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GENERAL NOTICE

NOTICE 1850 OF 2003

MINISTRY FOR PROVINCIAL AND LOCAL GOVERNMENT

TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK BILL, 2003

1. I, Fholisani Sydney Mufamadi, Minister for Provincial and Local Government, in terms of section 154(2) of the Constitution, hereby publish the Traditional Leadership and Governance Framework Bill, 2003, for public comment.

2. Comments must please be submitted in writing to –

The Director-General
Attention: Mr JLC Meiring
Department of Provincial and Local Government
Private Bag X804
PRETORIA
0001

3. Comments may also be faxed to facsimile number (012) 323 3337 at the above address, or sent by electronic mail to JOHAN@dplg.gov.za.

4. Comments must be received by no later than 18 July 2003.

DRAFT BILL

To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide for functions and roles of traditional leadership; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims; and to provide for matters connected therewith.

PREAMBLE

WHEREAS the government seeks –

- ☞ to set out a national framework that will define the place and role of traditional leadership within the new system of democratic governance;
- ☞ to transform the institution in line with constitutional imperatives; and
- ☞ to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices.

AND WHEREAS the South African indigenous people consist of a diversity of cultural communities;

AND WHEREAS the Constitution recognises –

- ☞ the institution, status and role of traditional leadership according to customary law;
- ☞ a traditional community that observes a system of customary law;

AND WHEREAS –

- ☞ the State must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa;
- ☞ the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that democratic governance and the values of an open and democratic society may be promoted; and
- ☞ the institution of traditional leadership must–
 - promote freedom, human dignity and achievement of equality and non-sexism;
 - derive its mandate and primary authority from applicable customary law and practices;
 - strive to enhance tradition and culture;
 - promote harmony and peace amongst people;
 - promote the principles of co-operative governance within all spheres of government and organs of state; and
 - promote an efficient, effective and fair dispute resolution system, and a fair system of administration of justice as envisaged in applicable legislation;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa as follows:-

PART 1: INTERPRETATION AND ADMINISTRATION OF ACT**Definitions**

1. (1) In this Act, unless the context indicates otherwise –

“**chief**” means a traditional leader of a specific traditional community and commonly referred to as morena, kgosi, inkosi, hosi, khosi, kgosi or ikosi in terms of customary law, and “**chieftainness**” has a corresponding meaning;

“**chieftainship**” means the position held by a chief or chieftainness;

“Commission” means the commission established by section 20;

“Constitution” means the Constitution of the Republic of South Africa, 1996, (Act No. 108 of 1996);

“customary institution or structure” means those institutions or structures established in terms of customary law;

“district house of traditional leaders” means a district house of traditional leaders provided for in section 16(b);

“district municipality” means a district municipality as defined in section 1 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

“headman” means a traditional leader that pays allegiance to a chief or chieftainess in accordance with customary law and who is commonly referred to as morenana, ramotse, kgosana, gota, ndhuna, induna, isibonda, sikhulu, ikosana, indvuna, ntona, rammoto and nduna in terms of customary law, and **“headwoman”** has a corresponding meaning;

“headmanship” means the position held by a headman or headwoman

“king” means a traditional leader to whom other chiefs or chieftainesses pay allegiance in accordance with customary law and who is commonly referred to as ingonyama, ingwenyama, ikumkani, morena e moholo or kgosikgolo in terms of customary law, and **“queen”** has a corresponding meaning;

“kingship” means the position held by a king or queen;

“metropolitan municipality” means a metropolitan municipality as defined in section 1 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998);

“Minister” means the member of Cabinet contemplated in section 2;

“provincial house of traditional leaders” means a provincial house of traditional leaders envisaged in section 16(a);

“royal family” means the core customary institution or structure consisting of close relatives of the ruling family within a traditional community who have been identified in terms of custom;

“traditional community” means a traditional community as provided for section 3;

“traditional council” means a council established in terms of section 4;

“traditional leader” means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position in that community, and is recognised in terms of section 11;

“traditional leadership” means the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practised by traditional communities;

“regent” means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position in a temporary capacity until a successor who is a minor is recognised as contemplated in section 12(4).

(2) Traditional communities must transform and adapt applicable customs and indigenous or customary law referred to in this Act so as to comply with the principle of equality as provided for in the Constitution.

Administration of Act

2. This Act is administered by a member of the Cabinet designated by the President.

PART 2: TRADITIONAL COMMUNITIES AND TRADITIONAL COUNCILS

Recognition of traditional communities

3. (1) A community may be recognised as a traditional community if it –
- (a) is subjected to a system of traditional leadership in terms of that community's own customary rules; and
 - (b) observes a system of indigenous and
 - (c) .
 - (d) customary law.

