CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 49/03

NONKULULEKO LETTA BHE	First Applicant
ANELISA BHE	Second Applicant
NONTUPHEKO MARETHA BHE	Third Applicant
WOMEN'S LEGAL CENTRE TRUST	Fourth Applicant
versus	
MAGISTRATE, KHAYELITSHA	First Respondent
MABOYISI NELSON MGOLOMBANE	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent
Together with	
COMMISSION FOR GENDER EQUALITY	Amicus Curiae

Case CCT 69/03

CHARLOTTE SHIBI	Applicant
versus	
MANTABENI FREDDY SITHOLE	First Respondent
JERRY SITHOLE	Second Respondent
MINISTER FOR JUSTICE AND	

CONSTITUTIONAL DEVELOPMENT Third Respondent

Case CCT 50/03

SOUTH AFRICAN HUMAN RIGHTS COMMISSION First Applicant

WOMEN'S LEGAL CENTRE TRUST Second Applicant

versus

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

Heard on : 2-3 March 2004

Decided on : 15 October 2004

JUDGMENT

LANGA DCJ:

Introduction

[1] Two statutes govern intestate succession in South Africa. They are the Intestate Succession Act 81 of 1987 and the Black Administration Act 38 of 1927 (the Act). Section 23 of the Act[1] read with regulations framed in terms of section 23(10)

[1] See para 35 below for the full text of the section.

contains provisions that deal exclusively with intestate deceased estates of Africans.[2] Estates governed by section 23 are specifically excluded from the application of the Intestate Succession Act.[3] The regulations were published in a Government Gazette[4] under the title "Regulations for the Administration and Distribution of the Estates of Deceased Blacks" (the regulations).

[2] The parallel system of intestate succession set up by section 23 and the regulations purports to give effect to the customary law of succession. It prescribes which estates must devolve in terms of what the Act describes as "Black law and custom" and details the steps that must be taken in the administration of those estates.

[3] Central to the customary law of succession is the principle of male primogeniture.[5] There are two main issues in the cases before this Court. The first is the question of the constitutional validity of section 23 of the Act. The second concerns the constitutional validity of the principle of primogeniture in the context of the customary law of succession.

[2] See paras 36-8 below for the full text and description of the regulations. Please note that whereas the Black Administration Act uses the term "Black" to describe a member of the indigenous race in South Africa, the term "African" has been used in this judgment. Its use should not be construed as conferring legal or constitutional validity for its exclusive use to describe one race group, nor is it intended to exclude persons of other race groups who are entitled to or describe themselves as "Africans".

[3] See n 37 below for the full text of section 1(4)(b) of the Intestate Succession Act.

[4] Government Gazette 10601 GN R200, 6 February 1987 as amended by Government Gazette 24120 GN R1501, 3 December 2002.

[5] See para 77 below for description of this principle.

[4] Because of the nature of the issues to be canvassed, the Chief Justice directed the registrar of this Court to deliver copies of the directions and the two applications for confirmation[6] to the Chairperson of the National House of Traditional Leaders.[7] The provisions of rule 9 of the Rules of the Constitutional Court that were in force at the time[8] were also drawn to his attention. No submissions were, however, received from the House of Traditional Leaders.

[5] There are three cases before the Court. They were heard together, by direction of the Chief Justice, since they are all concerned with intestate succession in the context of customary law.

[6] The first case, *Bhe and Others v The Magistrate, Khayelitsha and Others,* (the *Bhe* case)[9] followed a decision by the Magistrate of Khayelitsha and, on appeal, that of the Cape High Court. The second, *Charlotte Shibi v Mantabeni Freddy Sithole and Others* (the *Shibi* case),[10] concerned a decision of the Magistrate of Wonderboom which was successfully challenged in the Pretoria High Court. In both cases, the

[6] See paras 9 and 21 below.

[7] Section 212(2) of the Constitution provides that a house of traditional leaders may be established by legislation. The National House of Traditional Leaders was established under the National House of Traditional Leaders Act 10 of 1997 as amended.

[8] The rules were published in Government Gazette 18944 GN R757, 29 May 1998. Rule 9 dealt with the admission and participation of an amicus curiae.

[9] The case is reported as *Bhe and Others v Magistrate, Khayelitsha, and Others*, 2004 (2) SA 544 (C); 2004 (1) BCLR 27 (C).

[10] Case 7292/01, 19 November 2003, as yet unreported.

respective Magistrates made decisions on the basis of the relevant provisions of the legislation governing intestate succession.

[7] The third case is an application for direct access to this Court brought jointly by the South African Human Rights Commission and the Women's Legal Centre Trust, respectively the first and second applicants. They had initially applied to the Pretoria High Court for relief which included the constitutional invalidation of the whole of section 23 of the Act. Before argument was heard in the High Court, the order in the *Bhe* case[11] was referred to this Court for confirmation. Rather than proceed in the Pretoria High Court, the two applicants then applied for direct access to this Court for the relief which they had initially sought in the High Court. The application for direct access was granted by this Court on 3 November 2003 and the reasons for that decision are set out below.[12]

[8] I proceed to set out the background in respect to each of the matters before us.

(1) The Bhe case

[9] This case comes before us as an application for confirmation of an order of the Cape High Court. It is brought jointly by Nontupheko Maretha Bhe (Ms Bhe), who is the third applicant in this matter, and the Women's Legal Centre Trust, the fourth applicant.

[11] Above n 9.

[12] See paras 32-34 below.

