

CHAPTER 7:05

CUSTOMARY LAW AND LOCAL COURTS ACT

(Will be amended by the Judicial Service Act [Chapter7:18] (No.10 of 2006) when it comes into

operation.) Acts 2/1990, 22/1992 (s. 18), 22/1995; 6/1997 (s. 10); 9/1997 (s. 10) 22/2001 (s. 4), 4/2003; S.I. 158/2004.

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AN ACT to provide for the application of customary law in the determination of civil cases; to provide for the constitution and jurisdiction of local courts; to provide for appeals from the decisions of such courts; and to provide for matters connected with or incidental to the foregoing.

[Date of commencement: Parts I, III, IV, V, VI and VII - 12th February, 1992, Part II - 1st November, 1997.]

PART I

PRELIMINARY

1 Short title

This Act may be cited as the Customary Law and Local Courts Act [*Chapter 7:05*].

2 Interpretation

In this Act—

“chief” means—

- (a) any person appointed as a chief in term of subsection (1) of section 3 of the Chiefs and Headmen Act [*Chapter 29:01*];
- (b) any person appointed as an acting chief in terms of subsection (1) of section 4 of the Chiefs and Headmen Act [*Chapter 29:01*];

“community court” means a community court constituted in terms of paragraph (b) of subsection (1) of section *ten*;

“customary law” means the customary law of the people of Zimbabwe, or of any section or community of such people, before the 10th June, 1891, as modified and developed since that date;

“designated officer” means an officer designated by the Minister in terms of section *twenty-nine*;

“general law of Zimbabwe” means the common law of Zimbabwe and any enactment, and excludes customary law;

“headman” means any headman, acting headman or deputy headman appointed in terms of section 8 of the Chiefs and Headmen Act [*Chapter 29:01*];

“local court” means a primary court or community court;

“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“primary court” means a primary court constituted in terms of paragraph (a) of subsection (1) of section *ten*;

“province” means a province created in terms of section 3 of the Magistrates Court Act [*Chapter 7:10*];

“Secretary” means the Secretary of the Ministry for which the Minister is responsible. PART II

CUSTOMARY LAW

3 Application of customary law

(1) Subject to this Act and any other enactment, unless the justice of the case otherwise requires— (a) customary law shall apply in any civil case where—

- (i) the parties have expressly agreed that it should apply; or
- (ii) regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
- (iii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;

(b) the general law of Zimbabwe shall apply in all other cases.

(2) For the purposes of paragraph (a) of subsection (1)—

“surrounding circumstances”, in relation to a case, shall, without limiting the expression, include— (a) the mode of life of the parties;

- (b) the subject matter of the case;
- (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which apply to the case;
- (d) the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe, as the case may be.

4 Capacity

Subject to any enactment affecting such capacity, the capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law or to inherit rights or property shall be determined in accordance with the general law of Zimbabwe.

5 Interests of children paramount

In any case relating to the custody or guardianship of children, the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied.

6 Polygamous marriages: recognized

Subject to section 3 of the Customary Marriages Act [*Chapter 5:07*] and to any other enactment, if in any civil case a question arises as to the effects of a marriage which was contracted according to customary law by a person at a time when he already had another wife or other wives married to him according to customary law, the court shall treat such marriage as valid for all civil purposes, in so far as polygamous marriages are recognized by customary law.

7 Marriage: prohibited degrees of relationship

Customary law as to the prohibition of marriage between persons on account of their relationship by blood or affinity shall, in relation to persons to whom customary law is applicable, prevail over the general law of Zimbabwe:

Provided that, in regard to any marriage between persons which is, or is to be, contracted under the Marriage Act [*Chapter 5:11*], the general law of Zimbabwe on the aforesaid subject shall prevail over customary law.

8 Different systems of customary law

In any case where customary law is applicable and the parties are connected with different systems of customary law, the court shall apply the customary law by which the parties have agreed that their obligations should be regulated or, in the absence of such agreement, the customary law with which the case and the parties have the closest connection and if that is not ascertainable, the court shall apply any system of customary law which the court considers it would be just and fair to apply in the determination of the case.

