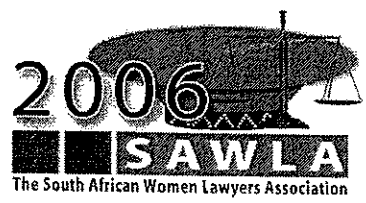


120921
scanty



EASTERN CAPE PROVINCE

OPINION ON THE COMMENTS ON TRADITIONAL COURTS BILL

Prepared by the SOUTH AFRICAN WOMEN LAWYERS ASSOCIATION
FOR THE EASTERN CAPE HOUSE OF TRADITIONAL LEADERS

1. INTRODUCTION

All references to 'section' in this document are to sections in the Criminal Procedure Act, 1977 (the CPA) and all references to 'clause' in this document are to clauses in the Traditional Courts Bill (the TCB).

The Constitution recognises the institution, status and role of traditional leadership, including a role in the administration of justice, as well as the application of customary law, **Clause 1 Definition of "traditional justice system"**). The traditional justice system is based on restorative justice as well as reconciliation, **Clause 2**). In essence the TCB requires the traditional courts to give effect to the Bill of Rights and the rules of natural justice during proceedings. There are vast similarities and few differences with regard to procedure as outlined in the CPA.

2. BACKGROUND TO THE BILL

The introduction to the bill states: "To affirm the recognition of the traditional justice system and its values, based on restorative justice and reconciliation; to provide for the structure and functioning of traditional courts *in line with constitutional imperatives and values*; (my emphasis) to enhance customary law and the customs of communities observing a system of customary law; and to provide for matters connected therewith."

3. JURISDICTION

A traditional court may hear and determine criminal and civil disputes arising out of **customary law and custom** brought before the court where the act or omission which gave rise to the dispute occurred within the area of jurisdiction of the traditional court in question. The TCB however, gives the traditional court limited jurisdiction with regard to both civil and criminal matters. Common assault, theft, malicious damage to property and *crimen injuria* where the amount involved does not exceed an amount determined by the Minister by notice in the *Government Gazette* are the only criminal offences whereby the TCB has jurisdiction.

Clarity is required on whether jurisdiction is limited in terms of section 5 and whether it includes all disputes arising out of customary law and custom. This appears to bring confusion especially on opponents of the bill who are opposed to customary practices.

Our opinion is that the jurisdiction conferred on these courts is too narrow.

Traditional leaders in terms of customary law are the custodians of rural land and the Act should specifically empower the courts to deal with these matters.

4. THE TRADITIONAL COURTS

Another issue of significant importance is to outline the nature of the courts envisaged by the bill. Clause 7 prescribes the nature of traditional courts to be established.

Traditional courts are distinct from courts referred to in section 166 of the Constitution, and operate in accordance with a system of customary law and custom that seek to—

(a) prevent conflict;

(b) maintain harmony; and

(c) resolve disputes where they have occurred, in a manner that promotes restorative justice and reconciliation and in accordance with the norms and standards reflected in the Constitution

The introduction of courts of this nature is not foreign to South African legal system and dispute resolution. The **Commission for Conciliation Mediation and Arbitration (CCMA)** and **Bargaining Councils** deal with labour disputes by conciliation and mediation before they are referred for arbitration or referred to the courts .

Secondly, the Small Claims Courts as established by the Small Claims Court Act, 61 of 1984 are intended to deal with the speedy resolutions of civil matters in cases of monetary claims and debt recovery. These institutions were established for a special purpose , that is, dispensing justice in a quicker and cost effective way, therefore promoting access to justice.

The purpose intended for the abovementioned institutions is not farfetched from the one intended by the Traditional Courts Bill. Furthermore clause 3 of the bill provides for the enhancement of the quality of life of traditional communities through mediation- similar purpose that the CCMA or Small Claims court were established for and continues to achieve so far.

4.1 PRESIDING OFFICERS

The presiding officers, subject to certain exceptions are expected to attend a training programme within the timeframe set. The Minister of Justice and Constitutional Development ("The Minister"), however, may determine the circumstances in which a traditional leader may be exempted from attending a training programme or course.

The Bill is silent on the role of traditional councils which in our opinion play an important role in the resolution and determination of disputes.