[10] Ms Bhe seeks no relief for herself but brings the application in the following capacities: (a) on behalf of her two minor daughters, namely Nonkululeko Bhe, born in 1994 and Anelisa Bhe, born in 2001;[13] (b) in the public interest,[14] and (c) in the interest of the female descendants, descendants other than eldest descendants and extra-marital children[15] who are descendants of people who die intestate.[16] Nonkululeko and Anelisa are the first and second applicants respectively and are the children of Ms Bhe and Mr Vuyo Elius Mgolombane (the deceased) who died

[13] Section 38 of the Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest".

[14] Id section 38(d) of the Constitution.

[15] The expression "illegitimate children" has been used by lawyers in South Africa for many years, and was used by the Cape High Court in the *Bhe* case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married. I choose not to use the term, however. No child can in our constitutional order be considered "illegitimate," in the sense that the term is capable of bearing, that they are "unlawful" or "improper". As this Court has said on many occasions, our Constitution values all human beings equally, whatever their birth status, whatever their background. The term "illegitimate children" may be construed as degrading of the status of children to whom it refers and I prefer to avoid it. See, also the discussion in the South African Law Reform Commission's report on the *Investigation into the legal position of Illegitimate Children* Project 38 (October 1985) at paras 6.25–6.26. Note also that Parliament has used the phrase "extra-marital children" recently on several occasions. See section 3 of the Children's Status Act 82 of 1987. On the other hand, see the use of "child born out of wedlock" in section 1 of the Child Care Amendment Act 96 of 1996; section 1 of the Births and Deaths Registration Amendment Act 40 of 1996; the Natural Fathers of Children Born out of Wedlock Act 86 of 1997 and the Adoption Matters Amendment Act 56 of 1998.

[16] Section 38(c) of the Constitution above n 13.

intestate in October 2002. The Women's Legal Centre Trust acted in this application "in the public interest".[17]

[11] In this Court, the first respondent is the Magistrate of Khayelitsha, who appointed the father of the deceased, Mr Maboyisi Nelson Mgolombane (the second respondent) as representative of the estate. The President of the Republic of South Africa (the President) and the Minister for Justice and Constitutional Development (the Minister) are cited as the third and fourth respondents respectively. The Commission for Gender Equality, a state institution established under section 187 of the Constitution,[18] was admitted as amicus curiae and presented helpful written and oral submissions to the Court.

[12] There was only one potentially material factual dispute before the Cape High Court, and that is whether Nonkululeko and Anelisa Bhe are extra-marital children. Both Ms Bhe and the deceased's father were agreed that no marriage or customary union had taken place between Ms Bhe and the deceased. The deceased's father however insisted that the deceased had paid lobolo, an assertion which Ms Bhe

[17] Section 38(d) of the Constitution above n 13.

[18] Section 187 of the Constitution provides that:

> "(1) The Commission for Gender Equality must promote respect for gender equality and the protection, development and attainment of gender equality.
>
> (2) The Commission for Gender Equality has the power, as regulated by national legislation, necessary to perform its functions, including the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.
>
> (3) The Commission for Gender Equality has the additional powers and functions prescribed by national legislation."

denied. Relying on the rule in *Plascon-Evans*,[19] however, the High Court approached the issue on the basis that lobolo had been paid and that Ms Bhe's daughters were accordingly not extra-marital children.

[13] Since the question whether or not the two minor daughters of Ms Bhe are extra-marital children bears on their status, reliance on the rule in *Plascon-Evans* was, in my view, inappropriate. I consider that the evidence produced is not sufficient to resolve the issue one way or another. It will accordingly be necessary, for purposes of this judgment, to deal with the effects of extra-marital birth on intestate succession, from the perspective of the rule of primogeniture and that of section 23 of the Act and the regulations. I return to this issue in due course.[20]

[14] It was not in dispute that from 1990 the deceased had a relationship with Ms Bhe and they lived together. He was a carpenter and she a domestic worker. They were poor and lived in a temporary informal shelter in Khayelitsha, Cape Town. The

[19] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) 634F-635C where the rule is formulated as follows:

> " . . .'. . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.' . . . In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . [t]here may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers". (footnotes ommitted)

[20] See para 79 below.

deceased subsequently obtained state housing subsidies which he used to purchase the property on which they lived as well as building materials in order to build a house. He however died before the house could be built. Until his death, the youngest of the two minor children lived with him and Ms Bhe in the temporary informal shelter. Nonkululeko was staying temporarily at the home of the deceased's father. The deceased supported Ms Bhe and the two children and they were dependent on him. The estate comprises the temporary informal shelter and the property on which it stands, and miscellaneous items of movable property that Ms Bhe and the deceased had acquired jointly over the years, including building materials for the house they intended to build.

[15] After the death of the deceased, the relationship between Ms Bhe and the father of the deceased deteriorated to the point of acrimony. In spite of the fact that he resided in Berlin in the Eastern Cape and nowhere near Cape Town, he was appointed representative and sole heir of the deceased estate by the Magistrate in accordance with section 23 of the Act and the regulations.

[16] Under the system of intestate succession flowing from section 23 and the regulations, in particular regulation 2(e), the two minor children did not qualify to be the heirs in the intestate estate of their deceased father. According to these provisions, the estate of the deceased fell to be distributed according to "Black law and custom".

[17] The deceased's father made it clear that he intended to sell the immovable property to defray expenses incurred in connection with the funeral of the deceased. There is no indication that the deceased's father gave any thought to the dire consequences which would follow the sale of the immovable property. Fearing that Ms Bhe and the two minor children would be rendered homeless, the applicants approached the Cape High Court and obtained two interdicts pendente lite to prevent (a) the selling of the immovable property for the purposes of off-setting funeral expenses; and (b) further harassment of Ms Bhe by the father of the deceased.

