

REPUBLIC OF SOUTH AFRICA

TRADITIONAL AFFAIRS GENERAL AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No 47061
of 22 July 2022)
(The English text is the official text of the Bill)*

(MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS)

[B 16—2022]

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(b) Any alleged breach of, or non-compliance with, the applicable provisions of the Code of Conduct referred to in paragraph (a), must be dealt with in accordance with the provisions of item [15] 17 of that Code of Conduct.

(c) The findings of any investigation contemplated in item [15] 17 of the Code of Conduct referred to in paragraph (a) and any sanctions imposed under that item, must be conveyed by the municipal council or MEC, as the case may be, to—

- (i) the relevant participating leader;
- (ii) the responsible MEC in the case of investigations conducted by the municipal council or a special committee as contemplated in item [14(1) of Schedule 1 to the Local Government: Municipal Systems Act, 2000] 16(1) of the Code of Conduct;
- (iii) the municipal council in the case of investigations conducted by a person or committee appointed by the MEC as contemplated in item [15(4) of Schedule 1 to the Local Government: Municipal Systems Act, 2000] 17(4) of the Code of Conduct; and
- (iv) the houses and councils referred to in paragraph (a).

(d) Notwithstanding the provisions of paragraph (a), a participating leader remains subject to the Code of Conduct contained in the Schedule to the TKLA, and any provincial code of conduct provided for in provincial legislation relating to traditional and Khoi-San leadership.”

Amendment of section 16 of Act 3 of 2019

2. Section 16 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) [The] A forum [contemplated in subsection (2)(a)(i)(bb)] of not more than five members of the royal family designated by the relevant royal family, must assist the king or queen, principal traditional leader or senior traditional leader, as the case may be, with the selection contemplated in subsection (2)(c)(i).”

Repeal of section 30 of Act 3 of 2021

3. Section 30 of the Local Government: Municipal Structures Amendment Act, 2021 (Act No. 3 of 2021), is hereby repealed.

Short title

4. This Act is called the Traditional Affairs General Amendment Act, 2022.

MEMORANDUM ON THE OBJECTS OF THE TRADITIONAL AFFAIRS GENERAL AMENDMENT BILL, 2022

1. OBJECTS OF THE BILL

- 1.1 Section 81 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998) (Structures Act), deals with the participation of traditional and Khoi-San leaders in municipal council proceedings.
- (a) Section 81 was replaced by the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019) (TKLA), with effect from 1 April 2021.¹ Certain provisions of the new section 81 refer to the Code of Conduct that will be applicable to municipal councillors as well as the participating traditional and Khoi-San leaders.
 - (b) At the time of the tabling in Parliament in 2015² of the TKLA (in Bill format), up to the assent to the Bill by the President on 20 November 2019 and the publication of the TKLA in the *Gazette* on 28 November 2019,³ the relevant Code of Conduct was part of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) (Systems Act).
 - (c) However, the Local Government: Municipal Structures Amendment Act, 2021 (Act No. 3 of 2021), which came into operation on 1 November 2021,⁴ removed the Code of Conduct from the Systems Act and added it as a new Schedule 7 to the Structures Act.
 - (d) Therefore, the references in the new section 81 to the Code of Conduct as part of the Systems Act are outdated and have to be corrected to refer to the Code of Conduct as it now appears in the Structures Act. This is necessary to ensure legal certainty.
- 1.2 The proposed amendment to section 16 of the TKLA is necessary to address an interpretation challenge that was identified during the preparations for the reconstitution of traditional councils in terms of the Act.
- (a) Section 16(2) of the Act states that the number of members of a kingship or queenship council, principal traditional council or traditional council must be determined by means of a formula issued by the Minister. For this purpose, the Minister must consult certain stakeholders. Section 16(2)(a)(i)(bb) provides that in the case of a kingship, queenship or principal traditional council, one of these stakeholders to be consulted is a forum of not more than five members of the relevant royal family, designated by such royal family. Section 16(3)(a) of the Act requires that this same forum must render assistance to a king or queen, principal traditional leader or senior traditional leader when he or she is selecting the 60% selected component of the kingship, queenship or principal traditional council.
 - (b) However, the forum mentioned in section 16(2)(a)(i)(bb) relates to the determination of the number of members for kingship, queenship and principal traditional councils and not traditional councils. Therefore a senior traditional leader cannot consult the forum contemplated in section 16(2)(a)(i)(bb) for the purposes of section 16(3)(a). It is therefore the intention to amend section 16(3)(a) to address this challenge.
- 1.3 As explained under paragraph 1.1 above, the TKLA replaced section 81 of the Structures Act. This was done through an amendment to the Structures Act contained in Schedule 3 of the TKLA.
- (a) However, in 2018, the Local Government: Municipal Structures Amendment Bill [B19-2018] was tabled in Parliament.⁵ This Bill

1. Proclamation No. 38 of 2020 — Government Gazette No. 43981 of 11 December 2020.

2. ATC No. 122 of 2015.

3. Government Gazette No. 42865 of 28 November 2019.

4. Proclamation No. 37 of 2021 — Government Gazette No. 45305 of 11 October 2021.

5. ATC No. 78 of 8 June 2018.

included an amendment to section 81 of the Structures Act. The amendment relates to the version of section 81 as it read before the replacement thereof by the TKLA.

