the traditional court to facilitate the transfer of the dispute to that other traditional court, court or forum.~~

(d) ~~Despite the provisions of this subsection, nothing precludes a traditional court from –~~

- (i) ~~counseling, assisting or guiding the party before the traditional court; or~~
- (ii) ~~facilitating the referral of the dispute to an appropriate institution or~~

¹⁸ The revision is in line with the PC view that traditional courts should be courts in terms of section

organisation.

~~(e) Any party who consents to have a dispute resolved by a traditional court may, subject to section 14, not abandon or withdraw from the proceedings after such proceedings have commenced, unless he or she—~~

- ~~(i) has compelling grounds to do so; and~~
- ~~(ii) informs the traditional court accordingly¹⁹.~~

~~(f)~~ 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—

- (i) counselling, assisting or guiding a party to the dispute who has approached it; or
- (ii) 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, ~~and without having exercised his or her rights under subsection (3)(a),~~²⁰ 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).

Composition of and participation in traditional courts

5. (1) ~~Members of a~~ A traditional court must -
- (a) consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution; and
 - (b) be ~~convened~~ presided over²¹ by a traditional leader or any person designated by the traditional leader.

(2) Traditional courts must promote and protect the representation and participation of women, as parties and members thereof.

¹⁹ Deleted as per PC instruction on the right to opt out of the traditional justice system.

²⁰ Deleted because the right to opt out of the traditional court has been deleted from the Bill.

(3) (a) The Cabinet member responsible for the administration of justice must—

- (i) put measures in place in order to promote and protect the fair representation and participation of women, as parties and members in traditional courts in order to create an environment that facilitates and promotes the meaningful and voluntary participation of women in accordance with the constitutional value of non-sexism;
- (ii) put measures in place in order to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity; and
- (iii) by not later than 30 September of every year, submit a prescribed report to Parliament containing the information contemplated in subparagraphs (i) and (ii).

(b) The Commission for Gender Equality referred to in Chapter 9 of the Constitution must, in its report to Parliament each year, report on the participation of women and the promotion of gender equality in traditional courts and may, to this end, make recommendations on legislative and other measures.

(4) (a) For every traditional court there must be a clerk of a traditional court who is appointed, designated or seconded in accordance with the laws governing the public service and who has the powers, duties and functions as set out in this Act or as may be prescribed.

(b) The role, functions and responsibilities of the clerk of a traditional court include the following:

²¹ Instruction of the PC.

- (i) Issuing summonses;
- (ii) keeping an attendance register of sessions of traditional courts;
- (iii) keeping records of proceedings of traditional courts;
- (iv) keeping record of all cases reported to traditional courts;
- (v) filing decisions of traditional courts with the Provincial Registrar;
- (vi) advising traditional courts on cases that should be referred to any other customary institution or structure or court or forum;
- (vii) transferring disputes to any other traditional court, court or forum;
- (viii) dealing with, recording and filing the information received in the prescribed manner; and
- (ix) submitting prescribed reports at the end of each quarter of a financial year to the Provincial Registrar to be dealt with in the prescribed manner.

(5) Before commencing any session of a court the traditional leader ~~convening~~ presiding over the court or the person designated by him or her must say the prescribed pledge that he or she will promote and protect the values enshrined in the Constitution and this Act.

Nature of traditional courts

6. (1) Traditional courts—
- (a) are courts of law ~~under customary law which are intended to~~ 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 custom~~; and
 - (b) function in accordance with customary law, subject to the Constitution.

(2) Traditional courts, ~~recognising the consensual nature of customary law,~~ must be constituted and function under customary law and customs 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 ~~such different~~ the following levels of traditional leadership as are contemplated in the Traditional Leadership and Governance Framework Act and recognised in terms of customary law and custom²²—

- (a) headman or headwoman's court;
- (b) senior traditional leader's court; and
- (c) king or queen's court, where available²³.

Procedure in traditional courts

7. (1) Sessions of a traditional court are held at the time and at a place which is accessible to members of the community in question.