(2) The Premier of a province may, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province and the community concerned, recognise a community envisaged in subsection (1) as a traditional community.

Establishment and recognition of traditional council

4. (1) Once the Premier has recognised a traditional community, that traditional community may establish a traditional council in line with principles set out in provincial legislation.

(2) The members of a traditional council, of whom at least a third must be women, must comprise traditional leaders, members of the traditional community selected by the chief concerned in terms of custom, and other members of the traditional community who are democratically elected.

(3) The Premier concerned must, by notice in the Provincial Gazette and in accordance with the relevant provincial legislation, recognise a traditional council for that traditional community within a defined area of jurisdiction.

Functions of traditional councils

5. (1) A traditional council has the following functions:
- (a) facilitating involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides;
 - (b) supporting municipalities in the identification of community needs;
 - (c) recommending appropriate interventions to government that will contribute to development and service delivery within the area of jurisdiction of the traditional council;
 - (d) participating in development programmes of municipalities and of the provincial and national spheres of government;
 - (e) promoting indigenous knowledge systems for sustainable development;
 - (f) administering the affairs of the traditional community in accordance with custom and tradition;
 - (g) assisting, supporting and guiding traditional leaders in the exercise of their powers and the performance of their functions;
 - (h) participating in the development of policy and legislation at local level;
 - (i) entering into service delivery agreements with municipalities regarding the provision of services to rural communities;
 - (j) promoting the ideals of cooperative governance, integrated development planning, sustainable development and service delivery;
 - (k) alerting any relevant municipality to any hazard or calamity that threatens the area of jurisdiction of the traditional council in question, or the wellbeing of people living in such area of jurisdiction; and
 - (l) exercise and perform those powers and functions conferred by customary law, customs and statutory law consistent with the Constitution.
- (2) Provincial legislation may regulate the exercise of functions by a traditional council by requiring a traditional council to –
- (a) keep proper records;
 - (b) have its financial statements audited;

- (c) disclose the receipt of gifts; or
- (d) adhere to a prescribed code of conduct.

Partnerships between municipalities and traditional councils

6. (a) Partnerships between municipalities and traditional councils must be strengthened through legislative and other measures.
- (b) Any partnership envisaged by paragraph (a) –
- (i) will be based on the principles of mutual respect and recognition of the status and role of the respective parties; and
 - (ii) must be guided and based on the principles of cooperative governance.

Support to traditional councils

7. A provincial government may adopt such legislative or other measures as may be necessary to support and strengthen the capacity of traditional councils within the province to fulfil their functions.

Withdrawal of recognition of traditional communities

8. (1) (a) The withdrawal of the recognition of a community as a traditional community as provided for in section 3 must be done in accordance with applicable provincial legislation.

(b) The provincial legislation referred to in paragraph (a), must provide for the withdrawal of the recognition of a traditional council at the same time that the recognition of its traditional community is withdrawn as provided for in paragraph (a).

(2) The withdrawal of the recognition of a community as a traditional community must be considered where –

- (a) the community concerned is requesting that its recognition as a traditional community be withdrawn;
- (b) the community concerned is requesting that it be divided into separate traditional communities;

- (c) the provincial government concerned is requested to review the position of a community or communities that were divided or merged in terms of past racially discriminatory measures prior to 1994; or
- (d) two or more communities are requesting their merger into a single traditional community.

(3) The provincial legislation referred to in subsection (1), must make provision for consultation with the provincial house of traditional leaders concerned and any community that may be affected, before the withdrawal of the recognition of a traditional community may be effected by way of notice in the Provincial Gazette in question.

Merger or division of traditional communities

9. The Premier of a province must, in terms of section 3, consider the recognition of separate traditional communities or a merged traditional community where –
- (a) the division of a traditional community or the merger of two or more traditional communities have been requested; or
 - (b) a review of the division or merger of communities envisaged by section 7(2)(c) indicates that newly constituted traditional communities must be recognised.

PART 3: LEADERSHIP POSITIONS WITHIN THE INSTITUTION OF TRADITIONAL LEADERSHIP

Recognition of traditional leadership positions

10. The following leadership positions within the institution of traditional leadership are recognised:
- (a) kingship;
 - (b) chieftainship; and
 - (c) headmanship.