[18] The applicants challenged the appointment of the deceased's father as heir and representative of the estate in the High Court. He opposed the application. The Magistrate and the Minister, cited as respondents, did not oppose and chose to abide the decision of the High Court.

[19] The High Court concluded that the legislative provisions that had been challenged and on which the father of the deceased relied, were inconsistent with the Constitution and were therefore invalid. The order of the High Court, in relevant part, reads as follows:

> "1. It is declared that s 23(10)(a), (c) and (e) of the Black Administration Act are unconstitutional and invalid and that reg 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette 10601 dated 6 February 1987 is consequently also invalid.
>
> 2. It is declared that s 1(4)(b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes from the application of s 1 any

> estate or part of any estate in respect of which s 23 of the Black Administration Act 38 of 1927 applies.
>
> 3. It is declared that until the aforegoing defects are corrected by competent Legislature, the distribution of intestate black estates is governed by s 1 of the Intestate Succession Act 81 of 1987.
>
> 4. It is declared that the first and second applicants are the only heirs in the estate of the late Vuyu Elius Mgolombane, registered at Khayelitsha magistrate's court under reference No 7/1/2-484/2004."[21]

[20] In this Court no submissions were received from the deceased's father. Helpful submissions were however received from the Minister, who supported the application for confirmation of the orders of the High Court and the amicus curiae, the Commission for Gender Equality.

(2) The Shibi case

[21] The second matter is an application for the confirmation of the order of the Pretoria High Court. The applicant is Charlotte Shibi (Ms Shibi) whose brother, Daniel Solomon Sithole (the deceased), died intestate in Pretoria in 1995. The deceased was not married nor was he a partner to a customary union. He had no children and, when he died, was not survived by a parent or grandparent. His nearest male relatives were his two cousins Mantabeni Sithole and Jerry Sithole, the first and second respondents respectively.

[21] *Bhe* above n 9 SA 555C-I; BCLR 37C-I.

[22] Since the deceased was an African, his intestate estate fell to be administered under the provisions of section 23(10) of the Act. The Magistrate of Wonderboom decided to institute an inquiry in terms of regulation 3(2) in order to determine the person or persons entitled to succeed to the property of the deceased. She did not complete the inquiry, however, deciding to await the conclusion of a case which was then before the Pretoria High Court and which was later reported as *Mthembu v Letsela and Another*.[22] This High Court case concerned a challenge to the constitutional validity of the customary law rule of primogeniture and of section 23 of the Act.

[23] When the application in *Mthembu*[23] was dismissed by the High Court, however, the Magistrate abandoned the inquiry and, without further notice to Ms Shibi, appointed Mantabeni Sithole as representative of the deceased estate. Mr Sithole was not required to provide security because of the size of the estate and the fact that he did not have the means to do so.

[24] The appointment of Mr Sithole was not a happy one. There were complaints by his relatives, including his mother, that he was misappropriating the estate funds. The appointment was withdrawn by the Magistrate who then appointed an attorney, Mr Nkuna, to administer the estate and to distribute the assets according to customary law. In terms of the liquidation and distribution account the remaining asset in the

[22] 1998 (2) SA 675 (T). The decision of the Supreme Court of Appeal is reported as *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA); [2000] 3 All SA 219 (A).

[23] Id

deceased estate, an amount of R11,468.02, was awarded to Mr Jerry Sithole, the second respondent, as the only heir to the estate. The estate was wound up and finalised and Mr Nkuna was duly discharged as its representative.

[25] In terms of the system flowing from the provisions of section 23 of the Act and the regulations framed under it, in particular regulation 2(e),[24] the estate of the deceased fell to be distributed according to custom. Ms Shibi was, in terms of that system, precluded from being the heir to the intestate estate of her deceased brother.

[26] In the High Court Ms Shibi challenged the decision of the Magistrate and the manner in which the estate had been administered. She sought an order declaring her to be the sole heir in the estate of the deceased. She also claimed damages and other related relief against the first and second respondents as well as against the Minister.

[27] The High Court set aside the decision of the Magistrate and declared Ms Shibi to be the sole heir. It then issued an order similar to that given by the Cape High Court in the *Bhe* case,[25] and, in addition, awarded damages against the deceased's two cousins, that is, first and second respondents in this case.

[28] In this Court no submissions were received from the first and second respondents. The Minister supported the application for confirmation of the orders of

[24] See text of the regulation in para 36 below.

[25] Above para 19.

the Pretoria High Court as he had done in respect of the decision of the Cape High Court in the *Bhe* case.[26]

(3) The South African Human Rights Commission and Another v President of the Republic of South Africa and Another

[29] The South African Human Rights Commission is a state institution supporting democracy under Chapter 9 of the Constitution. Its mandate is, among other things, to "promote respect for human rights and a culture of human rights . . . [and] to take steps to secure appropriate redress where human rights have been violated".[27] The Women's Legal Centre Trust is a non-governmental organisation whose stated core objective "is to advance and protect the human rights of all women in South Africa, particularly black women who suffer many intersecting forms of disadvantage." To this end, it has established the Women's Legal Centre, in order to conduct public interest litigation including constitutional litigation to advance the human rights of women.

[30] In bringing the application for direct access, both the South African Human Rights Commission and the Women's Legal Centre Trust were acting in their own interest[28] as well as in the public interest.[29] The Women's Legal Centre Trust was

[26] Above n 9.

[27] Section 184(1)(a) and (2)(b) of the Constitution.

[28] Section 38(a) of the Constitution above n 13.