(2) Subject to subsection (3), the procedure at any proceedings of a traditional court, including the notice to attend the proceedings of that traditional

²² PC is of the view that there is a confusion between custom and customary law, and that because

court and the manner of preserving the dignity of the traditional court and the manner of execution of any order imposed by it, must be in accordance with customary law and custom.

(3) During its proceedings, a traditional court must ensure that—

(a) the rights contained in the Bill of Rights in Chapter 2 of the Constitution are observed and respected, with particular reference to the following:

(i) That women, as parties to any proceedings or members of the traditional court, are afforded full and equal participation in the proceedings, as men are; and

(ii) that vulnerable persons, with particular reference to children, the elderly, the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity, are treated in a manner that takes into account their vulnerability; and

(b) the following rules of natural justice are adhered to:

(i) That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and

(ii) that any decision by the traditional court must be impartial.

(4) (a) Subject to paragraph (b), a party to a dispute before a traditional court may be assisted by any person of his or her choice in whom he or she has confidence.

(b) No party to any proceedings before a traditional court may be represented by a legal practitioner acting in that capacity.

(5) (a) Where two or more different systems of customary law

may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply.

(b) In the absence of any agreement contemplated in paragraph (a), the traditional court must decide the matter in accordance with the following guidelines:

- (i) The system of customary law applicable in the area of the traditional court should take precedence over any other system of customary law; or
- (ii) the traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection.

(6) Traditional courts must be open to all members of the community.

(7) ~~Subject to the provisions of section 4(3)(d),~~ Proceedings of traditional courts must be conducted in the presence of both parties to the dispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination referred to in section 9(3) of the Constitution.

(8) The customary law of procedure and evidence applies in traditional courts.

(9) Subject to the provisions of subsection (10), the proceedings and records of traditional courts, as contemplated in section 13, must be in the language most widely spoken in the area of the traditional court in question.

(10) If any of the parties does not understand the language used in the traditional court, an interpreter must be provided.

(11) The Minister, in consultation with the Cabinet members

²³ As per PC instruction.

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 law²⁴.

(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 dispute²⁵

Orders that may be made by traditional courts

8. (1) A traditional court may make any of the following orders after having deliberated on a dispute before it:

- (a) an order in favour of the party who instituted proceedings in terms of section 4(1), expressed in monetary terms or otherwise, including livestock—
 - (i) accepting a settlement between the parties to the dispute;
 - (ii) for the payment of any damages in respect of any proven financial loss;
 - (iii) for the payment of compensation; or
 - (iv) for the payment of damages to an appropriate body or organisation which is not connected in any manner whatsoever to a member of the court or a traditional leader:

Provided that any such order expressed in monetary terms or otherwise including livestock, may not exceed the value of the damage giving rise to the dispute in question or the amount determined by the Minister from time to time by notice in the *Gazette*, for this purpose, whichever is the lesser;

²⁴ PC requires fees to be paid to traditional courts.

- (b) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render to the aggrieved party some specific benefit or service instead of compensation for damage or pecuniary loss, with the consent of both the parties;
- (c) an order directing a party against whom proceedings were instituted in terms of section 4(1) who is financially not in a position to comply with any order contemplated in paragraph (a), to render without remuneration some form of service—
 - (i) for the benefit of the community; or
 - (ii) for the benefit of any person or persons in the community in need who, in the opinion of the members of the traditional court, are deserving of that service,

under the supervision or control of a person or group of persons identified by the traditional court who, in the opinion of the traditional court, promote the interests of the community and who must upon the completion or otherwise of the service in question report to the court thereon: Provided that no service whatsoever may be rendered to a traditional leader or his or her family or to any person acting in an official capacity in that traditional court;
- (d) an order prohibiting the conduct complained of or directing that specific steps be taken to stop or address the conduct being complained of;
- (e) an order ~~that~~ accepting an unconditional apology where such an apology is a voluntary settlement between the parties themselves²⁶ ~~be made~~;
- (f) an order ~~directing that~~ reprimanding a party or parties to the dispute be

²⁵ Proposed by Rural Women's Assembly.