9 Ascertainment of customary law

If a court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made and such evidence thereof as may be tendered by or on behalf of the parties, it may, without derogation from any other lawful source to which it may have recourse, consult reported cases, text books and other sources. and may receive opinions, either orally or in writing, to enable it to arrive at a decision in the matter: Provided that—

- (i) the decision as to the person whose opinions are to be relied upon shall be one for the court after considering such submissions thereon as may be made and such evidence thereof as may be tendered by or on behalf of the parties;
- (ii) any cases, text books, sources and opinions consulted by the court shall be made available to the parties;
- (iii) any such oral opinion shall be given to the court in the same manner as oral evidence.

PART III

CONSTITUTION OF LOCAL COURTS

10 Constitution of local courts

(1) The Minister may, by warrant published in a statutory instrument, constitute— (a) primary courts; and

(b) community courts; for such areas as may

be specified in the warrants.

(2) A local court constituted in terms of subsection (1) shall be a court of law and, within the area specified in the warrant by which it is constituted, shall exercise so much of the jurisdiction conferred by this Act as is specified in the warrant.

(3) The Minister may, by statutory instrument, amend or revoke any warrant referred to in subsection (1).

11 Composition of local courts

(1) Every primary court shall be presided over by a headman or other person who—

(a) shall be appointed to his office by the Minister or by a designated officer authorized thereto by the Minister; and

(b) may be removed from his office by the Minister or by a designated officer authorized thereto by the Minister.

(2) Every community court shall be presided over by a chief or other person who—

(a) shall be appointed to his office by the Minister or by a designate officer authorized thereto by the Minister; and

(b) may be removed from his office by the Minister or by a designated officer authorized thereto by the Minister.

(3) Before appointing a person to preside over a local court or removing him from his office in relation to that court, the Minister or designated officer, as the case may be, shall consult the Minister responsible for the administration of the Chiefs and Headmen Act [*Chapter 29:01*]:

Provided that the Minister or designated officer shall not appoint a member of the Public Service to preside over a local court, or remove him from his office in relation to that court, without the approval of the Public Service Commission.

(4) Persons presiding over local courts, other than headmen, chiefs and persons in the full-time employment of the State or a local authority, may be paid such remuneration and allowances as may be prescribed.

12 Assessors in local courts

(1) The person presiding over a local court shall exercise all the jurisdiction and powers of the court but, in the hearing of every case, shall be assisted by not fewer than two and not more than five assessors who shall be chosen by him from a list of persons prepared by him and approved by a designated officer.

(2) Assessors referred to in subsection (1)—

(a) shall act in an advisory capacity only and shall not be entitled to a vote in the decision of the court; and (b) may be paid such remuneration and allowances as may be prescribed.

13 Appointment of messengers of local courts

(1) Subject to such terms and conditions as he may determine, the Minister or any person authorized thereto by the Minister may appoint messengers of any local court for the purpose of serving the process of the court and for exercising such other functions as may be conferred or imposed upon a messenger by or in terms of this Act:

Provided that before appointing a messenger to a local court presided over by a chief or headman, the Minister or person authorized by the Minister, as the case may be, shall consult the chief or headman concerned.

(2) The person presiding over a local court may appoint a person to act as messenger, whenever by reason of illness, absence, or interest of the messenger or on the application of any person interested, he considers it necessary or expedient to do so.

(3) A messenger appointed in terms of subsection (1) or (2) shall not be a member of the Public Service.

(4) The allowances and additionally, or alternatively, the fees of a messenger appointed in terms of subsections (1) and (2) shall be as prescribed.

(5) Notwithstanding the appointment of messengers in terms of subsection (1) or (2), any police officer shall be competent to serve any summons, subpoena, notice, order or other document in connection with any case in a local court as if he were a duly appointed messenger of the local court.

14 Appointment of clerks of local courts

(1) Subject to this section, the Minister or a person authorized thereto by the Minister may appoint a clerk to any local court for the purpose of issuing court process and exercising such other functions as may be prescribed or as may be conferred or imposed upon him by the person presiding over the local court concerned:

Provided that, before appointing a clerk to a court presided over by a chief or headman, the Minister or person authorized by the Minister, as the case may be, shall consult the chief or headman concerned.

