



## NEGOTIATING MANDATE

**TO:** HON S SHAIKH, MP  
CHAIRPERSON OF SELECT COMMITTEE ON  
SECURITY AND JUSTICE

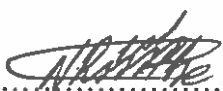
**NAME OF BILL:** TRADITIONAL COURTS BILL

**NUMBER OF BILL:** B1B – 2017

**DATE OF DELIBERATION:** 18 FEBRUARY 2020

**VOTE OF THE LEGISLATURE:**

The Portfolio Committee on Co-Operative Governance and Traditional Affairs met today, Tuesday, 18<sup>th</sup> February 2020 and agreed to mandate the KwaZulu-Natal delegation to **support** the **Traditional Courts Bill [B1B-2017]** with the following **proposed amendments** as outlined in the Committee Report, attached hereto.

  
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HON NR MTHEMBU, MPL  
CHAIRPERSON: PORTFOLIO COMMITTEE  
ON CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

.....18.2.2020  
DATE

# **COOPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS PORTFOLIO COMMITTEE REPORT ON PUBLIC HEARINGS ON THE TRADITIONAL COURTS BILL [B 1B -2017] and PROPOSED AMENDMENTS.**

The Cooperative Governance & Traditional Affairs Portfolio Committee received the above-mentioned Bill which is tagged as a Section 76 Bill in terms of the Constitution.

After having been briefed on the Bill and considered the nature of the Bill, the Committee resolved that holding public hearings with the affected communities will be the best form of implementing and complying with the provisions of Section 118 of the Constitution.

The Committee's intention was to cover as many areas of the province as possible, within the limited timeframe set by the National Council of Provinces (NCOP) and therefore public hearings were scheduled and held as follows:

- (a) Thursday 07 November 2019 Umkhanyakude and Umzinyathi Districts;**
- (b) Tuesday 12 November 2019 uThukela District;**
- (c) Wednesday 13 November 2019 Ilembe District;**
- (d) Thursday 14 November 2019 King Cetshwayo and Harry Gwala Districts; and**
- (e) Thursday 21 November 2019 Zululand District.**

Various submissions were received, most of which revolved around similar issues which can be summarized as follows:

1. Fines must not be done away with as a form of sentence as they serve as deterrence from the "would be offenders" – in order to avoid abuse of such, the amounts must be regulated and categorized according to the nature of disputes.
2. It is not clear in the Bill how enforcement of orders will be dealt with especially in circumstances where the person against whom the order is made defies such order.
3. Safety at the Traditional Courts is a huge concern where people that are summoned come armed.

Further to the verbal submissions received, there were other written submissions received mainly from Non-Government Organizations (NGO's). These submissions can be summarized as follows:

4. Page 5 clause 3 (2) (e): this clause is in line with the 'opt-out' clause which has been removed from the current version of the Bill.
5. Page 7 clause 7 (3) (b) (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...". However, the right to legal representation is limited in clause 7 (4) (b). There is a contradiction within the same clause.

(a) The comments in points 4 and 5 above touch on the constitutional validity of the Bill as it relates to rights enshrined in the Constitution.

6. Page 8 clause 8 (1) (a): it is pre-emptive, also refers to orders expressed in monetary terms or otherwise; including livestock –

#### **GENERAL EXPLANATORY NOTE:**

[        ] Words in bold type in square brackets indicate omissions from existing enactments;

\_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

#### **Nature of traditional courts**

6. (1) Traditional courts -
  - (a) are courts of law 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
  - (b) function in accordance with customary law, subject to the Constitution.

(2) Traditional courts must be constituted and function under customary law 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 provisions of this Act.

(3) The traditional court system is made up of the following levels of traditional leadership as contemplated in the Traditional Leadership and Governance Framework Act and recognized in terms of customary law:

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

### **Appeals from the decision of the traditional courts with the leave of the traditional court.**

#### **6A Powers of the king or queen's court on hearing appeals:**

**(1) the king or queen's court exercising appeal jurisdiction may –**

- (a) hear and determine the appeals from the traditional courts;**
- (b) receive further evidence;**
- (c) remit the matter or the case to the traditional court whose decision is subject of the appeal for further hearing with such instruction as regards the taking of further evidence otherwise as the king or queen's court deems necessary; and**
- (d) confirm, amend or set aside the decision which is the subject of the appeal and make any decision which the circumstances may require.**

**6A (2) Other disputes the king or queen's court may have jurisdiction on:**

**The king or queen's court exercising jurisdiction may, in addition to any power as may specifically be provided for in this act or in any other law –**

- (a) hear and determine disputes arising from traditional law and custom referred to it by an individual, the Premier or the MEC responsible for the traditional affairs, for consideration over:
- i. traditional leadership
  - ii. boundaries between traditional committees within a particular kingship or queenship concerned;
  - iii. succession or inheritance;
  - iv. payment or return of lobolo; or
  - v. related to:
    - (aa) altercation between the members of traditional leadership;
    - (bb) damages for seduction;
    - (cc) witchcraft; and
    - (dd) defamation of character

### **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 law as contemplated in section 6 (3) where the envisaged traditional appeal institution exist, 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.

### **Transitional provisions and repeal of laws**

18. (1) The following Acts, if they have not been repealed before the commencement of this Act, are hereby repealed:

- (a) The Regional Authorities Courts Act, 1982 (Act No. 13 1982) (Transkei); and

(b) The Chiefs Courts Act, 1983 (Act No. 6 of 1983) (Transkei).

(2) Any authorization 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 authorization 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.

18 (2A) All matters or cases that were dealt with under section 12 and 20 of the Black Administration Act (Act No. 38 of 1927) by traditional leaders before the commencement of this Act, shall be regarded as valid.

(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.