~~reprimanded~~ for the conduct complained of;

- (g) an order requiring a party or parties to keep the peace;
- (h) an order that a party attends any form of training, orientation or rehabilitation that is consistent with the relevant customary law and customary practices, the Constitution and this Act and does not include any form of detention or deprivation of any customary law benefits;
- (i) an order requiring any party to the dispute to make regular progress reports to the traditional court regarding compliance with any condition imposed by the traditional court;
- (j) an order directing that the matter be submitted to the national prosecuting authority for the possible institution of criminal proceedings in terms of the common law or relevant legislation; or
- (k) an order, containing a combination of any of the orders contemplated in paragraphs (a) to (i), except where the matter is referred to the national prosecuting authority under paragraph (j), in which event the decision of the national prosecuting authority prevails.

(2) A traditional court may order that any payment contemplated in subsection (1) be paid in full or instalments and at a time or times it deems just.

(3) A traditional court may order that any payment contemplated in subsection (1) or part thereof be paid to a person injured by an act or omission for which the payment was imposed, on condition that such a person, if he or she accepts the payment, may not bring an action in any court in order to recover damages for the injury he or she sustained.

²⁶ Amendments in (e) and (f) as proposed by Dr Sindiso Mnisi Weeks.

Enforcement of orders of traditional courts

9. (1) If an order made by a traditional court is not satisfied within the period determined by the traditional court, the party in whose favour the order was made, may bring the matter to the attention of the clerk.

(2) The clerk must inquire into or cause to be inquired into, the reasons for non-compliance with the order and make a determination as to whether the non-compliance is due to fault on the part of the party against whom the order was made.

(3) If the clerk finds that the non-compliance is not due to fault on the part of the party against whom the order was made, he or she must assist the party to comply with the order on such conditions as may be agreed upon between the parties.

(4) (a) If the clerk finds that the non-compliance is due to fault on the part of the party against whom the order was made, he or she must 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 order made by the traditional court 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

order was made, the power to negotiate with the parties on how and when the order will be complied with and to make a determination in accordance therewith; and

- (ii) if non-compliance is due to fault on the part of the party against whom the order was made, the power to summons the party to appear in the traditional court again in order to have the matter transferred to the magistrate's court having jurisdiction, as contemplated in section 14(1)(a) to be dealt with afresh.

Provincial Traditional Court Registrars

10. (1) (a) In provinces where there are traditional courts the Minister must, after consultation with the Cabinet Member responsible for traditional affairs, and subject to the laws governing the public service, designate, second or appoint persons as Provincial Traditional Court Registrars in respect of each province.

(b) A Provincial Traditional Court Registrar must have the qualifications and experience for that position, as prescribed.

(2) The role, functions and responsibilities of Provincial Registrars are as may be prescribed, in addition to the following:

- (a) Compiling and maintaining a prescribed register of all traditional courts in the province;
- (b) referring and reporting on cases of public interest, in the prescribed circumstances and prescribed manner, to the High Court having jurisdiction for review in order to contribute to jurisprudence or enhance the reform of customary law and the High Court, for this purpose, has the powers as set out

in section 11(2);

- (c) assisting parties in taking a matter on review as contemplated in section 11;
- (d) guiding and supervising the functioning of traditional courts; and
- (e) keeping the Member of the Executive Council responsible for traditional affairs informed about the functioning of the traditional courts in the province in question.

(3) A Provincial Registrar shall, at all times, and for purposes of carrying out his or her role, functions, powers and responsibilities in terms of this section, have access to any traditional court within the province in question and to the records thereof.

(4) In this section "public interest" means an outcome which affects any right of the public, public finances or the public good²⁷.

