



COMMERCIAL AND FINANCE ATTORNEYS

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Your Ref: Ms P Sibisi
Our Ref: Nthabiseng
Dlamini/Revised Final Submission
Date : 11 April 2008

Ms P Sibisi
Portfolio Committee
Department of Justice

By e-mail: psibisi@parliament.gov.za

Dear Ms Sibisi

Comments on the Traditional Courts Bill [B15-2008] (“the Bill”)

We refer to our letter to you dated 7 April 2008.

As you may be aware, we act for Royal Bafokeng Nation (“Bafokeng”). The Bafokeng have instructed us to review and comment on the Bill. Attach hereto are comments to the Portfolio Committee on Justice and Constitutional Development on behalf of the Bafokeng.

Yours sincerely

Nthabiseng Dlamini
Dlamini Mulangaphuma Mathopa
Malongete Moshimane
(Sent Electronically Without Signature)

BACKGROUND

The Bafokeng are a traditional community led by Kgosi Leruo Tshekedi Molotlegi, who is the 36th king of the Bafokeng and the 15th direct descendant of a long lineage of Bafokeng kings.

The Bafokeng inhabit land measuring approximately 2000 km² within the Rustenburg Local Municipality in the North West Province. Its land spans three magisterial jurisdictions, namely, Bafokeng Magisterial District, Mogwase Magisterial District and the Rustenburg Magisterial District. There are approximately 20 000 households spanning 29 villages within its area.

The Bafokeng governance structures comprise of the Pitso ya Kgothakgothe (general assembly), the Supreme Council (joint sitting of the Council of Dikgosana and the Traditional Council), the Council of Dikgosana (Headmen) and the Traditional Council. The Bafokeng have a functional Traditional Court currently regulated by the Bophuthatswana Traditional Courts Act 29 of 1979.

Structure of the Submissions

Part A deals with mainly the constitutional and statutory scheme;

Part B deals with our substantive concerns regarding certain provisions of the Bill;

PART A

Constitutional Framework

The Bill is indicative of the desire on the part of Parliament to infuse all the values that are enshrined in the Constitution of the Republic of South Africa Act, 108 of 1996 (“the Constitution”) into the system of Traditional Courts; and clothe them with constitutional recognition and legitimacy.¹

Section 211 of the Constitution provides as follows:

- (1) *The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.*
- (2) *A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation and those customs.*
- (3) *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”.*

Section 212 of the Constitution deals with the role of traditional leaders. The section provides that:

- (1) *National legislation may provide for a role for traditional leadership as an institution at local level matters affecting local communities.*

¹ It is important to note that constitutional jurisprudence and litigation “is not so much about distinguishing between right and wrong or drawing a line between justice and injustice, but with handling the clash between right and right.”– Sachs *The Free Diary of Albie Sachs* (2004) 84. These words are almost on all fours with those of Sachs J in *Christian Education South Africa v Minister of Education* 2001 1 SA 750 (CC) para [15] where he said: “It is clear... that a multiplicity of intersecting constitutional values are involved in (this) matter – some overlapping, some competing...The overlap and tension between the different clusters of rights reflect themselves in the contradictory assessment of how the central constitutional value of dignity is implicated. “ In other words, the Traditional Courts should not merely be viewed as an insignificant irritant, but as a vital cog in the country’s law-enforcement and administration-of-justice machinery.

- (2) *To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the custom of communities observing a system of customary law...*"

Section 165 of the Constitution provides as follows:

- (1) *The judicial authority of the Republic is vested in the courts.*
- (2) *The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
- (3) *No person or organ of state may interfere with the functioning of the courts.*
- (4) *Organs of the State , through legislative and other measures , must assist and protect the courts to ensure the independence, impartiality , dignity , accessibility and effectiveness of the courts*
- (5) *An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*

Section 166 of the Constitution deals with the structure of the Court system. The section provides that:

The courts are:

- (1) *The Constitutional Court;*
- (2) *The Supreme Court of Appeal;*

(3) *The High Courts , including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;*

(4) *The Magistrates' Courts; and*

(5) *any other court established or recognised in terms of an Act of Parliament ,including any court of a status similar to either the High Courts or the Magistrates Courts.*

Section 174 and 175 of the Constitution, respectively deal with the appointment of judicial officers and acting judges.

Section 20(1)(f) of the Traditional Leadership and Governance Framework Act provides that:

“national government or provincial government, as the case may be, may through legislative or other measure, provide a role for traditional councils or traditional leaders in respect of the administration of justice”.

We therefore welcome the proposed alignment of Traditional Courts with the tenets of the Constitution.

