

REPUBLIC OF SOUTH AFRICA

**REPEAL OF BLACK
ADMINISTRATION ACT AND
AMENDMENT OF CERTAIN
LAWS BILL**

*(As amended by the Select Committee on Security and Constitutional Affairs
(National Council of Provinces))
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

[B 25D—2005]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To repeal the provisions of the Black Administration Act, 1927, incrementally; to amend the Administration of Estates Act, 1965, so as to give the Masters of the High Courts jurisdiction over the property of all minors, including those who are governed by the principles of customary law; and to provide for matters connected therewith.

PREAMBLE

SINCE the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted so as to—

- establish a society based on democratic values, social and economic justice, equality and fundamental human rights;
- improve the quality of life of all citizens; and
- free the potential of each person by every means possible;

AND SINCE the Black Administration Act, 1927 (the Act), is regarded as a law that—

- is repugnant to the values set out in the Constitution, particularly section 1 and the Bill of Rights in Chapter 2 thereof;
- is reminiscent of past divisions and discrimination; and
- ought to be repealed as a matter of the utmost urgency;

AND SINCE the repeal of some provisions of the Act, in the interests of legal certainty and good governance, necessitates the incremental approach adopted hereunder, by repealing those provisions of the Act requiring legislative alternatives on a fixed and reasonably foreseeable future date or on such date as the legislative alternatives are implemented by the role players in question, whichever occurs earlier;

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

Repeal of Act 38 of 1927 and savings

1. (1) Sections 1, 2(1), (2), (3), (5), (6) and (9), 3, 5(1)(a), 11(3)(a), 11A, 21A, 23(1), (2), (3), (5), (6), (7)(b), (8), (9), (10)(a), (b), (c), (e) and (f) and (11), 26(1), 27, 31, 33, 34 and the Second Schedule of the Black Administration Act, 1927 (Act No. 38 of 1927) (hereafter referred to as the Act), are hereby repealed. 5

(2) Section 2(7), (7)bis, (7)ter and (8) of the Act is hereby repealed on—

- (a) 31 July 2006; or
- (b) such date when the last of the provinces of— 10
 - (i) KwaZulu-Natal;
 - (ii) Free State;
 - (iii) Mpumalanga;
 - (iv) North West;
 - (v) Limpopo; and 15
 - (vi) Eastern Cape,

have repealed those provisions that were assigned to them or their equivalent and have enacted and implemented corresponding provincial legislation regulating the matters dealt with in section 2(7), (7)bis, (7)ter and (8) of the Act in terms of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), within their areas of jurisdiction, 20

whichever occurs first.

(3) Sections 12(1), (2), (3), (4) and (6) and 20(1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act are hereby repealed on—

- (a) 31 July 2006; or 25
- (b) such date as national legislation to further regulate the matters dealt with in sections 12(1), (2), (3), (4) and (6) and 20(1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act is implemented,

whichever occurs first.

(4) Section 22(7) and (8) of the Act is hereby repealed on— 30

- (a) 31 July 2006; or
- (b) such date as national legislation to further regulate the matters dealt with in section 22(7) and (8) of the Act is implemented,

whichever occurs first.

(5) Section 24 of the Act is hereby repealed on— 35

- (a) 31 July 2006; or
- (b) such date as provincial legislation in the province of KwaZulu-Natal in order to further regulate the matters dealt with in section 24 of the Act is implemented,

whichever occurs first. 40

(6) Any—

- (a) proclamation made under section 25(1) of the Act, including a proclamation validated by an Act of Parliament, and in force immediately prior to the commencement of section 5 of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991), in an area, including a former self-governing territory; 45
- (b) regulation made under section 30(2) of the Act or any by-law made under section 30A(1) of the Act and in force immediately prior to the commencement of section 8 of the Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991), in an area, including a former self-governing territory, 50

which has not been repealed in terms of section 87 of the said Abolition of Racially Based Land Measures Act, 1991, is hereby repealed on—

- (i) 31 July 2006; or
- (ii) such date as it is repealed by a competent authority,

whichever occurs first. 55

(7) Sections 32, 35, 36, 37, the long title and First Schedule of the Act are hereby repealed subject to the repeal of all the provisions referred to in subsections (1) to (6).

