



Province of the  
**EASTERN CAPE**

COOPERATIVE GOVERNANCE  
& TRADITIONAL AFFAIRS

## **TRADITIONAL AFFAIRS BRANCH**

### **GUIDELINES ON THE ADMINISTRATION OF JUSTICE BY TRADITIONAL COUNCILS**

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<b>Document Name</b>	<b>Guidelines on the Administration of Justice by Traditional Councils</b>
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## SIGN OFF

### 1. Head of Department

These Guidelines on the Administration of Justice by traditional councils has been recommended by N. Mosehana in my capacity as the Head of the Department of Cooperative Governance and Traditional Affairs.

I am satisfied and concur with the content of these guidelines.

The development of these guidelines will ensure that the Department is able to support traditional leaders in their endeavours to carry out their legal obligation of promoting social cohesion, peace and harmony within traditional communities in the Province.


Signed	<i>At Dusho</i>
Designation	<b>Head of Department (N. Mosehana)</b>
Date	<i>20 December 2016</i>

**SIGN OFF**

**2. Executive Authority**

The Department of Cooperative Governance and Traditional Affairs has an unprecedented opportunity to improve the lives of the people by effectively rendering many services that it is expected to provide. We have envisaged a Department that has the required capacity to respond adequately to challenges of its people.

I therefore trust that these Guidelines on the Administration of Justice by Traditional Councils will positively contribute towards the Department's endeavour of promoting peace and the restoration of justice within the rural communities of our Province.

Signed	
Designation	<b>MEC: Honourable Fikile Xasa Department of Cooperative Governance and Traditional Affairs</b>
Date	21/12/2016

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## 1. Definition of key terms

In these guidelines unless the context indicates otherwise, the following expressions bear the meanings assigned to them below—

TERM	DEFINITION
“administrative area”	means an area of jurisdiction under the authority of headmanship or headwomanship and within the jurisdictional area of a senior traditional leader in accordance with customary law;
“Administration of Justice”	means the process and structures which allows conflicts between parties to be settled by a body dedicated for that purpose;
“Black Administration Act”	means the Black Administration Act, 1927 (Act No. 38 of 1927);
“Constitution”	means the Constitution of the Republic of South Africa, 1996;
“department”	means the department responsible for Cooperative Governance and Traditional Affairs in the Province;
“Eastern Cape Traditional Leadership and Governance Act”	means the Eastern Cape Traditional Leadership and Governance Act, 2005 (Act No. 4 of 2005);
“headmen or headwomen”	means a headmen or headwomen as defined in section 1 of the Traditional Leadership and Governance Act, read with section one of the Eastern Cape Traditional Leadership and Governance Act;
the Act”	means the Black Administration Act, 1927 (Act No. 38 of 1927) as amended and partly repealed;
“traditional council”	means a traditional council established in terms of section 6 of the Eastern Cape Traditional Leadership and Governance Act, 2005 (Act No. 4 of 2005)
“traditional court”	means a court established as part of the traditional justice system which— <ul style="list-style-type: none"> <li>(a) function in terms of customary law and custom; and</li> <li>(b) is presided over by a senior traditional leader, headmen or</li> </ul>

	<p>headwomen or any member of a traditional council who has been designated as a presiding officer of a traditional court by the Minister in terms of section 12 and 20 of the Black Administration Act, as partly repealed, and which includes a forum of family and community elders who meet to resolve any dispute which has arisen, referred to herein as—</p> <p>(i) <i>iNkundla</i>; and</p> <p>(ii) <i>Kgotla</i>;</p>
<b>“traditional justice system”</b>	means a system of law which is based on customary law and customs;
<b>“Traditional Leader”</b>	means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of the Traditional Leadership and Governance Framework Act, 2003;
<b>“Traditional Leadership and Governance Framework Act”</b>	means the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

## 2. Introduction

It is the Department's considered view that the institution of traditional leadership plays a critical role within the society and traditional communities in general in respect of the administration of justice. It forms an integral part of the cultural heritage of most African communities and as such in South Africa the institution is recognised by the Constitution as the supreme law of the land. The role of traditional leadership institution in relation to the administration of justice can be traced back to the origin of human beings. A large number of people in the Eastern Cape resides in rural areas and as such subscribes to the principles of customary law and embraces the customary structures that apply this form of law. The importance of traditional leadership institution in the administrative of justice is informed by the fact that, the institution is much closer to the communities and that it uses the language and methods that members of the communities are able to

understand and relate with better than the complicated procedures that are being applied by the formal courts.

### **3. Vision and Purpose of the guidelines.**

- 3.1. The vision of these guidelines is to affirm the statutory obligation of the institution of traditional leadership in the administrative of justice in accordance with applicable legislation.
- 3.2. The primary purpose of these guidelines is to provide the process to be adhered to by traditional councils whilst presiding over civil cases or disputes arising from customary law and practices, brought before a traditional council and the process going forward in respect of registering the judgements and sanctions imposed to the defendant with the concerned Magisterial Court.