4.2 CRIMINAL RECORD/PREVIOUS CONVICTION

One of the differences between the CPA and TCB is that unlike the CPA the TCB is silent with regard to the fact that once an offender is found guilty by a court of law, the sanction given is automatically accompanied by a criminal record. Furthermore, in practice, after conviction, the State ie prosecutor will indicate whether the accused has any previous convictions. The CPA deals with this procedure in sections 271 to

273. In this regard the court considers the previous conviction for purposes of sentencing. The person who is convicted time and again of similar offences will progressively be punished more severely.

This is because the offender, by continuing to commit offences, displays a disregard for the law and because it is believed that the heavier a penalty is, the more likely it is to deter the offender from committing more crimes. However, a number of decisions stressed that the seriousness of the particular crime should be the more important factor, and that the previous convictions should not be over-emphasised, **S v Barnabas 1991 (1) SACR 467 (A)**. In this regard, it cannot be stated that the TCB is defective because **Clause 19** creates a mechanism which regulates the transfer of cases in certain circumstances from a traditional court to a magistrate's court or small claims court and from a magistrate's court or small claims court to a traditional court.

The Bill does not provide for maintaining of the record for previous conviction in the event that the subject is convicted. This is a positive on the part of the convicted subject compared to when he or she would be convicted in a retributive justice system which would keep the subject's record , a record which would affect the subject negatively, i.e hindering employment opportunities and how the subject is perceived by the society.

PROVISIONS OF THE BILL CONSIDERED TO OFFEND THE CONSTITUTION

4.3 LEGAL REPRESENTATION

Firstly it is important to highlight one of the submissions of the preamble to the bill.

The preamble highlights the necessity to transform the traditional justice system, 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. Of foremost and importance with this submission is the recognition of the traditional court justice system coupled with the necessity to transform the system.

One of the procedural aspects which on face value seems to violate the provisions of the constitution is Clause 9(3)(a) which states **"No party to any proceedings before a traditional court may be represented by a legal representative"**

The above provision is not foreign to South African legal practice in that

- In the CCMA legal representation is not allowed in conciliation proceedings.- **Rule 25 (1) (a).**

- **Rule 25 (1) ©** of the Rules for the Conduct of Proceedings before the CCMA provide that " *if the dispute being arbitrated is about the fairness of a dismissal and the a party has alleged that the reason for the dismissal relates to the employee's conduct or capacity, the parties may despite rule 1(b) , are not entitled to be legally represented by a legal practitioner unless*
 - (1) *the commissioner and all the parties consent;*
 - (2) *the commissioner concludes that it is unreasonable to expect a party to deal with the dispute without legal representation, after considering-*
 - (a) *the nature of the questions of law raised by the dispute;*
 - (b) *the complexity of the dispute;*
 - © *the public interest; and*
 - (d) *the comparative ability of the opposing parties or their representatives to deal with the dispute.*

These provisions are applied on a daily basis in the CCMA and it has never been found to offend the spirit of the constitution or been challenged since the objects of the CCMA is conciliation and mediation.

The objects of the traditional court system are the restorative justice.

- In the traditional courts however, parties can be represented by any person of their choice in terms of customary law and custom.
- Small claims courts are also an example of another court with the objective of facilitating access to justice where also legal representation is not allowed. In

the small claims court the procedure of not allowing legal representation has never been questioned on the basis of unconstitutionality.

- It is important to note that in the CCMA representation is allowed but it is not automatic. The party seeking legal representation has to apply to the Commissioner (equivalent of presiding officer) to allow the party representation, an application which may not be permitted and the party will therefore proceed without representation. Be that as it may, clause 9(3)(b) provides " (b) A party to proceedings before a traditional court may be represented by his or her wife or husband, family member, neighbour or member of the community, in accordance with customary law and custom.

It has to be pointed that matters to be heard by traditional courts are simple matters – that are factual in nature rather than legal issues. If any party raises a legal issue then a presiding officer may decide to refer the matter to another court.

4.4 APPEALS AND REVIEW

Like the Criminal Procedure Act, Magistrates' Courts Act 32 of 1944 Supreme Court Act 59 the Traditional Courts Bill provides for appeal and review proceedings.

Appeals to magistrates' courts

See Clause 13. (1) A party to a civil or criminal dispute in a traditional court may, in the prescribed manner and period, appeal to the magistrate's court having jurisdiction against an order of a traditional court, as contemplated in section 10(2)(a), (b), (h) or (i), as well as section 10(2)(k), to the extent that the order in terms of section 10(2)(k) relates to an order contemplated in section 10(2)(a), (b), (h) or (i).