PART B

Preamble

When one looks at the Preamble of the Bill it neatly covers, as part of the Bill's spirit, the ideal traditional justice system that links up customary law with constitutional imperatives and values. This approach by the Bill also catapults Traditional Courts in to the fold of the legal system of the Republic. However, restorative justice and reconciliation does not form part of the Preamble but part of the Objects and Guiding Principles of the Bill.

It is submitted that it is necessary to include the notion of restorative justice and reconciliation in the Preamble.

Definitions

There should be a cross reading of this Bill together with the Traditional Leadership and Governance Framework Act, The Communal Land Rights Act and the respective Provincial Legislations governing and regulating the functions and roles of the Traditional Councils and the communities they govern.

Section 2 and 3

The Bill is very clear in what its objects and its guiding principles are (*vide* section 2 and 3 of the Bill). The Bill seeks 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 the constitutional imperatives and values; to enhance customary law and the customs of communities observing a system of customary law...*”.

Section 3 in particular emphasises the importance and centrality of the provisions of the Constitution to the Traditional Courts, and the relevance of the laws which have been enacted over the past few years with the view to promoting the values espoused therein.²

Section 4

Section 4 of the Bill seems to be intended to ensure proper supervision of the traditional leaders, and to place them firmly under the purview of the executive arm of government. This was the position under the Black Administration Act.³ This Section, if the Bill becomes law, is also intended to ensure that the traditional leaders receive formal training.⁴

² An example of this was when the Promotion of Equality and Elimination of Discrimination Act, 200 (Act 4 of 200) was promulgated.

³ See s 2(7) and 2(8). However, these provisions were open to abuse by the various colonial and apartheid administrations. They make provision for “appointing” and “recognising” traditional leaders.

We are of the view, and submit, that knowledgeable community elders should also be eligible for appointment as presiding officer of the Traditional Court in the absence of the king, queen or senior traditional leader.

SECTION 5

Sub-Section (1) of this Section deals with the traditional leaders' jurisdiction to adjudicate on civil matters which occur within their area of jurisdiction. Save for some minor modification, this Section is in line with the provisions of s 12(1) of the Black Administration Act which gave authority to the traditional leaders to deal with "(civil)⁵ matters arising out of Black⁶ law and custom"⁷. This implies that traditional leaders cannot deal with matters which arise from common-law; or apply rules and provide remedies which are peculiar to that system. If they did, their judgments would be null and void for lack of jurisdiction.⁸

The section is permissive in its language and this may signify an ability to decline jurisdiction under certain circumstances. It is unclear to us as to when and how these circumstances would arise but, in our view, this section encourages forum shopping, in other words, electing to by-pass the Traditional Court in favour of the Magistrates Court where a matter does not decisively fall into either category.

.The foregoing is in contradiction with, by way of example, section 28(1) of the Magistrates' Courts Act 32 of 1944 which provides that "*Saving any other jurisdiction assigned to a court by this Act or by*

This allowed for a situation where a rightful claimant to chieftainship, whose political views and philosophy were at variance with those of the government of the time, was passed over for someone who was agreeable and pliable. It is also important to note that the Black Administration Act will be repealed by when the Bill becomes law.

⁴ This will have to be accredited and regulated by SAQA or similar body to ensure its relevance and efficacy.

⁵ The chiefs, as traditional leader were called, had jurisdiction in respect of criminal matter in terms of s 20 of the Black Administration Act

⁶ This is in line with the Preamble to the Constitution, and s 2 (the Supremacy Section), s 9 (Equality Section) and s 30 (Language and culture Section). The latter Section provides that everyone has "the right to use the language and to participate in the cultural life of their choice". In other words, a white person who owns a store within the area of jurisdiction of a particular Traditional Court may, if he has a legal dispute with one of the locals, approach that court, and vice versa.

⁷ This refers matters such as magadi, ukungena (the levirate custom: the taking of a deceased brother's wife for oneself) and mafisa (the leasing of livestock to a friend, neighbour or relative).

⁸ In this regard, see Bennett note 3 143.

any other law , the persons in respect of who the court **shall** have jurisdiction shall be the following and no other ...” [our emphasis]

The above contrast raises a very practical question of what happens if the Traditional Court declines jurisdiction to adjudicate over a particular civil dispute. These are not conceptual problems but real challenges which might arise if the presiding officer declines to exercise his or her civil jurisdiction over a matter.

If this is the intention of the Legislature, it is suggested that in light of the foregoing the language of the section be made peremptory so that, provided the two requirements are met (jurisdictional facts), the presiding officer would be compelled to act and adjudicate over a matter brought before him or her.