### **4. Objectives of the Guidelines**

In the main the guidelines seeks to among others—

- 4.1. Re-affirm the applicability of section 12 and 20 of the Black Administration Act No. 38 of 1927 in respect to the powers of traditional leaders to preside over certain cases.
- 4.2. Affirm the legal mandate for traditional councils/courts to preside and enhance access to justice.
- 4.3. Provide a process of registering or filling judgements and sanctions imposed by traditional councils with Magisterial' Court having jurisdiction.

### **5. Legislative and Regulatory Framework**

The legislative framework for the role of traditional leaders in the Administration of Justice is contained in various pieces of legislation including but not limited to following;



- 5.1. Section 211 of the Constitution recognises the, “the institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution”. It further recognises that a traditional authority observing a system of customary law may function, subject to any applicable legislation and customs.
- 5.2. In terms of Section 166 (e) of the Constitution, the Courts include “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”
- 5.3. The Constitutional Court confirmed in 1996 that Section 166[e], which refers to “any other court established or recognised by an Act of Parliament” accords recognition to traditional courts established in accordance to the Black Administration Act No. 38 of 1927.
- 5.4. Section 16(1) of Schedule 6 of the Constitution is more direct in its recognition of the traditional courts wherein it states that “every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and any one holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office, subject to—
  - (a) any amendment or repeal of that legislation; and
  - (b) consistency with the new Constitution”
- 5.5. Section 12 of the Black Administration Act, 1927 (Act No. 38 of 1927) as amended and partly repealed gives power to the Minister to authorise any traditional leader recognised and appointed in accordance with the applicable legislation to hear and determine any civil claims arising out of disputes on customary law and practices brought before a traditional council.
- 5.6. Accordingly section 20 of the same Act state the authorisation of traditional leaders to preside over civil disputes should be confirmed in writing by the Minister responsible for Justice and constitutional development.

- 5.7. Whilst the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (Act No. 28 of 2005) repeals the provisions of the Black Administration Act, 1927, section 1 (3) of the Act, accordingly provides for the continued enforcement of section 12 (1), (2), (3),(4) and 20 (10, (20, (30, (4), (6)and (9) until such time a national legislation is put in place to regulate matters dealt with in these sections respectively.

## **6. Values and Guiding Principles**

### **6.1. Values**

When presiding over civil cases or disputes arising from customary law, a traditional court must be guided and adhere to customary values that seek to promote social cohesion, co-existence, peace and harmony within traditional communities. Therefore, in the administration of justice by traditional courts, the following values should apply—

6.1.1. Human dignity;

6.1.2. The achievement of equality;

6.1.3. The advancement of human rights and freedom;

6.1.4. Promotion and advancement of gender equality.

6.1.5. Non-racialism and non-sexism.

6.1.6. Unfair discrimination and inequalities.

### **6.2. Guiding Principles**

In administering justice, a traditional court must adhere but not limited to the following principles—

- 6.2.1. the need to effectively resolve cases or disputes arising from customary law and practice brought before a traditional council;

- 6.2.2. the need to promote and ensure access to justice for all persons residing within the jurisdiction of a traditional council;
- 6.2.3. the promotion of measures of restorative justice and reconciliation;
- 6.2.4. the enhancement of the quality of life of traditional communities under the jurisdiction of a traditional council through mediation;
- 6.2.5. the need to demonstrate procedural fairness when adjudicating cases or disputes arising from customary law;
- 6.2.6. the need to ensure that procedures and processes of the traditional justice system are simple, flexible and familiar to traditional communities with no rigid rules.

## **7. Scope of Applicability**

These guidelines are applicable to all traditional leaders in the Province who have been conferred with a certificate by the Minister in accordance with section 20 (a) and (b) of the Black Administrative Act, 1927 (Act No. 38 of 1927) to preside over civil disputes arising from customary law and certain offences.

## **8. Procedure for resolving cases or disputes through traditional justice system**

- 8.1. The process of resolving claims or disputes must start at the family, wherein the elders in the family concerned must attempt to resolve the claim or dispute.
- 8.2. If for whatever reason the family fails to resolve the claim or dispute, such a claim or dispute must be referred to the headmen or headwomen for resolution.
- 8.3. The process of resolving a claim or dispute at the family or headmen or headwomen level must be based on customary law and practice of the concerned family or administrative area (local level).