(2) An order of a traditional court in respect of which an appeal is lodged, as contemplated in subsection (1), is suspended until the appeal has been decided (if it was prosecuted in the time and in the manner so prescribed) or until the expiry of the prescribed period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed.

(3) Notwithstanding any other law to the contrary, a magistrate's court hearing an appeal as contemplated in this section has the power to —

(a) confirm the order of the traditional court;

(b) amend or substitute the order of the traditional court, as it deems appropriate in the circumstances, with any order contemplated in section 10(2); or

(c) dismiss the order of the traditional court.

Procedural review by magistrates' courts

Clause 14. (1) A party to any proceedings in a traditional court may, in the prescribed manner and period, take such proceedings on review before a magistrate's court in whose area of jurisdiction the traditional court sits on any of the following grounds:

(a) The traditional court acted *ultra vires* (outside the scope of the Act);

(b) absence of jurisdiction on the part of the traditional court;

(c) gross irregularity with regard to the proceedings; or

(d) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No.12 of 2004), on the part of the presiding officer.

(2) Notwithstanding any other law to the contrary, a magistrate's court has the powers, as may be prescribed, relating to a procedural review contemplated in this section.

It is also important to note that arbitration awards in the CCMA or Bargaining Councils are final and binding on the parties. They are not subject to appeal but are subject to review by the Labour Court. This would be in case of an irregularity.

5. SOME OF THE CRITICISMS LEVELLED AGAINST THE BILL

5.1 DISCRIMINATION OF WOMEN: SOME EXAMPLES

5.1.1 There is a fear that the bill will discriminate against women. In this regard we quote public comments. Some of the sentiments expressed is that ***"it was extremely worrying that women would be mostly affected by this bill but were not even allowed to sit on traditional councils"***¹.

¹ PRETORIA NEWS- 9 MAY 2012 comments by Dr Sindiso Mnisi – Weeks.

5.2 *"Sizani Ngubane, director of the Rural Women's Movement, took exception to section 39 of the bill which forbids legal representation at traditional courts. This was against the constitution, she said. "This bill also gives too much power to the presiding officers and it is quiet on the representation of women," said Ngubane.*

5.3 *Thabile Dlamini from Legal Resources Centre in Durban said she had concerns about the traditional courts hearing cases of ukuthwala (young women forced to marry mostly old men), saying in most of the cases this practice was accompanied by forcing women to have sex, which was tantamount to rape".²*

"The controversial Traditional Courts Bill came under heavy criticism yesterday with suggestions that some of its clauses were against the constitution and likely to prejudice women."

5.2 **ADVICE:**

The issue of legal representation has been dealt with at 4.3. above.

The Bill is clear on protection of rights:

Procedure of traditional court – provides for adherence to procedure which is very clear in that clause 9(2) states: during proceedings of a traditional court, a presiding officer 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 are afforded full and equal participation in the proceedings, as men are; and

(ii) that vulnerable persons, particularly children, disabled persons and the elderly, are treated in a manner that takes into account their particular vulnerability;

² The Mercury , May 9 2012 at 11.41 am. Traditional Courts Bill is unfair

There is nothing in the bill that suggests that rights of women will not be protected.

To 2- Thabile Dlamini 's comment above about ukuthwala and rape- We refer to the offences prescribed by the bill. Nowhere in the three offences that may be tried by the traditional courts is ukuthwala or rape mentioned.

To 3 – Prejudice to women- We refer to clause 9(2) (a) (i) and (ii) above.

There have been positive developments in that in most traditional council women are represented.

5.3 FURTHER CHECKS AND BALANCES

The Bill further provides for checks and balances- a value key to any democracy and constitutional process. The following clauses provide for the checks and balances:

Oath or affirmation of office

Clause 15. (1) A traditional leader who has been designated as presiding officer of a traditional court must, subject to section 23(3)(a)(ii) or 23(3)(b)(ii), take the prescribed oath or make the prescribed affirmation that he or she will uphold and protect the Constitution before the magistrate of the magistrate's court having jurisdiction or any additional magistrate of that court who has been authorised thereto in writing by the said magistrate, before he or she may perform any of the functions contemplated in this Act.

(2) The Director-General must establish and keep a prescribed register of every traditional leader in the traditional court in question who has taken the prescribed oath or made the prescribed affirmation, as contemplated in this section or section 23(3)(a)(ii) or 23(3)(b)(ii).