(8) (a) The repeal of any section, including sections 11A, 31, 34 and the Second Schedule of the Black Administration Act, 1927, by this Act must not be construed as derogating from any right which was acquired in terms of any section of the Black Administration Act, 1927, prior to the repeal thereof by this Act. 60

(b) The Registrar of Deeds having jurisdiction must, without charge, remove any restrictive condition contained in a deed which was imposed by virtue of the operation of section 34 of the Black Administration Act, 1927, and contemplated in the Second Schedule thereto, if the Minister responsible for land affairs in writing approves an application by the owner of the land in question for such removal. 5

Amendment of section 4 of Act 66 of 1965, as amended by section 1 of Act 86 of 1983, section 26 of Act 57 of 1988, section 4 of Act 20 of 2001 and section 2 of Act 47 of 2002

2. Section 4 of the Administration of Estates Act, 1965, is hereby amended by the substitution for subsection (2) of the following subsection: 10

“(2) In respect of the property belonging to a minor, including property of a minor governed by the principles of customary law, or property belonging to a person under curatorship or to be placed under curatorship, jurisdiction shall lie—
 (a) in the case of any such person who is ordinarily resident within the area of jurisdiction of a High Court, with the Master appointed in respect of that area; 15
 and
 (b) in the case of any such person who is not so resident, with the Master appointed in respect of any such area in which is situate the greater or greatest portion of the property of that person: 20

Provided that— 20

- (i) a Master who has exercised jurisdiction under paragraph (a) or (b) shall continue to have jurisdiction notwithstanding any change in the ordinary residence of the person concerned or in the situation of the greater or greatest portion of his or her property; and
- (ii) in the case of any mentally ill person who under the Mental Health Act, 1973 (Act No. 18 of 1973), has been received or is detained in any place, jurisdiction shall lie with the Master who, immediately prior to such reception or detention, had jurisdiction in respect of his or her property under paragraph (a) or (b).” 25

Short title 30

3. This Act shall be called the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005.

**MEMORANDUM ON THE OBJECTS OF THE REPEAL OF THE
BLACK ADMINISTRATION ACT AND AMENDMENT OF CERTAIN
LAWS BILL, 2005**

1. Purpose of Bill and Background Information:

- 1.1 The Bill, which emanates from an investigation and report of the South African Law Reform Commission, is intended to repeal the Black Administration Act, 1927 (Act 38 of 1927) (the Act), on an incremental basis. Since not all of the provisions of the Act can be repealed immediately, the Bill envisages the repeal of some of the provisions immediately, and others, on a particular date in the near future or on the date of implementation of substitute statutory provisions by different roleplayers at the national and provincial levels of government, whichever occurs earlier.
- 1.2 There are certain provisions of the Act which can be repealed immediately without any implications, while others created a detailed system of governance, the outright repeal of which does not represent a satisfactory solution unless they are replaced by appropriate alternative provisions. Moreover, some provisions of the Act are administered by Government Departments other than the Department of Justice and Constitutional Development, namely the Departments of Provincial and Local Government and Land Affairs at national level, as well as different departments at the provincial level of government.

2. Objects of Bill:

- 2.1 Clause 1 forms the crux of the Bill and, as mentioned above, intends to repeal the provisions of the Act on an incremental basis. It also contains some savings provisions. This clause attempts to categorise the different provisions of the Act that are intended for repeal, in such a manner that those provisions of the Act that—
- can be repealed without any problem, are in fact repealed immediately; and
 - require alternative provisions in their place, are repealed when the different Departments and levels of government have enacted and implemented such alternative provisions or on the date specified in the Bill (31 July 2006), whichever occurs first (a sunset clause).
- 2.2 Clause 1(1) deals with sections of the Act that can be repealed immediately without any implications. It seeks to repeal the following sections of the Act:
- (a) Section 1, dealing with the powers of the Governor-General (the President or Premiers where assignments to provinces have taken place) as Supreme Chief of all Blacks;
 - (b) section 2(1), (2), (3), (5) and (6) dealing with the appointment of different categories of commissioners and tribal settlement superintendents;
 - (c) section 2(9), providing for the punishment of a person who obstructs any officer, chief or headman in the lawful execution of his duty;
 - (d) section 3, dealing with the circumstances when a “tribe” is bound by the personal obligations of its “chief”;
 - (e) section 5(1)(a), which empowers the Governor-General to define the boundaries of the area of any tribe or of a tribal settlement and to amalgamate tribes or to constitute a new tribe;
 - (f) section 11(3)(a), which regulates the law to be applied in a Commissioner’s Court;
 - (g) section 11A, dealing with the legal capacity of Black women in relation to leasehold and ownership;
 - (h) section 21A, which empowers the Minister for Justice and Constitutional Development to confer certain judicial powers on persons in respect of the now defunct community councils;
 - (i) section 23(1), (2), (3), (5), (6), (7)(b), (8), (9), (10)(a), (b), (c), (e) and (f) and (11), dealing with the Customary Law of Succession;