- 8.4. If whatever reasons the matter is also not resolved at the headmen or headwomen level, such matter must be referred to the traditional council for resolution.
- 8.5. The senior traditional leader or any person designated as the head of a traditional council must convene a meeting of a traditional council to hear and debate the matter.
- 8.6. A traditional council must adopt a dispute resolution mechanisms that seeks to facilitate an agreement between the parties involved in a claim or dispute.
- 8.7. If no agreement is reached through the proposed resolution mechanisms, a senior traditional leader or any person designated as head of a traditional council in consultation with members of a traditional council must establish a traditional court to hear and adjudicate over the matter.
- 8.8. The hearing and adjudication must be done through formal processes of a traditional court which must be open to members of the community.
- 8.9. All claims or disputes brought before the headmen or headwomen as well as the judgement and sanctions imposed thereof, must be reported and registered with the traditional council concerned.
- 8.10. A traditional council may decide which claims or disputes are supposed to be heard and adjudicated at local level by a headmen or headwomen.

## **9. The procedures to be followed in the Administration of Justice by Traditional Councils**

- 9.1. Traditional court may only preside over cases or disputes that arise from the customary law and practices in line with the customs and practices of a traditional community concerned.
- 9.2. When resolving disputes arising from customary law or the interpretation of customs traditional councils must follow customary procedures applicable to the customs and practices within their jurisdictional areas.

- 9.3. All civil cases brought before a traditional council must be recorded before any adjudication by a traditional court (but taking into consideration that traditional courts are not courts of law).
- 9.4. An accused or defendant may be represented by a member of the family or community who is knowledgeable about customary law practice of the community or tribe concerned.
- 9.5. A traditional council must inform or register all reported civil cases with the Magisterial Office having jurisdiction before the adjudication processes.

#### **10. Process and procedure for imposing sanctions**

- 10.1. A traditional court may impose sanctions in accordance with applicable customary law and practices of a traditional community concerned in line with section 20 (2) of the Act.
- 10.2. A traditional court must not impose any form of imprisonment or suspended sentence.
- 10.3. A traditional court may impose fines and monetary or livestock compensation in accordance with the customs and practices of traditional communities concerned.
- 10.4. A traditional court must impose sanctions in accordance with the applicable legislation.
- 10.5. The sanctions imposed by a traditional court must seek to facilitate reconciliation and restorative justice between parties involved in a dispute.
- 10.6. Before imposing a sanction, a traditional council must seek to offer the accused person the opportunity to voluntarily impose sanction on himself or herself to indicate his or her contribution and to wash away his or her offence.
- 10.7. After imposing a sanction a traditional court must ask the accused/defendant if he or she understand and agree with judgement and sanction thereof.

10.8. If the accused/defendant does not agree with the judgement and sanction, the court must inform the accused/defendant of his or her rights to appeal the judgement or sanction with the Magistrate Court within the jurisdiction.

## **11. Keeping of certain records**

11.1. A traditional court must record all the proceedings of the hearing.

11.2. However, a traditional council must have and keep a register in which the following must be accurately recorded;

11.2.1. All civil cases or disputes brought before a traditional council;

11.2.2. All cases or disputes adjudicated by a traditional court;

11.2.3. All sanctions imposed to accused/offenders;

11.2.4. All fines paid by offenders to a traditional council and/or to complainant;

11.2.5. All monies paid by a traditional council to the complainant as a compensation;

11.2.6. All decisions or judgement and the reasons for such decisions or judgement taken by a traditional court in respect of cases or disputes brought before a traditional council.

11.2.7. The date of the judgement.

11.2.8. All completed cases registered with the Magisterial Office having a jurisdiction.

11.3. The records must be signed by the senior traditional leader or any person designated as head of a traditional council by the royal family or traditional council.

- 11.4. The records of the proceedings must be registered or filed with the clerk of the Magistrate's Court having jurisdiction in accordance with the applicable procedure and processes.
- 11.5. Copies of the records must be given to the affected parties and one copy must be kept by the traditional council.
- 11.6. The purpose of filing records with Magistrate Court is to indicate that a particular case or dispute was brought before and adjudicated by a traditional court as well as for purpose of processing an appeal or assistance in the execution of judgement by the Magistrate's Court having a jurisdiction.

**12. Review of decision or judgement of a traditional council**

A decision or judgement of a traditional court and sanction imposed by a traditional court thereof, may be reviewed by the Magistrate' Court having jurisdiction.

**13. Approval of the Guidelines**

These guidelines shall be approved by the Executive Authority on the recommendation of the Head of Department as per the updated departmental delegations.

**14. Administration of the Guidelines**

Responsibility and accountability for implementing the guidelines rests with the Head of Department and ultimately the Executive Authority.

**15. Effective date of the Guidelines**

These guidelines shall become effective on the date it is signed by the Executive Authority (MEC) responsible for Cooperative Governance and Traditional Affairs.

## **16. Procedure for implementing these Guidelines**

There is no separate procedure for the implementation of the guidelines as they will be incorporated into the daily activities of the management of all affected directorate's programmes. It is therefore critical that the management of affected programmes or directorates who are responsible for providing support to traditional councils, to familiarise themselves with the contents of the guidelines.