Sub-Section (2) is intended to exclude the Traditional Courts’ jurisdiction in respect of certain matters. These matters, by and large, involve the interpretation of the Constitution; the determination of the personal and marital status of the litigants. The sub-Section also helps to qualify and limit the substantive jurisdiction of the Traditional Courts.

It is submitted that Traditional Courts be accorded substantive jurisdiction in respect of civil matters similar to that of Small Claims Courts for purposes of providing extension services to Magistrates Courts in Traditional Community areas.

SECTION 6

In terms of this sub-Section, the traditional leaders have limited jurisdiction to deal with criminal matters.⁹ The Bill grants the Traditional Courts criminal jurisdiction over offences that occurred within

⁹ This is substantively similar to the provisions of s 20(1) of the Black Administration Act and other similar pieces of legislation where the Act did not apply. The Schedule to the Bill sets out the types of offence that the Traditional Court may adjudicate upon: theft, including stock theft, malicious damage to property, assault (common) and *crimen injuria*. Needless to say, the Traditional Court’s jurisdiction is limited in terms of the seriousness, gravity and the amount involved. There is therefore no need to be apprehensive about the extent of the Traditional Courts’ punitive jurisdiction. Also, Section 19(1) provides a safety valve: a matter which is considered difficult or complex for the court, may be transferred to the magistrate’s court with jurisdiction. However, the question remains: What if the presiding officer, who is a queen, king or Paramount Chief of the particular area, is a victim of *crimen injuria*? In pre-colonial times, this kind of behaviour might have been viewed as treasonous or perfidious. It is submitted that, nowadays, it would just amount to criminal defamation – see Burchell & Milton *Principles*

the area of jurisdiction of the Traditional Courts in question **and** if such an offence is listed in schedule 1.

Schedule 1 list the following offences as offences over which a Traditional Court may have jurisdiction:

- Theft and stock theft, amount to be determined by the Minister by notice in the gazette;
- Malicious injury to property, maximum amount to be determined by the Minister;
- Assault where grievous bodily harm has not been inflicted;
- Crimen injuria, where amount involved does not exceed an amount determined by the Minister by notice in the Gazette.

It is submitted that powers of punishment and sentence similar to those of District Courts be given to Traditional Courts in so far as criminal jurisdiction is concerned. This approach will eliminate double standards created by section 10(1) where offenders coming before a District Court and those coming before a Traditional Court having committed offences listed in the Schedule to be Bill are sentenced differently. It is submitted that the limitation set by section 10(1) simply erodes the legitimacy of Traditional Courts.

It is further submitted that the Traditional Court structure be aligned with the current judicial system, with the necessary limitation with respect to geographical jurisdiction and quantum. Traditional Courts should not be confined to traditional law and custom only but should in fact also be given jurisdiction in so far as the matters set out in the schedule are concerned.

of Criminal Law (1991) 450-451. It is also important to note that the territorial jurisdiction of the Traditional Courts may be extended extraterritorially in terms of the so-called “4 kilometre” rule particularly in those areas of South Africa that are on the coast, or those that are on the border with the various neighbouring countries such as Botswana, Mozambique, Namibia and Zimbabwe – see s 90(2)(b) of the Criminal Procedure Act.

Section 9(3)(a) of the Bill provides that:

“no party to any proceedings before a Traditional Court may be represented by a legal representative”.

Theoretically, if Traditional Courts can adjudicate over criminal matters their convictions are convictions of the same status as those of the magistrate’s courts and high courts so that these convictions are recorded and reflected in the official records as convictions. Although the Traditional Courts, in the current Bill, do not have the competence to impose imprisonment or corporal punishment, if they can convict and it appears they can, then the rights enshrined in section 35 (arrested, detained and accused persons) of the Constitution must be observed as they would in any other Court of law.

Section 35 (3) of the Constitution sets out the rights to which an accused person has with regard to a trial. The right to a fair trial includes the right to have a legal practitioner assigned to the accused person by the state at the state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Whether or not substantial injustice would result, would be determined by the court that is seized with the matter. However there should be no outright prohibition of legal representation. The alternative would be to refer the matter to the magistrates’ courts in cases where the legal and factual matters before the court are fairly complex.

In light of the above, it is suggested that the prohibition on legal representation might be unconstitutional given the potential for substantial prejudice arising out of the fact that the accused would be unrepresented and the presiding officer may not be acquainted with the nuances of an adversarial legal system¹⁰.

We are of the view that there should be a factoring in and due regard and observance of Customary Succession [considering its current review as well], in particular, Traditional Courts must have, as part of their jurisdiction, the competence to deal with and adjudicate on matters arising from this area of the Law. In our view, succession, excluding the interpretation and the determination of the validity of wills, is still one of the competencies of the Traditional Courts.