- (j) Section 26(1), providing that a list of proclamations issued by the President under the authority of this Act must be tabled in Parliament;
- (k) section 27, which empowers the President to make regulations in respect of a large range of issues relating to Black persons;
- (l) section 31, empowering the President to grant to any Black person a letter exempting the recipient from Black law and customs;
- (m) section 33, providing that no stamp duty or fee shall be payable in respect of any declaration made under the provisions of the Act;
- (n) section 34 and the Second Schedule to the Act, dealing with the extension of the operation of the Act to any area or piece of land in the district of Namaqualand which has been granted, set apart, reserved or made available for occupation by persons commonly described as “Hottentots or Bastards” or to the areas comprising the Fingo and the “Hottentot” villages in the Grahamstown urban area.

2.3 Clause 1(2) repeals the sections of the Act that are administered by the Department of Provincial and Local Government and the six provinces to which the administration thereof was assigned in 1994, namely section 2(7), (7)*bis*, (7)*ter* and (8). Section 2(7) provides that the Governor-General may recognise or appoint and depose any person as a chief of a Black tribe and may make regulations prescribing the duties, powers, privileges and conditions of service of such persons. Section 2(7)*bis* provides that the Governor-General may, in certain circumstances, make an order awarding to, or imposing on, the person recognised or appointed as a chief, such of the property, rights or obligations of the previous chief as the Governor-General may deem just. Section 2(7)*ter* provides that any person affected by an order made in terms of section 2(7)*bis* may petition the Governor-General for the amplification, variation or interpretation of the provisions of the order, in respect of which the Governor-General may make such order thereon as he may deem fit. Section 2(8) provides that the Minister or his delegate may appoint any person as headman over a tribal settlement or as headman of the Blacks in any area and may appoint any person to act temporarily as a chief or headman in the place of or in addition to the ordinary incumbent of the post and may also depose such person. This clause provides that these provisions are repealed on 31 July 2006 or on such date when the last of the provinces of KwaZulu-Natal, Free State, Mpumalanga, North West, Limpopo and the Eastern Cape have repealed these provisions that were assigned to them or their equivalent and have enacted and implemented corresponding provincial legislation dealing with these matters, as contemplated in the Traditional Leadership and Governance Framework Act, 2003, whichever occurs first.

2.4 Clause 1(3) of the Bill deals with the repeal of sections of the Act that are administered by the Department of Justice and Constitutional Development, namely the remaining provisions of sections 12 and 20 and the Third Schedule to the Act, which regulate the judicial powers of traditional leaders and Traditional Courts. The repeal of these provisions can only take place once the Justice Department has promoted and implemented new legislation dealing with these issues. Clause 1(3) consequently provides that the remaining provisions of sections 12 and 20 and the Third Schedule to the Act are repealed on the date of implementation of national legislation to further regulate the matters dealt with in these sections or on 31 July 2006, whichever occurs first.

2.5 Clause 1(4) deals with the repeal of the remaining provisions of section 22 of the Act, sections which is also administered by the Department of Justice and Constitutional Development and which relates to issues of customary marriages. The repeal of these provisions of the Act can only take place once new legislation dealing with these issues has been enacted and implemented. Clause 1(4) consequently provides that the remaining provisions of sections 22 of the Act are repealed on the date of implementation of national legislation to further regulate the matters dealt with in section 22(7) and (8) of the Act or on 31 July 2006, whichever occurs first.