Review by High Court

11. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take those proceedings on review to a division of the High Court having jurisdiction on any of the following grounds:

- (a) The traditional court was not competent to deal with the matter as contemplated in section 4(3)(f);²⁸
- (b) the traditional court was not properly constituted as contemplated in section 5;
- (c) the requirements relating to the pledge or affirmation contemplated in section 5 were not complied with;
- (d) the provisions of section 7(3)(a), affording—

²⁷ Insertion proposed by Dr Sindiso Mnisi Weeks.

- (i) women, as parties to any proceedings or members of the court, full and equal participation in the proceedings; or
 - (ii) vulnerable persons treatment that takes into account their particular vulnerability,
- were not complied with;
- (e) the provisions of section 7(3)(b), were not complied with;
 - (f) one or both of the parties were not allowed to represent themselves or²⁹ be represented by a person of their choice as contemplated in sections ~~4(3)(a)~~ and³⁰ 7(4);
 - (g) the proceedings of the traditional court were not open to all members of the public, contrary to the provisions of section 7(6);
 - (h) the proceedings of the traditional court were not conducted in the presence of both parties, contrary to the provisions of section 7(7);
 - (i) the proceedings of the traditional court were conducted in a language which one or both of the parties did not understand without the intervention of an interpreter, contrary to the provisions of section 7(9) or (10);
 - (j) an order was made contrary to the provisions of section 8; or
 - (k) a member of the traditional court participated in the proceedings of the court contrary to the provisions of section 7(12)³¹; or
 - (l) ~~the provisions of section 3(3) have not been complied with or have been contravened~~ any procedural shortcoming relating to the conduct of the traditional court in the resolution of the dispute.

- (2) (a) The division of the High Court reviewing the proceedings

²⁸ Paragraph (f) has been deleted.

²⁹ Proposed by Dr Sindiso Mnisi Weeks.

³⁰ Clause 4(3)(a) has been deleted.

³¹ Insertion emanates from the proposal of the Rural Women's Assembly

of a traditional court as contemplated in subsection (1) may, at any sitting thereof, hear any evidence and for that purpose summon any person to appear to give evidence or to produce any document or article.

(b) The division of the High Court reviewing the proceedings of a traditional court, whether or not it has heard evidence, may—

- (i) confirm, alter, set aside or correct the order made by the traditional court in terms of section 8;
- (ii) set aside or correct the proceedings of the court;
- (iii) generally make such order as the traditional court ought to have made on any matter which was before it; or
- (iv) remit the case to the traditional court with instructions to deal with any matter in such manner as the division of the High Court may think fit.

(3) Any request for review as contemplated in subsection (1) after the expiry of the period determined in the regulations may be condoned by the division of the High Court in question on good cause shown.

(4) An order of a traditional court in respect of which the matter is taken on review in terms of this section, is suspended until the review has been decided on.

(5) At the conclusion of the matter before the traditional court, the traditional court must advise the parties of their right to take the matter on review and of the grounds for such review as contemplated in this section.

Escalation-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 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.

Record of proceedings

13. (1) A traditional court must, in the prescribed manner, record or cause to be recorded in the language contemplated in section 7(9)—

- (a) a file number of the dispute;
- (b) the date on which the dispute was dealt with;
- (c) the nature of the dispute;
- (d) a summary of the facts of the dispute;
- (e) the names and addresses of the parties and their witnesses;
- (f) the decision of the traditional court, including the decision or order of the traditional court;
- (g) a list of exhibits; and
- (h) an indication that the prescribed pledge or affirmation was taken by the traditional leader ~~convening~~ presiding over the session of the traditional court or by a person designated by him or her in accordance with customary law

and custom, as contemplated in section 5(~~54~~).

(2) The record contemplated in subsection (1) must be accessible to the public under the supervision of the clerk the traditional court at convenient times, as prescribed.³²

Transfer of disputes

14. (1) (a) If a traditional court is of the opinion that a dispute before it is not a matter which it is competent to deal with, as contemplated in section 4 or if the matter involves difficult or complex questions of law or fact that should be dealt with in a magistrate's court or a small claims court or if it is a matter as contemplated in section 4(4)(b)(ii) or section 9(4)(b)(ii), the traditional court may, in the prescribed manner, transfer such dispute to the magistrate's court or small claims court having jurisdiction and notify the parties to the dispute of the transfer.