[29] Section 38(d) of the Constitution above n 13.

also acting in the interest of a group or a class of people.[30] The respondents are the President and the Minister, first and second respondents respectively. It was not disputed by the respondents that both the South African Human Rights Commission and the Women's Legal Centre Trust have standing in these proceedings.

[31] The relief that the applicants sought is wider than that in the *Bhe* and *Shibi* cases above. Apart from the provisions declared invalid by the Cape and Pretoria High Courts, the applicants in this matter claim that the whole of section 23 of the Act, alternatively subsections (1), (2) and (6) of section 23, should be declared unconstitutional and invalid because of their inconsistency with the Constitution's equality provisions (section 9),[31] the right to human dignity (section

[30] Section 38(c) of the Constitution above n 13.

[31] Section 9 provides that:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

10)[32] and the rights of children under section 28 of the Constitution.[33]

Direct access

[32] This Court will grant direct access in exceptional circumstances only.[34] In this case, the Court had regard to the considerations set out herein. In the first place, the challenged provisions govern the administration and distribution of all intestate estates of deceased Africans. The impact of the provisions falls mainly on African women and children, regarded as arguably the most

[32] Section 10 of the Constitution provides that:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[33] Section 28 of the Constitution, in relevant part, provides that:

> "(1) Every child has the right–
>
> (a) . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) . . .
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> . . .
>
> (2) A child's best interests are of paramount importance in every matter concerning the child."

[34] *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 11; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 3; *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at para 4; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4; *Christian Education South Africa v Minister of Education* 1999 (2) SA 83 (CC); 1998 (12) BCLR 1449 (CC) at para 4; *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) at para 19; *National Gambling Board v Premier, Kwazulu-Natal and Others* 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 29; *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC) at para 7; 2002 (10) BCLR 1092 (CC) at para 6; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC); 2004 (1) BCLR 1 (CC) at para 6.

vulnerable groups in our society. The provisions also affect male persons who, in terms of the customary law rule of primogeniture, are not heirs to the intestate estates of deceased Africans. Many people are therefore affected by these provisions and it is desirable that clarity as to their constitutional validity be established as soon as possible.

[33] The submissions sought to be made by the applicants relate to substantive issues that were already before the Court. The direct access application, however, quite helpfully broadens the scope of the constitutional investigation, given the need to deal effectively with the unwelcome consequences of the Act in the shortest possible time. The application further adds fresh insights on difficult issues, including the question of the appropriate remedy.

[34] From the description of the two applicants, it is clear that they are both eminently qualified to be part of the debate on the issues before the Court. By reason of the above considerations, this Court concluded that it was in the interests of justice that the application for direct access should be granted.

The legislative framework

[35] For a proper understanding of the issues, it is necessary to set out in full the legislative provisions which are the subject of the constitutional challenge. Section 23 of the Act provides as follows:

"(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.

(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

(3) All other property of whatsoever kind belonging to a Black shall be capable of being devised by will.

(4) . . .

(5) Any claim or dispute in regard to the administration or distribution of any estate of a deceased Black shall be decided in a court of competent jurisdiction.

(6) In connection with any such claim or dispute, the heir, or in case of minority his guardian, according to Black law, if no executor has been appointed by a Master of the Supreme Court shall be regarded as the executor in the estate as if he had been duly appointed as such according to the law governing the appointment of executors.

(7) Letters of administration from the Master of the Supreme Court shall not be necessary in, nor shall the Master or any executor appointed by the Master have any powers in connection with, the administration and distribution of–
(a) . . .
(b) any portion of the estate of a deceased Black which falls under subsection (1) or (2).

(8) A Master of the Supreme Court may revoke letters of administration issued by him in respect of any Black estate.

(9) Whenever a Black has died leaving a valid will which disposes of any portion of his estate, Black law and custom shall not apply to the administration or distribution of so much of his estate as does not fall under subsection (1) or (2) and such administration and distribution shall in all respects be in accordance with the Administration of Estates Act, 1913 (Act No. 24 of 1913).

(10) The Governor-General may make regulations not inconsistent with this Act–

(a) prescribing the manner in which the estates of deceased Blacks shall be administered and distributed;

(b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Blacks;

(c) dealing with the disherison of Blacks;

(d) . . .

(e) prescribing tables of succession in regard to Blacks; and

(f) generally for the better carrying out of the provisions of this section.

(11) Any Black estate which has, prior to the commencement of this Act, been reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every Black estate which has not been so reported."[35]

[36] For purposes of this discussion, it is necessary to draw attention to regulations 2, 3 and 4 only. Regulation 2 provides as follows:

"2. If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:

(a) . . .

[35] Paragraphs not reproduced were deleted by subsequent legislation.

(b) If the deceased was at the time of his death the holder of a letter of exemption issued under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve as if he had been a European.

(c) If the deceased, at the time of his death was —

(i) a partner in a marriage in community of property or under antenuptual contract; or
(ii) a widower, widow or divorcee, as the case may be, of a marriage in community of property or under antenuptual contract and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage,

the property shall devolve as if the deceased had been a European.

(d) When any deceased Black is survived by any partner—

(i) with whom he had contracted a marriage which, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences of a marriage in community of property; or
(ii) with whom he had entered into a customary union; or
(iii) who was at the time of his death living with him as his putative spouse;

or by any issue of himself and any such partner, and the circumstances are such as in the opinion of the Minister to render the application of Black law and custom to the devolution of the whole, or some part, of his property inequitable or inappropriate, the Minister may direct that the said property or the said part thereof, as the case may be, shall devolve as if the said Black and the said partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said Black had been a European.