Recognition of traditional leader

11. (1) Whenever the position of a king, queen, chief, chieftainess, headman or headwoman is to be filled, the following process must be followed:

- (a) The royal family concerned must, within a reasonable time after the need arose for any of those positions to be filled, and with due regard to applicable customary law:
 - (i) identify a candidate in terms of customary law to assume the position of a king, queen, chief, chieftainess, headman or headwoman, as the case may be; and
 - (ii) inform the Premier of the province concerned of the particulars of the person so identified to fill the position and the reasons for the identification of that person;
- (b) the Premier concerned must, subject to subsections (3) and (4), recognise the person so identified by the royal family in accordance with provincial legislation, as king, queen, chief, chieftainess, headman or headwoman as the case may be.

(2) The provincial legislation referred to in subsection (1)(b), must at least provide for –

- (a) a notice in the Provincial Gazette recognising the candidate identified as king, queen, chief, chieftainess, headman or headwoman in terms of subsection (1); and
- (b) the issuing of a certificate of recognition to the identified candidate.

(3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with indigenous and customary law, the Premier –

- (a) may refuse to issue a certificate of recognition; and
- (b) must refer the matter back to the royal family for reconsideration and resolution.

Recognition of regent

12. (1) Where the successor to the position of king, queen, chief, chieftainess, headman or headwoman identified in terms of section 4(1) is still a minor -

- (a) the royal family concerned must, within a reasonable time –
 - (i) identify a regent to assume leadership on behalf of the minor;

- (ii) inform the Premier of the province concerned of the particulars of the person identified as regent and the reasons for the identification of that person; and
- (b) the Premier concerned must, with due regard to applicable customary law, and subject to subsections (2) and (3), recognise the regent identified by the royal family in accordance with provincial legislation.

(2) The provincial legislation referred to in subsection (1)(b), must at least provide for –

- (a) a notice in the Provincial Gazette recognising the candidate identified as regent in terms of subsection (1);
- (b) the issuing of a certificate of recognition to the identified regent; and
- (c) the recognition of a regent to be reconsidered by the Premier at least every three years.

(3) Where there is evidence or an allegation that the identification of a person as regent was not done in accordance with customary law or processes, the Premier -

- (a) may refuse to issue a certificate of recognition; and
- (b) must refer the matter back to the royal family for reconsideration and resolution.

(4) As soon as the successor to the position of king, queen, chief, chieftainess, headman or headwoman ceases to be a minor, the regent recognised in terms of subsection (1) must relinquish his or her position as regent, and the rightful successor must be installed and a certificate of recognition be issued by the Premier in terms of section 11(2)(b) after his or her name has been published in the Provincial Gazette.

Person acting as traditional leader

13. (1) A royal family may, in accordance with provincial legislation, identify a suitable person to act as a king, queen, chief, chieftainess, headman or headwoman, as the case may be, where –

- (a) a successor to the position of a king, queen, chief, chieftainess, headman or headwoman has not been identified by the royal family concerned in terms of section 11(1); or

- (b) the identification of a successor to the position of a king, queen, chief, chieftainess, headman or headwoman is being reconsidered and resolved in terms of section 11(3).

(2) An acting appointment in terms of subsection (1) must be made in accordance with provincial legislation, which legislation must at least provide for –

- (a) the removal of a person who has been appointed in an acting position; and
(b) the issuing of a certificate of appointment in an acting position by an appropriate authority.

(3) A person who has been appointed as an acting king, queen, chief, chieftainess, headman or headwoman in terms of subsection (1), may exercise any powers and perform any duties that are attached to the kingship, chieftainship or headmanship in question.

Deputy traditional leaders

14. (1) A king, queen, chief, chieftainess, headman or headwoman, as the case may be, may, after consultation with the royal family, appoint a deputy to act in his or stead whenever that king, queen, chief, chieftainess, headman or headwoman –

- (a) becomes a full-time member of a municipal council;
(b) is elected as a member of a provincial legislature;
(c) is elected as a member of the National Assembly;
(d) is appointed as a permanent delegate in the National Council of Provinces; or
(e) is elected to, or appointed in, a full-time position in any house of traditional leaders.

(2) An appointment in terms of subsection (1) must be made in accordance with provincial legislation, which legislation must at least provide for –

- (a) the removal of a person who has been appointed as a deputy; and
(b) the issuing of a certificate of appointment to a deputy by an appropriate authority.

(3) A person who has been appointed as a deputy in terms of subsection (1), may exercise any powers and perform any duties that are attached to the kingship, chieftainship or headmanship in question.

Removal of traditional leader

15. (1) A traditional leader may be removed from office on any of the following grounds:

- (a) conviction by a criminal court, without an option of a fine, on any criminal charge;
- (b) physical incapacity, mental infirmity or age; or
- (c) where the Commission has found the traditional leader concerned to have been wrongly appointed or recognised.