¹⁰ See *Bangindawo v Head of Nyanda Regional Authority 1998(3) BCLR 314 (Tk)* at 330 and 331

SECTION 7

Section 7 of the Bill emphasises the importance of reconciliation, harmony and social cohesion as the main objectives of the arbitral role that the Traditional Courts play. It is a contradiction in terms to, on the one hand, emphasise constitutional values as being the bedrock of the Traditional Courts, and on the other, denounce these structures as being “distinct from the courts referred to in section 166 of the Constitution”.

This Section would not, if challenged in court, pass constitutional muster. The reason being that Traditional Courts are in fact - and in law - part of South Africa’s constitutional dispensation, and an integral part of our court structure. For instance, section 165 (1) of the Constitution states that:

“the judicial authority of [South Africa] is vested in the courts”.

It is therefore submitted that “courts” includes the Traditional Courts as well. Moreover, section 166(e) puts the matter beyond all doubt. It states that the courts include “*any other court established or recognised in terms of an Act of Parliament...*” If the founding fathers¹¹ did not think highly of this age-old institution, they would have said so expressly.

There is no need to treat Traditional Courts with suspicion and apprehension. There is also no reason to think that they will not apply the law “impartially and without fear, favour or prejudice.”¹² To paraphrase Ngwenya J in *Mbatha v Mabuza*,¹³ the Traditional Courts should not be treated as a foreign concept.

¹¹ See Constitutional Principle XXXIII (l) of the Constitution Act, 1993 (Act 200 of 1993) (“the Interim Constitution”) which states that: “The institution, status and role of traditional leadership, according to indigenous law, shall be recognised and protected in the Constitution. Indigenous law, like common law, shall be recognised and applied by the courts subject to the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.” S 211 and 212 of the (Final) Constitution encapsulate his principle.

¹² S 165(2) of the Constitution; see also Bennett note 3 147 ; see also *Bangindawo and others v head of Nyanda Regional Authority and another* 1998 3 SA 262 (Tk); but cf. *Mhlekwana and Feni v head of Western Tembuland Regional Authority and another* 2001 1 SA 574 (Tk).

¹³ 2003 (4) SA 218 (C) 219.

It is our submission that the phrase “are distinct from courts referred to section 166 of the Constitution, and” as contained in the Bill should be omitted. This submission is in line with our view that the Traditional Courts are part of South Africa’s constitutional framework and court structure.

It is hoped that the proposed training programmes and courses will ensure that the presiding officers, at the Traditional Courts, appreciate and understand their responsibilities within South Africa’s constitutional framework and court structure.¹⁴

SECTION 9

Sub-Section 9 (1) (a) sets out the procedural and parameters within which the Traditional Courts should operate. The procedure in the Traditional Court “must be in accordance with customary law and custom”.¹⁵ But this may, if not clarified, create problems in instances where the litigants are not required to take an oath or make an affirmation. There is no provision for this in the Bill and there may be a temptation for the mendacious litigants, and witnesses, to perjure themselves¹⁶. There is also the mistaken view that, in customary-law matters, hearsay evidence is readily admissible.

It is also important to note that the rules of natural justice stand on three pillars, the *audi alteram partem* rule, the *nemo iudex in propria causa* rule, and the doctrine of legitimate expectation.¹⁷ In sum, this doctrine teaches that individual have a right to expect that reasonable practices, and rules, will be adhered to, and not be changed to suit a particular person or circumstances. It is our considered view that another paragraph - 9(a) (iii) - be inserted into the sub-Section.¹⁸

Another contentious issue, which might lead to a great deal of constitutional litigation, is the exclusion from the Bill (sub-Section 9(3) (a)), of the right to legal representation. Is the sub-Section unfairly

¹⁴ But, see Bennett note 3 147(n99).

¹⁵ The juxtaposition of “customary law” and “custom” may seem tautological. However, “customary law” refers to “a set of norms derived from practice which is invested with binding authority by a society or its organs” – see Dlamini in De Beer (ed) *Bill of Rights Compendium* (1999) 6A3.

¹⁶ See Bekker note 19 (1995) 32.

¹⁷ See Devenish *A Commentary on the South African Bill of Rights* (1999) 462 -463.