> (e) If the deceased does not fall into any of the classes described in paragraphs (b), (c) and (d), the property shall be distributed according to Black law and custom."[36]

[37] In terms of regulation 3, a magistrate in whose jurisdiction the deceased resided may hold an inquiry to determine the identity of the person or people entitled to succeed to the deceased's property. For that purpose, the magistrate may summon anyone able to supply the information necessary to make that decision.

[38] Regulation 4 provides for the appointment of a representative of the estate who may be required to provide security for the due and proper administration of the estate. Once appointed, the representative has an obligation to render "a just, true and exact account of his administration of the estate."

[39] The above provisions should be read with section 1(4)(b) of the Intestate Succession Act which provides as follows:

> "Intestate estate" includes any part of an estate … in respect of which section 23 of the Black Administration Act, 1927 (Act No 38 of 1927), does not apply."[37]

[36] Paragraphs not reproduced were deleted by subsequent legislation.

[37] Section 1 of the Intestate Succession Act provides:

> "(1) If after the commencement of this Act a person (hereinafter referred to as the "deceased") dies intestate, either wholly or in part, and –

(a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;

(b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;

(c) is survived by a spouse as well as a descendant –

(i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the *Gazette*, whichever is the greater; and

(ii) such descendant shall inherit the residue (if any) of the intestate estate;

(d) is not survived by a spouse or descendant, but is survived –

(i) by both his parents, his parents shall inherit the intestate estate in equal shares; or

(ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or

(e) is not survived by a spouse or descendant or parent, but is survived–

(i) by –

(aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or

(bb) descendants of his deceased parents who are related to the deceased through both such parents; or

(cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb),

the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

(ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

(f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.

(2) Notwithstanding the provisions of any law or the common law, but subject to the provisions of this Act and section 5(2) of the Children's Status Act, 1987, illegitimacy shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.

(3) A notice mentioned in subsection (1)(c)(i) shall not apply in respect of the intestate estate of a person who died before the date of that notice.

(4) In the application of this section –

(a) in relation to descendants of the deceased and descendants of a parent of the deceased, division of the estate shall take place *per stirpes*, and representation shall be allowed;

(b) "intestate estate" includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply;

(c) . . .

(d) the degree of relationship between blood relations of the deceased and the deceased –

(i) in the direct line, shall be equal to the number of generations between the ancestor and the deceased or the descendant and the deceased (as the case may be);

(ii) in the collateral line, shall be equal to the number of generations between the blood relations and the nearest common ancestor, plus the number of generations between such ancestor and the deceased;

(e) an adopted child shall be deemed –

(i) to be a descendant of his adoptive parent or parents;

(ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child; and

(f) a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one.

(5) If an adopted child in terms of subsection (4)(e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.

(6) If a descendant of a deceased, excluding a minor or mentally ill descendant, who, together with the surviving spouse of the deceased, is entitled to a benefit from an intestate estate renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse.

The approach to customary law

[40] The system that flows from the above legislative framework purports to give effect to customary law. It is a parallel system, different in concept and in effect, to that which flows from the Intestate Succession Act, which is designed to apply to all intestate estates other than those governed by section 23 of the Act.

[41] It is important to appreciate the distinction between the legal framework based on section 23 of the Act and the place occupied by customary law in our constitutional system. Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30[38] and 31[39] of the Constitution entrench respect for cultural

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> (7) If a person is disqualified from being an heir of the intestate estate of the deceased, or renounces his right to be such an heir, any benefit which he would have received if he had not been so disqualified or had not so renounced his right shall, subject to the provisions of subsection (6), devolve as if he had died immediately before the death of the deceased and, if applicable, as if he was not so disqualified."

[38] Section 30 of the Constitution provides that:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[39] Section 31 of the Constitution provides that:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community–

diversity. Further, section 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, section 39(3)[40] states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, section 211[41] protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.

(a) to enjoy their culture, practise their religion and use their language; and

(b) . . .

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

[40] Section 39 of the Constitution provides that:

"(1) . . .

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[41] Section 211 of the Constitution provides that:

"(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[42] It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.

[43] This status of customary law has been acknowledged and endorsed by this Court. In *Alexkor Ltd and Another v Richtersveld Community and Others*, the following was stated:

> "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution." (footnotes omitted) [42]

This approach avoids the mistakes which were committed in the past and which were partly the result of the failure to interpret customary law in its own setting but rather attempting to see it through the prism of the common law or other systems of law.[43] That approach also led in part to the fossilisation and

[42] 2003 (12) BCLR 1301 (CC) at para 51. See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44; *Mabuza v Mbatha* 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) at para 32.

[43] In Bennett *Human Rights and African Customary Law under the South African Constitution* (Juta & Co., Ltd, Cape Town 1997) 63 the learned author states in this respect –

codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances. This no doubt contributed to a situation where, in the words of Mokgoro J, "[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community".[44]

[44] It should however not be inferred from the above that customary law can never change and that it cannot be amended or adjusted by legislation. In the first place, customary law is subject to the Constitution.[45] Adjustments and development to bring its provisions in line with the Constitution or to accord with the "spirit, purport and objects of the Bill of Rights" are mandated.[46] Secondly, the legislative authority of the Republic vests in Parliament.[47]

> "[c]ustomary rules were grouped into common-law categories, such as marriage, succession, and property, and common-law concepts were freely used to describe customary institutions. At the same time the devices of precedent, codification, and restatement were used to impose western requirements of certainty and stability." (footnote omitted)

[44] *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 172 (footnote omitted).

[45] Section 211(3) of the Constitution above n 41.

[46] Section 39(2) of the Constitution above n 40.