(2) Whenever a traditional leader is removed from office on any of the grounds referred to in subsection (1)(a) or (b), the royal family concerned must, within a reasonable time –

- (a) inform the Premier of the province concerned of the particulars of the traditional leader to be removed from office; and
- (b) furnish reasons for the request for such removal.

(3) The Premier of the province concerned must in terms of applicable provincial legislation -

- (a) withdraw the certificate of recognition with effect from the date of removal;
- (b) publish a notice with particulars of the removed traditional leader in the Provincial Gazette; and
- (c) inform the royal family concerned and the removed traditional leader of such removal.

(4) Where a traditional leader is removed from office, a successor in line with customary rules of succession, may assume the position, role and responsibilities subject to the provisions of section 11.

PART 4: HOUSES OF TRADITIONAL LEADERS

Structuring of houses of traditional leaders

- 16.** Houses of traditional leaders are structured in the following manner:
- (a) a national house of traditional leaders and provincial houses of traditional leaders as provided for in section 212(2)(a) of the Constitution; and
 - (b) district houses of traditional leaders established in accordance with the principles set out in section 15.

District houses of traditional leaders

17. (1) A district house of traditional leaders must be established in accordance with provincial legislation for the area of jurisdiction of a district municipality or metropolitan municipality where more than one chieftainship exists in that district municipality or metropolitan municipality.

(2) (a) The number of members of a district house of traditional leaders may not be less than five and may not be more than 10.

(b) Members of a district house of traditional leaders are elected by an electoral college consisting of all kings, queens or their representatives, chiefs and chieftainesses, residing in the district municipality in question.

(3) A district house of traditional leaders has the following functions:

- (a) advising the district municipality or metropolitan municipality in question on—
 - (i) matters pertaining to indigenous and customary law, custom, traditional leadership and the traditional communities within the district municipality or metropolitan municipality;
 - (ii) the development of planning frameworks that impact on traditional communities; or
 - (iii) the development of by-laws that impact on traditional communities;
- (b) participating in local programmes that have the development of rural communities as an object; or
- (c) participating in local initiatives that are aimed at monitoring, reviewing or evaluating government programmes in rural communities.

(4) Where a district house of traditional leaders cannot be established in terms of subsection (1), the functions of a district house of traditional leaders referred to in subsection (3), are performed by the respective traditional councils within the district municipality or metropolitan municipality concerned.

PART 5: ROLES AND FUNCTIONS OF TRADITIONAL LEADERSHIP

Guiding principles for allocating roles and functions

18. (1) National government or a provincial government, as the case may be, may, through legislative or other measures, provide a role for traditional councils or traditional leaders in respect of –

- (a) arts and culture;
- (b) land administration and agriculture;
- (c) health and welfare;
- (d) the administration of justice;
- (e) safety and security;
- (f) the registration of births, deaths and customary marriages;
- (g) economic development;
- (h) environment and tourism;
- (i) the management of natural resources; and
- (j) the dissemination of information related to government policies and programmes.

(2) Whenever an organ of state within the national government or a provincial government considers allocating a role for traditional councils or traditional leaders in terms of subsection (1), that organ of state must –

- (a) consult –
 - (i) the Minister if it is an organ of state in the national sphere of government; or
 - (ii) the Member of the Executive Council responsible for traditional affairs in the province concerned if it is an organ of state of that province;
- (b) consult with the relevant structures of traditional leadership;

- (c) ensure that the allocation of a role or function is consistent with the Constitution and applicable legislation;
- (d) take the customary law and practices of the respective traditional communities into account;
- (e) strive to ensure that the allocation of a role or function is accompanied by resources, and that appropriate measures for accounting for such resources are put in place;
- (f) ensure, to the extent it is possible, that the allocation of roles or functions is implemented uniformly in areas where the institution of traditional leadership exists; and
- (g) promote the ideals of cooperative governance, integrated development planning, sustainable development and service delivery through the allocation of roles and functions.

PART 6 : DISPUTE RESOLUTION AND COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS

Dispute resolution

19. (1) Whenever a dispute concerning indigenous and customary law or custom arises within a traditional community or between traditional communities on a matter arising from the implementation of this Act, or other customary institutions, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with custom.

(2) (a) A dispute referred to in subsection (1) that cannot be resolved as provided for in that subsection, must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with its internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute as provided for in paragraph (a), the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted –

- (i) the parties to the dispute; and

- (ii) the provincial house of traditional leaders concerned.