¹⁸ Some people may argue that this is covered by the provisions of s 9(the Equality Section) and s 32 (the Just administrative action Section), and will therefore, be superfluous. However, because the Traditional Courts will be manned by people who are, largely, unlettered, it would be better that the matter be placed beyond all doubt.

discriminatory? On the face of it, the sub-Section is unfairly discriminatory¹⁹. This because it may violate the individual's constitutional rights as set out in sections 9 and 34 and 35(3) (e),²⁰ (f)²¹ and (g) ²²of the Constitution. But, the right to legal representation, like all the rights that are enshrined in the Constitution, is subject to limitation "only in terms a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality..."²³

However, this begs the question: Will the Bill, if it becomes law, be of general application? The answer should, it is submitted, be in the affirmative. But is the limitation "reasonable and justifiable"? If the sub-Section is intended to curtail the proceedings in the Traditional Courts, then the answer should be in the affirmative.

But, if the object of the Bill is to exclude legal representation merely because these are Traditional Courts, then the exclusion is unconstitutional. The better view ,however, would be to regard the exclusion as a reasonable and justifiable limitation of the constitutional right to representation because of the nature of the Traditional Courts or the level of education of most of the presiding officers, the litigants and the witnesses who participate in these proceedings.

It is submitted that it be considered that paralegals, junior public defenders and candidate attorneys be legal representatives in instances where it is necessary so to avoid violating individual's constitutional rights.

With regard to the choice-of-law rules as set out in sub-Section (4), the Bill appears to be granting the parties the option of choosing a preferred customary-law system to resolve their dispute. What if the parties are educated, as is usually the case, and choose the common law? It would seem as if the procedure as set out in Section 19 should be adopted, and the matter be referred to the magistrate's court with jurisdiction. The section appears to be permissive and discretionary.

¹⁹ But see *Bangindawo and others v Head of Nyanda Regional Authority* 1998 3 SA 262 (Tk).

²⁰ To be represented at the trial.

²¹ To choose, and to be represented, by a legal practitioner.

²² To be represented by a practitioner who has been assigned to one at the expense of the State.

²³ S 36 (1) of the Constitution.

Granting litigants the ability to choose their own traditional law system, undermines the rationale for the civil jurisdiction which is, that the matter must be one of customary law or custom and matter must have arisen within the area of jurisdiction of the Traditional Court. We submit that parties should not be given the ability to dictate the traditional custom system that they wish applied to them. This will unduly burden the system.

It is submitted that a peremptory provision would prevent litigants from forum-shopping.

The Bill must be clear that in respect of matters arising from customary law and custom, such matters must first be reported to a tribunal such as dikgotla or dikgoro before it is reported to the Traditional Court in order to involve Clans in the initial assessment and mediation of cases before they can be referred to the Traditional Court.

It is suggested that a provision be included to provide for the reporting of offences arising out of traditional areas of jurisdiction to the local SAPS for instance which shall immediately report the matter to the Traditional Court.

Where a Kgotla cannot resolve on a matter then it must refer it to the Traditional Court with a written account of steps the Kgotla undertook in resolving the dispute and the recommendations furnished to the parties to the dispute. There should also be a substantial definition of a (le)Kgotla, Kgoro, inkundla, etc. and these structure's role should sufficiently be dealt with.

What is also not dealt with in the Bill is a situation where any of the parties involved objects to the transfer from either court to the other on the grounds that he may be prejudiced in the conduct of his own case. We therefore submit that a section or paragraph should be inserted which precludes the transfer of a particular matter from the one court (Traditional Court) to another (Magistrate's Court), and vice versa, if such transfer will lead to prejudice to one of the parties or both or all, as the case may be.

We further submit that where matters are transferred from Magistrates Court to Tribal Court, full powers should be given to the Traditional Courts so that they deal with them exhaustively and avoid cross referral.

When it comes to the administration of fines imposed by the Traditional Courts and also how Traditional Councils must account for such funds, there is reference made to the Traditional Leadership and Governance Framework Act only, which in the broader scheme of the administration of Traditional Councils may differ from Province to Province. It is submitted that there be reference to the effect that such funds such be accounted for through the Traditional Leadership and Governance Framework Act read together with the Provincial Traditional Leadership and Governance Acts.

SECTION 10

This Section deals with the sanctions and orders which the Traditional Courts can impose. Sub-Section (1) deals with the forms of punishment which the Traditional Court may not impose. Of significance amongst these are: (a) detention, which includes imprisonment;²⁴ (b) banishment from the traditional community;²⁵ and (c) corporal punishment.²⁶ Needless to say, imprisonment, banishment and corporal punishment are subsumed under “any punishment which is inhumane, cruel or degrading”, but are mentioned in sub-Section (1) *ex abundanti cautela* to emphasise the importance of the specific provisions of the Constitution.