- 2.6 Clause 1(5) seeks to repeal section 24 of the Act, dealing with the Code of Zulu Law. Section 24 of the Act provides that, notwithstanding the repeal of Natal Law 19 of 1981 by section 1 of the Black Laws Amendment Act, 1976, the Schedule to that Act, as substituted by Proclamation R. 195 of 1967, shall remain of full force as law for Blacks in Natal, and the State President may from time to time by proclamation in the Gazette amend, repeal or substitute the provisions of that Schedule, which shall be known as the Code of Zulu Law. The proclamation containing the Code of Zulu Law was assigned to the province of KwaZulu-Natal in 1994. The repeal of section 24 of the Act is dependent on the Kwazulu-Natal Provincial Legislature enacting substitute legislation. Clause 1(5) consequently provides that section 24 of the Act is repealed on the date of implementation of provincial legislation by KwaZulu-Natal to further regulate the matters dealt with in section 24 of the Act or on 31 July 2006, whichever occurs first.
- 2.7 Clause 1(6) seeks to repeal subordinate legislation made under the Act. This subordinate legislation has been “kept alive” by virtue of the Abolition of Racially Based Land Measures Act, 1991 (Act 108 of 1991). Clause 1(6) provides that any proclamation made under section 25 of the Act, any regulation made under section 30(2) of the Act or any by-law made under section 30A of the Act and which was in force prior to the commencement of the Abolition of Racially Based Land Measures Act, 1991, which has not yet been repealed, is repealed on 31 July 2006 or on such date as it is repealed by a competent authority, whichever occurs first. This approach has been followed in an attempt to create legal certainty since it has proved virtually impossible to try and identify the remaining subordinate legislation, let alone to try and ascertain whether it is still being applied in practice.
- 2.8 Clause 1(7) deals with the repeal of sections, 32, 35, 36, 37, the long title and the First Schedule of the Act, which respectively provide for penalties in the event of a breach of any proclamation, rule or regulation made under the authority of the Act (section 32), definitions (section 35), the repeal of laws (section 36), the short title of the Act and the commencement thereof (section 37), the long title and the First Schedule thereto which deals with the laws the Act repealed at its commencement. This subclause envisages the repeal of these sections once the other provisions of the Act have been repealed, that is all the provisions referred to in clause 1(1) to (6).
- 2.9 Clause 1(8) contains savings provisions. Clause 1(8)(a) makes provision for the protection of vested rights and provides that the repeal of any section, including sections 11A, 31, 34 and the Second Schedule of the Act, by the Bill does not affect any rights acquired in terms of those sections prior to their repeal. Clause 1(8)(b) gives effect to a request of the Department of Land Affairs that a provision be built into the Bill to provide that any restrictive condition contained in an existing deed which was imposed by virtue of section 34 and Schedule 2, must be withdrawn by the relevant Registrar of Deeds, without charge, if the Minister responsible for land affairs in writing approves an application by the owner of the land in question for such removal.
- 2.10 Clause 2 of the Bill amends section 4(2) of the Administration of Estate Act, 1965, the aim of which is to ensure that all minors are treated in the same manner. Section 4 of the Administration of Estates Act, 1965, deals with the jurisdiction of Masters of the High Courts, subsection (1) thereof dealing with the jurisdiction of Masters in the case of deceased estates. Section 4(2) deals with the jurisdiction of Masters in respect of property belonging to minors. This amendment is proposed in order to bring about legal certainty, leaving no doubt that the property of all minors, including the property of those minors who are governed by the principles of customary law, enjoy the protection of the High Courts as upper guardians of all minors.

3. CONSULTATION:

The South African Law Reform Commission, during the course of its investigation, consulted with relevant roleplayers and the Department of Justice and Constitutional Development, when evaluating the report of the Commission, consulted with the Departments of Provincial and Local Government and Land Affairs.

4. IMPLICATIONS FOR PROVINCES:

The six provinces to which the administration of some of the provisions of the Act were assigned will be required to enact and implement provincial legislation as contemplated in the Traditional Leadership and Governance Framework Act, 2003, prior to a date set in the Bill before some of the provisions of the Act can be repealed, failing which the said provisions will be repealed.

5. FINANCIAL IMPLICATIONS:

None.

6. PARLIAMENTARY PROCEDURE:

- 6.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by subsection (1) or (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution (that is indigenous law and customary law, subject to Chapter 12 of the Constitution).
- 6.2 The State Law Advisers are of the opinion that it is necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does contain provisions pertaining to customary law or customs of traditional communities.