Establishment of Commission

20. (1) There is hereby established a commission known as the Commission on Traditional Leadership Disputes and Claims.

(2) The Commission must carry out its functions in a manner that is fair, objective and impartial.

Appointment of members of Commission

21. (1) The President must appoint not more than 15 persons who are knowledgeable of custom and traditional leadership as members of the Commission.

(2) Any vacancy amongst the members of the Commission must be filled in terms of subsection (1) whenever it arises.

(3) The President may remove a member of the Commission on any of the following grounds:

- (a) conviction by a criminal court without an option of a fine;
- (b) physical incapacity;
- (c) insolvency;
- (d) declaration by court to be of unsound mind.

Vacancies

22. A vacancy occurs whenever a member of the Commission –

- (a) resigns by giving written notice to the President;
- (b) is removed in terms of section 21(3); and
- (c) becomes a member of the National Assembly, a provincial legislature or a municipal council, or becomes a permanent delegate to the National Council of Provinces.

Powers and functions of Commission

23. (1) The Commission will operate nationally and will have authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province.

(2) (a) The Commission has authority to investigate the following cases:

- (i) where there is doubt as to whether a kingship, chieftainship or headmanship was established in accordance with custom and indigenous or customary law;
- (ii) a traditional leadership position where the title or right of the incumbent is contested;
- (iii) claims by communities to be recognised as traditional communities;
- (iv) the legitimacy of establishment or disestablishment of tribes;
- (v) disputes resulting from the determination of traditional authority boundaries and the merger of tribes; and
- (vi) where good grounds exist, the Commission may, either on request or of its own accord, also investigate any other relevant matters listed in this paragraph which the Commission deems fit.

(b) A dispute or claim may be lodged by any person and should be accompanied by information setting out the nature of the dispute or claim and any other relevant or sufficient information.

(c) The Commission may refuse to consider a dispute or claim on the ground that the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information;

(d) The Commission may on its own, initiate an investigation into any matter referred to in paragraph (a).

(3) (a) When considering a dispute or claim, the Commission must consider and apply indigenous and customary law and customs of the relevant traditional community when facts occurred that give rise to the dispute or claim;

(b) The Commission must be guided by the relevant customary norms and criteria relevant to the establishment of a kingship, chieftainship and headmanship.

(4) The Commission has authority to investigate all traditional leadership claims and disputes dating from 1927, subject to subsection (2) (a) (vi).

(5) The Commission must complete its mandate within a period of five years or within such longer period as the President may determine.

(6) The provisions of sections 2,3,4,5 and 6 of the Commission Act, 1947 (Act No. 8 of 1947), read with the necessary changes, apply to the Commission.

Decisions of Commission

24. (1) A decision of the Commission is taken with the support of at least two thirds of the members of the Commission.

(2) A decision of the Commission must, within two weeks of the decision being taken, be conveyed to the relevant provincial government, which is then obliged to immediately implement the decision of the Commission in accordance with applicable provincial legislation.

(3) Any decision taken by the Commission, must be conveyed to the President.

PART 7: GENERAL PROVISIONS

Transitional arrangements

25. (1) Any traditional leader who has been appointed or recognised in terms of applicable provincial legislation immediately before the commencement of this Act, is deemed to have been appointed or recognised as provided for in section 11.

(2) A person that has immediately before the commencement of this Act been appointed or recognised as a regent, or been appointed in an acting capacity or as a deputy, is deemed to have been recognised or appointed as provided for in section 12,13 or 14, as the case may be.

(3) Any tribal authority that has been established or recognised in terms of applicable legislation immediately before the commencement of this Act, is deemed to be a traditional council as provided for in section 4 and shall carry out the functions provided for in section 5: Provided that such a tribal authority must comply with section 4(2) within four years of the commencement of this Act.

(4) (a) The member of the Executive Council of a province responsible for traditional affairs, by notice in the Provincial Gazette, must within one year of the commencement of this Act disestablish any regional authority, Ibandla Lamakhosi, Councils of Chiefs and ward authorities functioning under tribal authorities that have been established in terms of applicable legislation before the commencement of this Act.

(b) The notice disestablishing a regional authority must regulate the legal, practical and other consequences of the disestablishment, including –

- (i) the transfer of assets, liabilities and administrative and other records to an appropriate provincial department, a municipality or district house of traditional leaders, as the circumstances may require;
- (ii) the vacation of office of any office bearer of such a regional authority; and
- (iii) the transfer of staff of such a regional authority.

Short title and commencement

26. This Act is called the Traditional Leadership and Governance Framework Act, 2003, and comes into operation on a date determined by the President by proclamation in the Gazette.

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