The phrase “in the case of both civil and criminal dispute”, in sub-Section (2) indicates some acknowledgement on the part of the legislature that - strictly speaking- there is no clear-cut distinction, in the Traditional Courts, between civil and criminal proceedings.²⁷ It is even difficult to separate (delictual) damages from a (criminal) fine.

²⁴ In other words, the traditional leaders do not have the jurisdiction to impose custodial sentences.

²⁵ This abolishes the supposed power of traditional leaders to issue the *trekpas* – See Maithufi *The application of trekpas in the indigenous law and the protection of rights in South Africa* in De Kock & Labuschagne (eds) *Festschrift: JC Bekker* (1995) 143-155; see also *Mokhatle v Union Government* 1926 AD 71; *S v Mukwevho*; *S v Ramukhuba* 1983 2 SA 498 (V). The *trekpas*, would, if it was still issuable by Traditional Courts, infringe on the individual's right to enter, and to remain, anywhere in South Africa (s 21(3)); and his or her right to freedom of association (s 18) and his or her right to property (s 25).

²⁶ See *S v Williams and others* 1995 3 SA 632 (CC); See also the Abolition of Corporal Punishment Act 33 1997.

²⁷ See Bennett note 3 145.

Paragraphs (ii) and (iii) of sub-Section (2) (b) are a clear indication of this coalescence and confluence of two separate common-law concepts under customary law. For that reason, paragraph (ii) seems to be providing for compensation, a delictual (civil) concept, and paragraph (iii) seems to invoke the provisions of s 300 of the Criminal Procedure Act,²⁸ which are punitive (criminal) in nature.

Sub-Section (2) (i) refers to a situation where, for example, the accused or defendant who is a relative of the complainant or the plaintiff is disinherited for having committed adultery with a wife, or one of the wives, of the head of the family home.

Sub-Section (2) (l) is a catch-all provision. However, the need to promote harmony, reconciliation and social cohesion, and adherence to the provisions of the Constitution, should serve as a guide to the Traditional Courts in this regard. For instance, where members of Traditional Communities are widely engaging in subsistence farming, the court may order that a particular year's harvest or a portion thereof be given to the complainant or the plaintiff, as the case may be.

SECTION 11

This Section deals with enforcement or execution of the judgements which have been handed down by the Traditional Courts. It seems to emphasise the largely arbitral and mediatory nature of the Traditional Courts' sanctions. For that reason, those individuals whose failure to attend court, and remain in attendance, is due to their own fault, will not be dealt with in the same way as those who are guilty of committing contempt of court in the other courts. Instead, the court is supposed to impose any of the sanctions which are set out in Section 10(2). These include "an unconditional apology" or depriving him or her "of any benefits which arise in terms of customary law and custom." These could include that person being excluded from the particular traditional leader's council or committee, if he was a member of such a council or committee, or being disinherited.

At best, this could be interpreted as being to ensure that the Traditional Court's judgments are much less punitive in nature than those of the other courts. At worst, they could be viewed as perpetuating the legal myth of fallacy that Traditional Courts are not part of South Africa's constitutional framework

²⁸ Act 51 of 1977 as amended.

and court structure. The former interpretation is preferable in the context of sub-Section than the latter (2).

SECTION 12

This Section should be read, and interpreted, in the light of the notes on Section 18.²⁹ In the past, the judgments of the Traditional Courts were not necessarily final.³⁰ The legal position in this regard was not particularly clear.³¹ Whenever the judgments were taken on appeal, to the magistrate's court with jurisdiction, they would be dealt with *de novo*.³² In other words, there would be a complete rehearing of the matter.³³ But now, the traditional leader, would in terms of this Section, be *functus officio*³⁴ after delivering his judgement or making the order.

SECTION 13

This Section, like Section 12, emphasises the fact that Traditional Courts are now courts of record, and the orders that issue from them are final, and should be dealt with, by the magistrate's courts, as fully-fledged appeals if one of the parties should not be satisfied with the decision of the Traditional Court. Therefore, this Section (together with Section 12) clarifies a legal situation which was very nebulous and confusing in the past.

SECTION 14

²⁹ This Section, if the Bill becomes law, will enjoin the Traditional Courts to keep records. In the past, particularly in terms of s 12 of the Black Administration Act or similar law, these institutions were not courts of record.

³⁰ Bekker note 19 32.

³¹ Bennett note 3 147.

³² Keeping records appears to have been optional under the Black Administration Act- see Bekker note 38 17.

³³ See Bennett note 3 145.

³⁴ He or she would not be able to hear, and decide on, the same matter again.