(b) If proceedings are transferred from a traditional court to a magistrate's court in terms of this section, the magistrate's court must commence proceedings afresh.

(2) If a prosecutor, in the case of a criminal matter, before an accused person has pleaded to a charge as contemplated in section 6(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or a magistrate or a commissioner of a small claims court, in the case of a civil matter before him or her, is of the opinion that a dispute before him or her—

(a) in the case of a dispute of a civil nature—

(i) is a matter that can be dealt with more appropriately in terms of

³² Proposed by Dr S Mnisi Weeks.

customary law ~~and custom~~ in a traditional court; and

(ii) is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act; or

(b) in the case of a dispute of a criminal nature, is a matter in respect of which a traditional court has jurisdiction, as contemplated in this Act,

the prosecutor, magistrate or commissioner of a small claims court, as the case may be, may, ~~should the parties agree~~³³, facilitate the transfer of the dispute to the traditional court and notify the parties to the dispute of the transfer.

Limitation of liability of members of traditional courts

15. A member of a traditional court is not liable for anything done or omitted in good faith—

(a) in the performance of any function under this Act; or

(b) in the exercise of any power under this Act.

Code of conduct and enforcement thereof

16. (1) (a) The Minister, in consultation with the Cabinet member responsible for traditional affairs and after consultation with the National House of Traditional Leaders, must compile a code of conduct for all persons who have a role in terms of customary law for the effective functioning of traditional courts, including persons who facilitate sessions of court on behalf of traditional leaders, clerks of traditional courts and interpreters, which must be submitted to Parliament for

³³ As the provision requires consent and the deletion is in line with the instructions of the PC.

approval 60 days prior to publication thereof in the *Gazette*.

(b) If the code of conduct is not approved within the 60 day period referred to in paragraph (a), it shall be deemed to have been approved by Parliament.

(2) The code must be reviewed at least once in every three years by the Minister, acting in consultation with the Minister responsible for traditional affairs and after consultation with the National House of Traditional Leaders, and the result of such review, including any proposed amendment to the code must be tabled in Parliament for approval as contemplated in subsection (1).

(3) The code serves as the prevailing standard of conduct which must be adhered to by the persons contemplated in subsection (1).

(4) The code and every subsequent amendment must be published in the *Gazette*.

(5) (a) Any breach of a provision of the code must be reported, in the prescribed manner, to the ~~Member of the Executive Council responsible for traditional affairs~~ House of Traditional Leaders³⁴ in the province in question, ~~who~~ which must cause the alleged breach to be investigated.

(b) Any investigation in terms of paragraph (a) must be in accordance with the rules of natural justice, after following due process.

(6) Any one or a combination of the following remedial steps may be imposed by the ~~Member of the Executive Council~~ Provincial House of Traditional Leaders³⁵ in question in respect of a member of the traditional court who is found to have breached a provision of the code:

(a) Apologising to the complainant, in a manner specified;

³⁴ PC instructed that the misconduct should be dealt with within the institution of traditional leadership.

- (b) a reprimand;
- (c) a written warning;
- (d) any form of compensation;
- (e) appropriate counselling;
- (f) attendance of a specific training course; ~~or~~
- (g) being relieved of the role in the traditional court for the duration of his or her rehabilitation; or³⁶
- (g) any other appropriate corrective measure.