- (b) The Bill was passed by Parliament, assented to by the President and published in the Gazette as the Local Government: Municipal Structures Amendment Act, 2021 (Act No. 3 of 2021).⁶ Section 30 of this Amendment Act contains the amendment to the previous version of section 81. Since it is thus amending a version of section 81 that no longer exists, section 30 has to be repealed.

2. CLAUSE BY CLAUSE ANALYSIS

- 2.1 Clause 1 seeks to amend section 81 of the Structures Act in order to correct the references to the Code of Conduct as explained under paragraph 1.1 above.
- 2.2 Clause 2 seeks to provide clarity on which forum traditional leaders must consult when selecting the 60% component of their councils as contemplated in section 16(3) of the TKLA.
- 2.3 Clause 3 seeks to repeal section 30 of the Local Government: Municipal Structures Amendment Act, 2021, for the reasons explained under paragraph 1.3 above.
- 2.4 Clause 4 contains the short title.

3. FINANCIAL IMPLICATIONS FOR STATE

None.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

- 4.1 The Department of Cooperative Governance, being the department responsible for the administration of the Structures Act, was consulted and supports the proposed amendments.
- 4.2 The Bill was presented to and supported by the COGTA Technical MINMEC on 17 November 2021 and the COGTA MINMEC on 3 December 2021.
- 4.3 In December 2021, the Bill was submitted to SALGA and the National House of Traditional and Khoi-San Leaders for noting.
- 4.4 The Bill was presented to representatives of provincial departments responsible for traditional and Khoi-San leadership during a meeting of the Traditional Affairs Technical Governance Forum (TATGOF) held on 3 March 2022.
- 4.5 On 22 March 2022, the Bill was presented to and supported by the Governance, State Capacity and Institutional Development (GSCID) Technical Working Group. On 1 April 2022, the GSCID Directors-General Cluster supported the Bill.

5. CONSTITUTIONAL IMPLICATIONS

None.

6. Government Gazette No. 44647 of 1 June 2021.

6. COMMUNICATION IMPLICATIONS

The Department of Traditional Affairs will inform all stakeholders who are involved with the implementation of the TKLA and section 81 of the Structures Act once the new Amendment Act comes into operation.

7. PARLIAMENTARY PROCEDURE

7.1 An ordinary Bill must be classified as a section 76 Bill if it, in a substantial measure, affects any of the functional areas listed in Schedule 4 of the Constitution. In *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*⁷ the key issue concerned the proper classification of the Communal Land Rights Act, 2004 (Act No. 11 of 2004) (“CLARA”), which had been processed in terms of section 75 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”). The Constitutional Court rejected the “pith and substance” test and endorsed the substantial measure test instead. Ngcobo CJ held as follows:

“[60] *The test for tagging must be informed by its purpose. Tagging is not concerned with determining the sphere of government that has the competence to legislate on a matter. Nor is the process concerned with preventing interference in the legislative competence of another sphere of government. The process is concerned with the question of how the Bill must be considered by the provinces and in the NCOP, and how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more it affects the interests, concerns and capacities of the provinces, the more say the provinces should have on its content.*”

7.2 The Court then examined the CLARA to determine the extent to which its provisions regulated “indigenous law” and “traditional leadership”, which are functional areas listed in Schedule 4 to the Constitution.⁸ The Court held that any Bill whose provisions substantially affect the interests of provinces must be tagged as a section 76 Bill. This would include Bills over which provinces have concurrent jurisdiction but would go further. The question whether a Bill should be tagged as such is determined in two ways. First, by the list of matters contained in section 76(3)(a)–(f) of the Constitution. Second, by whether the provisions of the Bill in substantial measure fall within a concurrent provincial legislative competence.⁹

7.3 As stated in its long title, the Bill seeks to amend section 81 of the Local Government: Municipal Structures Act, 1998, which section deals with the participation of traditional and Khoi-San leaders in municipal council proceedings. The Bill also intends to amend section 16 of the Traditional and Khoi-San Leadership Act, 2019, which Act deals *inter alia* with the recognition of traditional and Khoi-San communities and leaders, as well as the establishment of traditional and Khoi-San leadership structures. Taking into account the provisions of the Bill, we are of the opinion that the Bill in substantial measure deals with indigenous law and traditional leadership which are all items listed in Part A of Schedule 4 to the Constitution. Schedule 4 to the Constitution deals with matters which fall within a functional area of concurrent national and provincial legislative competence.

7.4 Since the provisions of the Bill in substantial measure fall within a concurrent provincial legislative competence and affect the interests, concerns and capacities of provinces, we are of the opinion that the Bill must be classified as a section 76 Bill and dealt with in accordance with the procedure established by subsection (1) or (2) of section 76 of the Constitution.

7. CCT 100/09 [2010] ZACC 10. Hereinafter referred to as the *Tongoane* case.

8. *Tongoane* case at par 74.

9. *Tongoane* case at par 72.

- 7.5 The State Law Advisers are also of the opinion that the Bill must be referred to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it directly affects traditional and Khoi-San communities.

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