[47] Section 43(a) of the Constitution provides that:

> "In the Republic, the legislative authority—
>
> (a) of the national sphere of government is vested in Parliament, as set out in section 44".

Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.[48]

[45] The positive aspects of customary law have long been neglected. The inherent flexibility of the system is but one of its constructive facets. Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu.[49] These valuable aspects of customary law more than justify its protection by the Constitution.

[46] It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.

The constitutional rights implicated

[47] In both written and oral submissions before the Court, it was argued that the impugned provisions seriously violate various constitutional rights,

[48] Section 211(3) of the Constitution above n 41.

[49] See Mogkoro J in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (2) SACR 1 (CC); 1995 (6) BCLR 665 (CC) at paras 307-8.

primarily, rights to human dignity (section 10 of the Constitution), and to equality (section 9 of the Constitution), as well as the rights of children (section 28 of the Constitution).

(1) Human dignity (section 10 of the Constitution)

[48] Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." This Court has repeatedly emphasised the importance of human dignity in our constitutional order. In *S v Makwanyane*[50] Chaskalson P stated that the right to human dignity was, together with the right to life, the source of all other rights. Elsewhere, Ackermann J stated that "the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society." [51] As a value, Kriegler J referred to human dignity as one of three "conjoined, reciprocal and covalent values" which are foundational to this country.[52] In *Dawood and Another v Minister of Home Affairs and Others*, the Court asserted:

> "The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the

[50] Id at para 144.

[51] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 28.

[52] *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 41.

> intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected." (footnotes omitted)[53]

(2) The right to equality and the prohibition of discrimination (section 9 of the Constitution)

[49] The importance of the right to equality[54] has frequently been emphasised in the judgments of this Court. In *Fraser v Children's Court, Pretoria North, and Others*, Mahomed DP had the following to say:

> "There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '. . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'." (footnotes omitted)[55]

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[53] 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[54] Above n 31.

[55] 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20. This judgment dealt with section 8 of the interim Constitution but the remarks remain apposite to section 9 of the final Constitution. See also *Makwanyane* above n 49 at paras 155-66 and 262; *Shabalala and Others v Attorney-General of Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26; *Brink* above n 34 at para 33; *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 at para 18.

[50] The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court.[56] Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus section 9(3) of the Constitution prohibits unfair discrimination by the state "directly or indirectly against anyone" on grounds which include race, gender and sex.

[51] Nor is the South African Constitution alone in the emphasis it places on the right to equality. The right is cherished in the constitutions and the jurisprudence of many open and democratic societies. A number of international instruments, to which South Africa is party,[57] also underscore the need to protect the rights of women, and to abolish all laws that discriminate against them[58] as well as to eliminate any racial discrimination in our society.[59]

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[56] Sections 1, 3, 7, 8, 9, 36 and 39 of the Constitution. See also *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20; *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at paras 41-53; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 22; *National Coalition* 1999 above n 51 at para 17; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 32; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (1) BCLR 1211 (CC) at para 27; *Satchwell* id at para 21.

[57] South Africa became party to the Convention on the Elimination of All Forms of Discrimination against Women on 14 January 1996; to the International Convention on the Elimination of All Forms of Racial Discrimination on 9 January 1999; to the African [Banjul] Charter on Human and Peoples' Rights on 9 July 1996; and to the Protocol to the African [Banjul] Charter on Human and Peoples' Rights on the Rights of Women in Africa on 16 March 2004.

[58] Article 2(c) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women; article 18(3) of the African [Banjul] Charter on Human and Peoples' Rights; articles 2(1)(a),

(3) The rights of children

[52] Section 28 of the Constitution provides specific protection for the rights of children.[60] Our constitutional obligations in relation to children are

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21 and 25 of the Protocol to the African [Banjul] Charter on Human and Peoples' Rights on the Rights of Women in Africa.

[59] Article 4 of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.

[60] Section 28 provides that:

> "(1) Every child has the right—
>
> (a) to a name and a nationality from birth;
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and
>
> (ii) treated in a manner, and kept in conditions, that take account of the child's age;
>
> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

particularly important for we vest in our children our hopes for a better life for all.[61] The inclusion of this provision in the Constitution marks the constitutional importance of protecting the rights of children, not only those rights expressly conferred by section 28 but also all the other rights in the Constitution which, appropriately construed, are also conferred upon children.[62] Children, therefore, may not be subjected to unfair discrimination in breach of section 9(3) just as adults may not be.

[53] Two prohibited grounds of discrimination are relevant in this case. The first relates to sex, something that I need not discuss further here, except to remark that the importance of protecting children from discrimination on the grounds of sex is acknowledged in the African Charter on the Rights of the Child.[63]

> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section "child" means a person under the age of 18 years."

[61] See the Preamble to the Constitution.

[62] Most of the other rights in the Constitution vest in children. Exceptions to this are the right to vote and the right to stand for public office, both of which are conferred only on adults. See section 19(3) of the Constitution.

[63] Article 21(1)(b) of the Charter provides that –

> "States parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
>
> (a) . . .

[54] The second relates to the prohibition of unfair discrimination on the ground of "birth" in section 9(3). To the extent that one of the issues that arises in this case is the question of whether the differential entitlements of children born within a marriage and those born extra-maritally constitutes unfair discrimination, the meaning to be attributed to "birth" in section 9(3) is important.

[55] In interpreting both section 28 and the other rights in the Constitution, the provisions of international law must be considered.[64] South Africa is a party to a number of international multilateral agreements[65] designed to strengthen the protection of children. The Convention on the Rights of the Child asserts that children, by reason of their "physical and mental immaturity" need "special safeguards and care".[66] Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed

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(b) those customs and practices discriminatory to the child on the grounds of sex or other status."