Incapacity, gross incompetence or misconduct of presiding officers

Clause 16. (1) Any person may, in the prescribed manner, lodge with the Minister a complaint relating to the role of a presiding officer in the administration of justice.

(2) A complaint must be lodged by means of a prescribed affidavit or an affirmed statement, specifying—

(a) the nature of the complaint; and

(b) the facts upon which the complaint is based.

(3) The grounds on which any complaint against a presiding officer may be lodged, are the following:

(a) (i) Incapacity, giving rise to a presiding officer's inability to perform his or her functions as a presiding officer;

(ii) gross incompetence; or

(iii) misconduct,

which has a bearing on the administration of justice;

(b) any wilful or grossly negligent breach of the code of conduct contemplated in the Traditional Leadership and Governance Framework Act, or any code of conduct under any provincial legislation required by the Traditional Leadership and Governance Framework Act, which has a bearing on the administration of justice;

(c) any wilful or grossly negligent conduct, other than conduct contemplated in paragraph (a) or (b), that is incompatible with or unbecoming of, the office of presiding officer; or (d) any contravention of a provision of this Act.

6. RECOMMENDATIONS

- **Designation and training of traditional leaders.**

Recommended to provide- all traditional leaders /presiding officers to undergo training in order to allay fears.

Recommend that Family members or neighbours representing the party may be afforded training in order to balance the fact that the presiding officers are going to be trained.

- **The Bill– to be translated into all official languages as part of the training of presiding officers, traditional council and or community members;**
- **Public education on customs of the area;**
- **Express provision that if a plaintiff or complainant chooses to refer a dispute to a traditional court the defendant or accused person cannot opt out except for lack of jurisdiction- like in Small Claims Court;**
- **Clarity is required on the jurisdictional limit: whether the court’s jurisdiction will be limited to disputes set out in clause 5 or whether they should have jurisdiction in all disputes arising out of customary law or custom**
 - **Will the courts determine dispute which are of a customary law nature but where no amount of money involved – eg ukwabiwa kwezindlu zesithembu-**
 - **in the CPA theft is included in a list of offences where a minimum sentence must be imposed by magistrates. The Act has to deal with the possible conflict regarding sentencing./ Minimum sentences legislation should not apply in the traditional courts.**
 - **audit of legislation that requires to be repealed - for example the offences created in the Traditional Circumcision Act 6 of 2001 (Eastern Cape) should be heard by the traditional courts.**
 - **land disputes in areas falling within the jurisdiction of the courts-**
 - **Section 11 of the court should specifically provide for contempt proceedings where persons duly summoned to appear before a traditional court wilfully fail to do so .**

7. CONCLUSION

The Bill of Rights provides for the recognition of customary practises as long as the practises conform to Chapter 2 of Act 108 of 1996. The Traditional Courts Bill is a step in the right direction with regard to upholding customary values. Most importantly the TCB has set out some guidelines to be followed in order for traditional courts to comply with the constitution.

The Bill does not cast the net too wide as indicated above . The offences which may be tried under this Bill are clearly prescribed and limited to four offences. The punishment for the offences will be determined by the Minister, therefore providing for safeguards in that the traditional leader /presiding officer may not impose his or her own sentence. It is important to note that these offences are inherent in traditional communities, currently these are the offences which normally go before courts, and the introduction of the Bill will enhance the constitutional values by providing for clear guidelines during the course of proceedings.

Traditional courts are required by law to adhere to the act (the bill does make provisions for remedies - it provides for review, appeals and complaints to the Minister of Justice and Constitutional Development as remedies for the improper application of the act. Application of the act (to take into consideration the following)

- the existence of systemic unfair discrimination and inequalities, particularly in respect of gender, age, race, as a result of past unfair discrimination, brought about by colonialism, apartheid and patriarchy;
- the need to promote and preserve the African values of justice which promote social cohesion, reconciliation and restorative justice; and
- the principles underlying the traditional justice system are not, in all respects, the same as in the context of due process, as applied or understood in the retributive justice system.

Another important practicality is that some of the presiding officers will be women by virtue of their traditional leadership status. This also gives confidence that the system is representative to an extent that it is practically possible in the light of the fact that traditional leadership is bestowed by birth. As previously mentioned the incorporation of the provisions relating to traditional councils will ensure that the composition of the courts is gender balanced.

Signed at east London this 19th day of September 2012.

NELISA MALI

SECRETARY

nosidina
dimdim @ polka. co. za