This section is modeled on the provisions of s 24 of the Supreme Court Act.³⁵ However, there are significant differences between this section and s 24. While this Section refers to *ultra vires* orders of the Traditional Courts and Chapter 2 of the Combating and Prevention of Corrupt Activities,³⁶ as grounds for review, the Supreme Court Act refers to “the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence as such a ground.”³⁷ Another novel feature of this Section is that it gives the power of judicial review - which has hitherto been the preserve of the High Court - to the magistrate’s court. Needless to say, this power is not as extensive as that of the High Court. The High Court, like the Constitutional Court, enjoys inherent jurisdiction in matters of this nature, in terms of common law.³⁸ The Traditional Court is, like all the other lower courts and tribunals, a creature of statute.³⁹

It is suggested that a sub-Section, or a paragraph, be inserted which stipulates that the wrong, mistaken or deliberate application of common law by the Traditional Courts is ground for review.

SECTION 15

The provisions of this Section are self-explanatory. However, as indicated above, there is a need for them to be modified to provide for the taking of an oath, or making of an affirmation, by the accused, plaintiff or witnesses, as the case may be, before giving evidence in a Traditional Court. This could be done by inserting a paragraph in Section 9(2). Failure to do so might create the impression that witnesses in these courts have the licence to perjure themselves with impunity⁴⁰ during the proceedings.

³⁵ Act 59 of 1959.

³⁶ Act 12 of 2004.

³⁷ This is in line with one of the objects of the Bill: the traditional leaders should not apply common law in an attempt to resolve the disputes that are brought to their courts lest they be a nullity – see Bennett note 143 (n 70).

³⁸ See Erasmus *Superior Court Practice* (Revision Service 11) (1999) A1-69.

³⁹ See note 58 above.

⁴⁰ Bekker note 19 32.

As Bekker puts: “Perjury is no offence [in these courts], nor is there any equivalent of an affirmation to speak the truth.”⁴¹

SECTION 16

This Section is about the removal, from office, of a traditional leader who might have been designated as a presiding officer of a particular area. It is also important to note that these capacities are mutually exclusive - and can be delinked.⁴² Strangely, the Judicial Services Commission does not have any role in this regard. Instead, the Premier of the Province where the particular Traditional Court sits, and the director-general in the Department of Justice and Constitutional Affairs, are supposed to play a role in the investigation of any complaint of incapacity, gross incompetence or misconduct.

This is further evidence of the desire on the part of the Legislature to keep Traditional Courts outside the Constitutional framework and the ordinary court structure. This, it is submitted, is not in line with the provisions of sections 165, 166 and 211 of the Constitution.

SECTION 17

This Section allows the Minister of Justice and Constitutional Development to assign one or more of the officers from his or her department to assist the Traditional Courts in the performance of their functions.

As indicated above, the Traditional Courts cannot apply common law to the disputes that are brought before them. If they did, their decisions would be null and void.⁴³

SECTION 19

This Section allows for the transfer of a matter from the Traditional Courts to the magistrate’s court, and vice versa. Substantively, sub-Section (1) is a mirror image of sub-Section (2). The decision to transfer a matter from the one court to another should be based on the appropriateness of the court and

⁴¹ See note 65 above.

⁴² See notes on Section 23 below.

⁴³ See Bennett 143 (n70).

the exigencies of a particular case; and the complexities and intricacies of the legal issues –and facts - involved.⁴⁴

While the Traditional Court may deal competently with matters arising out of customary law, such as *mafisa* (leasing of livestock to a friend, relative or neighbour); *ukungena* (the levirate custom: the taking of a deceased relative's wife for oneself) and *lobolo*; and criminal matters that are set out in the Schedule to the Bill, the magistrate might have the necessary expertise and authority, to deal with issues arising from common law such as sale, lease, rape and, in certain instances, murder.⁴⁵

SECTION 20

This Section is a slight departure from the arbitral, conciliatory and mediatory nature of the orders which are ordinarily issued by the Traditional Courts. But we are of the view that it would be important to state clearly that those “who wilfully insult the presiding officer” or “interrupt the proceedings” or fail to attend court or to remain until they are excused, would, on conviction, be punished for the offence of contempt of court. After all, Traditional Courts are *courts* in the legal and constitutional sense.⁴⁶ They are an important level of South Africa's court structure. The comments on Section 11(2) made above are also apposite in this regard.

However, sight should not be lost of the fact that the Magistrates' Courts, just like the High Court, have the discretion to apply common law or customary law in trying to resolve civil disputes between the litigants.⁴⁷

It submitted, therefore, that sub-Section (2) will have much more limited application than sub-Section (1).

SECTION 21

⁴⁴ Cf. City Press Sunday 27 June 2008 13.