[64] Section 39(1) of the Constitution in relevant part provides –

"When interpreting the Bill of Rights, a court, tribunal or forum–

(a) . . .

(b) must consider international law".

[65] South Africa became a party to the United Nations Convention on the Rights of the Child on 16 July 1995; the International Covenant on Civil and Political Rights on 10 March 1999; the African [Banjul] Charter on Human and Peoples' Rights on 9 July 1996; and to the African Charter on the Rights and Welfare of the Child on 7 January 2000.

[66] See Preamble to the Convention which cites the Declaration of the Rights of the Child which was adopted by the General Assembly in 1959.

regardless of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."[67] Article 24(1) of the International Covenant on Civil and Political Rights (1966), also provides expressly that:

> "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

Similarly, article 3 of the African Charter on the Rights and Welfare of the Child provides that children are entitled to enjoy the rights and freedoms recognised and guaranteed in the Charter "irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, . . . birth or other status."

[56] The European Court on Human Rights has held that treating extra-marital children differently to those born within a marriage constitutes a suspect ground of differentiation in terms of article 14 of the Charter.[68] The United States Supreme Court, too, has held that discriminating on the grounds of "illegitimacy" is "illogical and unjust".[69]

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[67] Article 2 of the UN Convention on the Rights of the Child. See also article 24 of the International Covenant on Civil and Political Rights; article 18(3) of the African [Banjul] Charter on Human and Peoples' Rights; articles 3 and 26(3) of the African Charter on the Rights and Welfare of the Child.

[68] See *Marckx v Belgium* [1979] ECHR 2 at paras 38-9; *Inze v Austria* [1987] ECHR 28 at para 41.

[69] See *Weber v Aetna Casualty and Surety Co* 406 US 164 (1972) 175. See also *Levy v Louisiana* 391 US 68 (1968); *Glona v American Guarantee and Liability Insurance Co* 391 US 73 (1968) 76; *Trimble v Gordon* 430 US 762 (1977).

[57] Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law.[70] Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra-marital birth at common law flowed from the Dutch principle that "een wijf maakt geen bastaard",[71] the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother's name, inherited only from his or her mother, and the father of the child had no parental obligations or rights vis-à-vis the child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them which was harmful and degrading.

[58] It is important, however, in assessing the discrimination and stigma attached to extra-marital birth to distinguish between common law and customary law. As Jones records:

> "The African means of dealing with extramarital birth is essentially accommodative in intent and character; it is oriented towards social

[70] For a full account see Hughes "Law, religion and bastardy: Comparative and historical perspectives" in Burman and Preston-Whyte (eds) *Questionable Issue: Illegitimacy in South Africa* (Oxford University Press, Cape Town 1992) 1–20.

[71] *Green v Fitzgerald and Others* 1914 AD 88 at 99. See also the full discussion in Van Heerden et al (eds) *Boberg's Law of Persons and the Family* 2 ed. (Juta & Co., Ltd, Kenwyn 1999) 390ff.

> inclusivity. The mechanism of maternal-filiation provides an extramarital child with a father, with a male ritual and social sponsor, with a place in a conjugal unit, and it manufactures for the child a full lineal identity. Very importantly, these attributes are socially visible – they counter what would otherwise be clearly evident deficits in an extramarital child's social make-up – and are preserved and upheld by way of taboo against reference to the child's real paternity or social position. As far as is possible within the bounds of cultural reason, the effect of the African system is therefore to ensure that an extramarital child's position is *not* compromised by the circumstances of his or her birth."[72]

Nevertheless, extra-marital sons had reduced rights of inheritance under customary law, as they would only inherit in the absence of any other male descendants. Contemporary research suggests too that there is social stigma attached to extra-marital children, though the stigma probably varies depending on the circumstances and community concerned.[73]

[59] The prohibition of unfair discrimination on the ground of birth in section 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair

[72] Jones "Children on the Move: parenting, mobility, and birth-status among migrants" in Burman and Preston-Whyte (eds.) *Questionable Issue: Illegitimacy in South Africa* (Oxford University Press, Cape Town 1992) 247, 251-2. Jones points to only two elements of customary law and practice which disadvantaged the marital child: the first relates to inheritance discussed in the text, and the second relates to clan identity. See also Jones 252-3.

[73] See Burman "The Category of the illegitimate in South Africa" in Burman and Preston Whyte (eds.), id 21, 31-2.

discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when section 9(3) prohibits unfair discrimination on the ground of "birth", it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.

Does section 23 violate the rights contended for?

[60] In argument, section 23 was correctly described as a racist provision which is fundamentally incompatible with the Constitution. It was submitted that the section is inconsistent with sections 9 and 10 of the Constitution because of its blatant discrimination on grounds of race, colour and ethnic origin and its harmful effects on the dignity of persons affected by it. This Court has often expressed its abhorrence of discriminatory legislation and practices which were a feature of our hurtful and racist past and which are fundamentally inconsistent with the constitutional guarantee of equality.

[61] Section 23 cannot escape the context in which it was conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans, ostensibly to avoid exposing them to a result which, "to the Native

mind", would be "both startling and unjust".[74] What the Act in fact achieved was to become a cornerstone of racial oppression, division and conflict in South Africa, the legacy of which will still take years to completely eradicate. Proponents of the policy of apartheid were able, with comparative ease, to build on the provisions of the Act and to perfect a system of racial division and oppression that caused untold suffering to millions of South Africans. Some parts of the Act have now been repealed and modified; most of section 23 however remains and still serves to haunt many of those Africans subject to the parallel regime of intestate succession which it creates.