(2) A clerk appointed in terms of subsection (1) shall not be a member of the Public Service.

(3) The allowances and additionally, or alternatively, the fees of a clerk appointed in terms of subsection (1) shall be as prescribed.

PART IV

JURISDICTION OF LOCAL COURTS

15 Jurisdiction of local courts

Subject to this Act and any other enactment and in particular to section *sixteen*, a local court shall have jurisdiction to hear, try and determine any civil case in which customary law is applicable where— (a) the defendant is normally resident within the area of jurisdiction of the court; or

(b) the cause of action or any element thereof arose within such area; or (c) the defendant consents to the jurisdiction of the court.

16 Limits of jurisdiction of local courts

(1) A local court shall have no jurisdiction in any case— (a) where the claim is not determinable by customary law; or

(b) subject to subsection (2), where the claim or the value of any article claimed exceeds— (i) fifty million dollars, in the case of a primary court; or

(ii) one hundred million dollars, in the case of a community court; or

(c) to determine the validity, effect or interpretation of any will; or (d) to dissolve any marriage:

Provided that a community court may adjudicate upon marital relationships which, though recognized by customary law, have not been solemnized in terms of the Customary Marriages Act [*Chapter 5:07*]; or

(e) to determine the custody or guardianship of minors; or (f) to determine the liability of any person to maintain another; or (g) to determine rights in respect of land or other immovable property.

(2) The Minister may, by statutory instrument, amend paragraph (b) of subsection (1) so as to alter the monetary limits of jurisdiction of local courts and, in so doing, may prescribe different amounts in respect of different classes of case:

Provided that no such amendment shall have effect in relation to any case instituted in the local court concerned before the date of commencement of the statutory instrument.

17 Orders that may be made by local courts

Subject to this Act and any other enactment, a local court may, in any case—

- (a) order the payment of damages or compensation;
- (b) order the specific performance of a contract;
- (d) order the payment of penal damages where customary law so permits or requires;
- (e) make such order as to costs as may be just;
- (f) make any other order which the justice of the case may require; and may make any combination of such orders.

18 Enforcement of judgments of local courts

(1) Where a judgment of a local court is not satisfied within the period specified by the court, the judgment creditor may request the clerk of the local court to issue a writ of execution against the property of the judgment debtor.

(2) The judgment creditor may, on payment of the prescribed messenger's fees, require the messenger of a local court to serve and enforce the writ of execution issued in terms of subsection (1), and in such event the procedure for attachment and sale in execution which applies in the Magistrates courts, including the provisions relating to the exemption of property from execution, shall apply, *mutatis mutandis*, in relation to the attachment and sale of property in execution of the writ of execution.

(3) No writ of execution issued in terms of subsection (1) shall be executed pending the final determination of any appeal which has been lodged against the judgment concerned.

(4) No judgment shall be enforced in terms of subsection (1) more than two years after the judgment was pronounced, unless the judgment has been revived in terms of subsection (5).

(5) A judgment of a local court may be revived either by the local court in which it was pronounced or by any other local court having jurisdiction in respect of the judgment debtor.

[Section as substituted by Act 4 of 2003]

PART V

PROCEDURE IN LOCAL COURTS

19 Summoning of witnesses, parties, etc.

(1) Subject to this Act, every local court shall have the power to summon before it any person who is— (a) the defendant in a case before that court; or (b) required to give evidence before that court.

(2) If a person summoned in terms of paragraph (b) of subsection (1) fails to appear or to remain in attendance until excused by the local court, and the court is satisfied, upon the production by any person of a document purporting to be a certificate signed by the person required to serve the summons or upon any other evidence, that the person concerned was duly summoned, the court may, if no sufficient cause for the default appears to exist, order the arrest of the defaulter.

(3) Where an order is made by a local court in terms of subsection (2) the person whose arrest has been ordered shall be arrested and brought forthwith before that court— (a) by the messenger of that court; or

(b) if the messenger of that court is unable to arrest that person, and if the order is in writing and endorsed by a magistrate, by a messenger of the magistrates court or a police officer to whom it is transmitted.