⁴⁵ See s 98(2) of the Criminal Procedure Act, 1977 (Act 51 of 1977).

⁴⁶ See s 9, 165 and 166 of the Constitution.

⁴⁷ See s 1(1) of the Law of Evidence Amendment Act, 45 of 1988.

This Section, if the Bill becomes law, will give power to the Minister of Justice and Constitutional Development to make a set of regulations whose purpose it would be to ensure the smooth running of the Traditional Courts, and the elucidation of the procedural aspects. In other words, the regulations are likely to be mainly procedural and administrative in nature.

With regard to Section 21(d), it would be important to stipulate, or insert another Section, or paragraph, which sets out who the training programmes and courses will be designed, accredited and coordinated by. It would be appropriate and assuring if the Department of Justice and Constitutional Development, the Department of Education, the South African Qualification Association or some other similar body, could be involved in this process. This would ensure that the programmes and courses are adequate and appropriate for the purpose for which they are intended; and that the Traditional Courts, and presiding officers, appreciate their adjudicative role within the legal system, and their responsibility in terms of the Constitution.

SECTION 23

This Section contains transitional and repealing provisions. They set out the laws which will be repealed when the traditional the Bill becomes law.

According to sub-Section (2) (a), the provisions of the Bill will not apply in the former homelands and “independent” states of Transkei, KwaZulu- Natal, Venda, Bophuthatswana, Ciskei, and Qwa-Qwa , until the 31 December 2008. These are areas in which certain provisions of the Black Administration Act have not been in operation for many years, or where it was substituted by some other law which is *pari materia*.⁴⁸

However according to this Section, if the “affected laws” are, for some reason, not repealed on the aforementioned date, they will be deemed to have been repealed when the Bill becomes law.

⁴⁸ That deals with the same subject-matter as the Black Administration Act.

However, those “affected laws” which still operate in former homeland of KwaNdebele (now part of the Mpumalanga Province), will be repealed, automatically, when the Bill is promulgated on the 29 June 2008.

This position also applies to those areas where the “affected laws” shall already have been repealed when the Bill becomes law.

In terms of sub-Section (3) (a), any king, queen or senior traditional leader who exercised their judicial powers in terms of s 12(1) (criminal) and 20(1) (civil) in terms of the Black Administration Act, 1927 (as in KaNgwane, Lebowa and Gazankulu (now part of the Limpopo Province) shall only continue to do so if they go through the prescribed training programme; and if they take an oath or make an affirmation as prescribed. Failure to do so will result in their designation lapsing.⁴⁹

There is also a substantively similar provision (sub-Section (3) (b)) in which addresses the position in “affected areas” (Transkei, Ciskei, Bophuthatswana (now the North-west Province), Qwa-Qwa, KwaZulu and Venda).

However, it is important to note that, in terms of sub-Section (4) (a) and (b), all pending proceedings - civil or criminal - shall not be affected by the coming into operation of the Bill.

In terms of sub-Section (5) (a) and (b), the Regional Courts Act, 1982 (Transkei) and the KwaNdebele Tradition of the Civil and Criminal Hearings by the Lingwenyama, Amakhosi and Linduna Act, 1984 (KwaNdebele) will be repealed on the 29 June 2008, when the Bill becomes law.

Interface with other Government Departments

⁴⁹ It is important to note that a traditional leader may lose his capacity to be a presiding officer of a particular court and still remain a traditional leader of the area. However, the position is likely to be different when he or she is removed from the position of traditional leadership: he or she cannot be a presiding officer without being a traditional leader; but the converse is not necessarily true.

There is a need for the following Government Departments to be catered for in this Bill as Government Departments do not always approach Legislative Impacts in a comprehensive way, thus causing unintended consequences once a Bill is passed in to an Act:

- Ministry of Safety and Security (in respect of SAPS having to provide Court Orderlies to keep order at the Courts and also serve various Warrants as the Tribal Police have been outlawed by the Traditional Governance and Framework Act and the respective Provincial Acts on Traditional Leadership);
- Ministry of Agriculture and Land Affairs (in respect of assisting the State President or the respective Premiers to determine the Traditional Community Area of Rule taking in to account the Traditional Leadership and Governance Framework Act and the Communal Land Rights Act);
- Ministry of Provincial Government and Local Government (in respect all the support, regulation, planning, delivery and capacity of Traditional Leaders and their Traditional Councils);
- Ministry of Public Administration (in respect of providing the Human Resources and Support and Benefits due to Public Bearers and Judicial Officers), and;
- Ministry of Justice and Constitutional Development (in respect of the overall implementation of the Bill)

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