Regulations

17. (1) The Minister must make regulations regarding the following:
- (a) the role and responsibilities of clerks as contemplated in section 5(43);
 - (b) the pledge to be said or affirmation to be made by the traditional leader ~~convening~~ presiding over the traditional court or the person designated by him or her in accordance with customary law ~~and custom~~ as contemplated in section 5(54);
 - (c) the qualifications and experience required to be appointed or designated as a Provincial Registrar as contemplated in section 10(1)(b);
 - (d) the register to be kept by Provincial Registrars of Traditional Courts of all traditional courts as contemplated in section 10(2)(a);
 - (e) the manner and circumstances in which Provincial Registrars of Traditional Courts may refer matters on review, as contemplated in section 10(2)(b);
 - (f) the time period and manner for taking proceedings of a traditional court on

³⁵ See comment above.

review to the High Court, as contemplated in section 11(1);

- (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);
- (gh) the manner in which the records of proceedings of traditional courts must be dealt with, as contemplated in section 13;
- (hi) 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);
- (ij) the manner in which to report alleged breaches of the code of conduct, as contemplated in section 16(5)(a);
- (jk) the training of traditional leaders and persons designated by traditional leaders to ~~convene~~ preside over traditional courts;
- (kl) the involvement and training of paralegals and interns in the functioning of traditional courts; and
- (lm) any other matter which is necessary or expedient to prescribe in order to give effect to this Act.

(2) Any regulation envisaged under this section must be -

- (a) made after consultation with the Cabinet member responsible for traditional affairs, the Members of Executive Councils of provinces responsible for traditional affairs and the National House of Traditional Leaders; and
- (b) submitted to Parliament for approval.

Transitional provisions and repeal of laws

18. (1) The following Acts, if they have not been repealed before the

³⁶ As proposed by the NHTL.

commencement of this Act, are hereby repealed:

- (a) the Regional Authorities Courts Act, 1982 (Act No. 13 of 1982) (Transkei);
and
- (b) the Chiefs Courts Act, 1983 (Act No. 6 of 1983) (Transkei).

(2) Any authorisation by the Minister under section 12 of the Black Administration Act, 1927 (Act No. 38 of 1927), to hear and determine certain civil claims, any conferment of power by the Minister under section 20 of the Black Administration Act, 1927, to try certain criminal offences, and any other similar authorisation or conferment of power under any other law is of no force and lapses upon the commencement of this Act and the provisions of this Act apply.

(3) Any proceedings pending before a traditional court at the commencement of this Act must be continued and concluded as if this Act had not been passed.

Short title and commencement

19. This Act is called the Traditional Courts Act, 2017 2019, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

Schedule 1

**PROHIBITED CONDUCT WHICH INFRINGES ON THE DIGNITY, EQUALITY AND
FREEDOM OF PERSONS
(Section 3(3))**

Conduct of any nature which tends to—

- (a) discriminate against the dignity of members of the Lesbian, Gay, Bisexual, Transgender and Intersexed community;
- (b) promote homophobia;
- (c) denigrate, or discriminate against, elderly persons who suffer from mental health conditions such as memory loss, dementia and Alzheimer's disease;
- (d) discriminate against persons who are mentally or physically infirm or disabled on the basis of existing perceptions or beliefs;
- (e) discriminate against persons with albinism; and
- (f) discriminate against unmarried persons.

Schedule 2

(Section 4(2)(a))

Matters which traditional courts are competent to deal with in terms of this Act:

- (a) Theft where the amount involved does not exceed ~~R5 000.00~~ R15 000.00³⁷.
- (b) Malicious damage to property where the amount involved does not exceed ~~R5 000.00~~ R15 000.00.
- (c) Assault where grievous bodily harm is not inflicted.
- (d) Breaking or entering any premises with intent to commit an offence either at common law or in contravention of any statute where the amount involved does not exceed ~~R5 000.00~~ R15 000.00.
- (e) Receiving any stolen property knowing it to be stolen where the amount involved does not exceed ~~R5 000.00~~ R15 000.00.
- (f) *Crimen injuria*.
- (g) Advice relating to customary law practices in respect of –
 - (i) ukuThwala;
 - (ii) initiation;
 - (iii) customary law marriages;
 - (iv) custody and guardianship of minor or dependent children;
 - (v) succession and inheritance; and
 - (vi) customary law benefits.
- (h) Any matter arising out of customary law and custom where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the *Gazette* and different amounts may be determined in respect of different categories of disputes.
- (i) Altercations between members of the community.

³⁷ PC instruction.