(4) After hearing a person who has been brought before it in terms of subsection (3) the local court may summarily impose upon him a fine not exceeding level one.

(5) Any person who has been fined in terms of subsection (4) may appeal against the fine in accordance with section *twenty-three* or *twenty-four*, as the case may be, as if it were the decision of the local court concerned in a civil case.

20 Procedure in local courts

(1) Subject to this Act, the procedure and law of evidence in local courts shall be regulated by customary law and not by the general law of Zimbabwe, and the proceedings in such courts shall be conducted in as simple and informal a manner as is reasonably possible and as, in the opinion of the person presiding over the court, seems best fitted to do substantial justice.

(2) A legal practitioner shall not be entitled to appear in a local court on behalf of a party in any case before such court.

(3) Subject to the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*], all cases in a local court shall be heard in open court.

21 Contempt of local courts

(1) If any person wilfully insults a local court or any member thereof during any sitting of the local court or wilfully interrupts the proceedings of the local court or otherwise wilfully disturbs the peace or order of such proceedings the person presiding over the court may order that person to be removed and detained in custody as if he were a prisoner awaiting trial until the rising of the local court, and such person shall be liable, in addition to such removal and detention, to be sentenced summarily by the person presiding over the court to a fine not exceeding level one.

(2) Any person who has been sentenced to a fine in terms of subsection (1) may appeal against the fine in accordance with section *twenty-three* or *twenty-four* as the case may be, as if the sentence were the decision of the local court concerned in a civil case.

22 Transfer of cases between local courts

(1) In any case before a local court, the person presiding over the court may—

- (a) if it appears to him that the case is not one to be determined according to customary law or that his court does not otherwise have jurisdiction to try the case; or
- (b) for other good cause; at any stage before judgment, stop the proceedings and refer the case to a magistrate for directions as to the transfer of the case to another court.

(2) A magistrate to whom a case has been referred in terms of subsection (1) may—

- (a) annul the proceedings and transfer the case to be heard, *de novo*, by another local court or by a magistrates court of competent jurisdiction; or
- (b) direct that the case should be continued in the court which referred the matter to him.

PART VI

APPEALS AND REVIEWS

23 Appeals from primary courts

(1) Any person who is dissatisfied with any decision of a primary court may, in the time and manner prescribed, appeal against such decision to the community court within whose area of jurisdiction the primary court is situated.

(2) Upon an appeal being made in terms of subsection (1) the community court shall rehear the case and shall give such decision, order or direction as it thinks fit.

24 Appeals from community courts

(1) Any person who is dissatisfied with any decision of a community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the community court is situated.

(2) Upon an appeal being made in terms of subsection (1), the magistrate shall rehear the case and shall give such decision, order or direction as he thinks fit.

(3) For the hearing of an appeal in any civil case, a magistrate may summon to his assistance two or more assessors chosen by him from a list of persons prepared by the Secretary with the approval of the Minister.

(4) Any assessor summoned in terms of subsection (3) shall act in an advisory capacity only and shall not be entitled to a vote in the decision of the court.

(5) An assessor summoned in terms of subsection (3) may be paid such allowances as may be prescribed from moneys appropriated to the purpose by Act of Parliament.

(6) An appeal shall lie to the High Court against a decision, order or direction given by a magistrate in terms of subsection (2) as if were an appeal against a judgment in a civil suit by the magistrate, and for such purposes the law relating to such appeals shall apply, *mutatis mutandis*.

(Subsection as amended by s. 10 of Act No. 9 of 1997)

25 Review by magistrates of proceedings of local courts

(1) Where it comes to the notice of a magistrate that a local court within his province may have given a judgment or order which it was not competent to give, he shall direct the local court to refer the case to him, together with such report thereon as the person presiding over the community court or primary court may wish to give.

(2) Where it appears to a designated officer that a local court has given a judgment or order which it was not competent to give, he shall refer the case to a magistrate for the province within which the local court is situated.

(3) Where a case has been referred to him in terms of subsection (1) or (2), a magistrate may, if he considers that—

(a) the local court concerned had no jurisdiction but another local court does, annul the proceedings and direct the case to be heard, *de novo*, before such other local court; (b) the local court concerned had jurisdiction—

- (i) set aside the judgment or order concerned and return the case for further hearing with such advice or directions as appear to him to be necessary or desirable; or

- (ii) set aside the judgment or order concerned and direct the case to be heard, *de novo*, before the same or another local court with such advice and directions as appear to him to be necessary or desirable; or
- (iii) confirm the judgment or order concerned:

Provided that any such confirmation shall not affect the rights of any party to appeal against the judgment or order or to bring the proceedings concerned on review before any court of competent jurisdiction;

(c) no local court has jurisdiction, annul the proceedings:

Provided that a magistrate shall not exercise the powers conferred upon him by this subsection in any case—

- (a) unless the parties concerned have been afforded a reasonable opportunity of making representations as to the proposed exercise of any such powers; or
- (b) which was determined more than twelve months prior to the case being referred to him.

(4) Where a judgment or order has been set aside or varied as a result of action taken by a magistrate in terms of subsection (3) or a local court in accordance with a direction given by a magistrate in terms of that subsection, the party in whose favour the judgment or order was made shall make such refund or restitution as is necessary to accord with the setting aside or variation of the judgment or order, as the case may be.

(5) An appeal shall lie to the High Court against a decision or direction given by a magistrate in terms of subsection (3) as if it were an appeal against a judgment in a civil suit by the magistrate and for such purposes the law relating to such appeals shall apply, *mutatis mutandis*.

(Subsection as amended by s. 10 of Act No. 9 of 1997)

PART VII

GENERAL

26 Evidence of proceedings in local courts

A certificate which purports to be signed by the person presiding over or clerk of a local court and which specifies—

- (a) that a particular person appeared before that local court on a specified date; and
- (b) the grounds for, or cause of action in, the proceedings before that court; and
- (c) the result of such proceedings; shall be *prima facie* proof of the fact stated in it on its mere production by any person in any proceedings in any court.

27 Fines to be paid into Consolidated Revenue Fund

Every person presiding over a local court shall ensure that all fines paid to him or to any officer of the court are paid into the Consolidated Revenue Fund.

28 Adjudication without authority and impersonation

Any person who—

- (a) not being duly authorized, by this Act or any other enactment to do so, purports to exercise judicial functions as member of a local court; or
- (b) falsely holds himself out to be a member of a local court or a member of the staff thereof; shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment:

Provided that this section shall not prohibit any arbitration or like settlement in any matter with the consent of the parties thereto.

29 Designated officer

- (1) The Minister may designate any officer in the Public Service to perform, subject to the directions of the Minister, such functions as may be prescribed.
- (2) A person designated in terms of subsection (1) shall have power—
 - (a) to inspect all records, books and documents of any local court;
 - (b) to advise local courts generally;
 - (c) to take such steps as he considers desirable to ensure that the staff of local court carry out their duties efficiently and properly:

Provided that this subsection shall not be construed as empowering or authorizing such a person to advise a local court as to the decision in any particular matter to be determined by that court.

30 Regulations

- (1) The Minister may by regulation prescribe all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be prescribed for the administration of local courts or for the better carrying out of or giving effect to this Act.
- (2) Regulations made in terms of subsection (1) may provide for—
 - (a) the commencement of proceedings in local courts;
 - (b) the procedure for securing the attendance of parties and witnesses before local courts;

- (c) the form and manner of service of process of local courts;
- (d) the procedure for enabling local courts to obtain evidence on commission;
- (e) the procedure to be followed in local courts;
- (f) the records to be kept by local courts and the duties of the staff thereof;
- (g) the enforcement of judgments and orders of local courts;
- (h) the procedure for appeals from judgments of local courts and the effects on such judgments of noting such appeals;
- (i) the scale of fees, costs and charges payable in respect of proceedings in local courts, the application of such fees, costs and charges and the manner of taxation thereof;
- (j) the forms to be used in connection with proceedings in local courts;
- (k) the manner and circumstances in which persons shall be detained in custody in connection with proceedings in local courts.