[62] The Act has earned deserved criticism which must be seen in the light of the origins of its provisions. The remarks of McLoughlin, made in two of his judgments when he was President of the Native Appeal Court, are instructive in this regard. In *Ruth Matsheng v Nicholas Dhlamini and John Mhaushan*, he stated:

[74] See Whitfield *South African Native Law* 2 ed. (Cape Town, Juta & Co., Ltd 1948) 314. The passage in question reads:

> "The extension of Europeans westward and northward carried with it the application to the Bantu of Roman-Dutch law, but the unsuitability of this system to many of the conditions of Native life was not long in making itself felt. In general it allowed no recognition of the marriage union celebrated after annexation by other than the prescribed formalities; but a marriage, entered into with all the ceremonies essential to its recognition in the Native mind as a solemn and binding contract, could not, without injustice, be rigidly regarded as an agreement for illicit intercourse, allowing no rights to the issue against the deceased father's estate. Nor could it be expected that in cases where there was no legal celebration of a marriage between Natives the consequent substitution for Native methods of the inheritance of the Roman-Dutch system, with its community of property between husband and wife, a result, to the Native mind, both startling and unjust, would find voluntary acceptance. Consequently, the legislature has from time to time conceded, at first a partial, and ultimately a complete recognition of the Native system."

> "The attitude of the legislature towards natives and Native Law in the Transvaal is clearly shown by the survey of the history of legislation on the subject since the early Republican days. The natives were placed in a category separate from the Europeans and they were permitted no equality either in the system of law applied to them nor in regard to the courts to which they were accorded access in civil matters. . . . It is the Shepstonian conception of legal segregation successfully adopted in Natal and imported into the Transvaal on annexation in 1877."[75]

and later in the same judgment, he remarked as follows:

> "The subjection by native law of women to tutelage and the denial of *locus standi in judicio* unaided is neither 'inconsistent with the general principles of civilisation recognised in the civil world' nor is the custom one which occasions evident injustice or which is 'in conflict with the accepted principles of natural justice', for the common law in this country still maintains a similar disability in respect of women married in community of property. Other civilised nations extend the rule much further."[76]

Later still, in *Dukuza Kaula v John Mtimkulu and Madhlala Mtimkulu*,[77] writing on the subject of the exemption of Africans from the operation of "Native law", he stated:

> "The policy of legal segregation dates back to the beginning of the legal history of Natal. To meet the case of Natives 'not so ignorant or so unfitted by habit or otherwise as to render them incapable of exercising and understanding the ordinary duties of civilised life' provision was made to

[75] 1937 N.A.C. (N. & T.) 89, 91.

[76] Id 92.

[77] 1938 N.A.C. (N. & T.) 68.

> exempt such persons from the operation of Native law – or as stated in the statute 'taken out of the operation of Native Law,' – Natal law 28 of 1865."[78]

Quite clearly the Act developed from these notions of separation and inequality between Europeans and Africans, and its provisions have not moved much from the "Shepstonian conception of legal segregation".[79]

[63] In *DVB Behuising*,[80] Madala J referred to the Act as "a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom".[81] In the same case, Ngcobo J described the Act as "an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy"[82] and referred to proclamations made under it as part of a "demeaning and racist" system.[83] Ngcobo J went on to comment:

> "The Native Administration Act 38 of 1927 appointed the Governor-General (later referred to as the State President) as 'supreme chief' of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act

[78] Id 70.

[79] See above n 75.

[80] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC).

[81] Id at para 93.

[82] Id at para 1.

[83] Id at para 2.

> became the most powerful tool in the implementation of forced removals of Africans from the so-called 'white areas' into the areas reserved for them. These removals resulted in untold suffering. This geographical plan of segregation was described as forming part of 'a colossal social experiment and a long term policy'." (footnotes omitted)[84]

[64] More recently, in *Moseneke,* Sachs J, writing for a unanimous Court, expressed himself as follows:

> "It is painful that the Act still survives at all. The concepts on which it was based, the memories it evokes, the language it continues to employ and the division it still enforces are antithetical to the society envisaged by the Constitution. It is an affront to all of us that people are still treated as 'blacks' rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour." [85]

[65] Sachs J went on to discuss section 23(7) of the Act and regulation 3(1) of the regulations. He noted that the Minister and the Master suggested that the administration of deceased estates by magistrates was often convenient and inexpensive, and responded by commenting that even if there are practical advantages for people in the system, the fact remains that it is rooted in racial discrimination. He held that, given our history of racial discrimination, the indignity occasioned by treating people differently as "blacks" is not rendered fair by the factors identified by the Minister and the Master. He concluded that no society based on equality, freedom and dignity would tolerate differential

[84] Id at para 41.

[85] *Moseneke* above n 34 at para 21.

treatment based on skin colour, particularly where the legislative provisions in question formed part of a broader package of racially discriminatory legislation that systematically disadvantaged Africans. Any convenience the provisions might achieve could be accomplished equally as well by a non-discriminatory provision.[86]

[66] In the *Bhe* and *Shibi* cases, the constitutional attack was directed at particular provisions of subsection (10) of section 23 and the regulations. It is quite clear though that the subsections which constitute section 23, read with the regulations, together constitute a scheme of intestate succession. The subsections are interlinked and, in my view, they all stand or fall together. They provide a scheme whereby the legal system that governs intestate succession is determined simply by reference to skin colour. The choice of law is thus based on racial grounds without more. In so doing, section 23 and its regulations impose a system on all Africans irrespective of their circumstances and inclinations. What it says to Africans is that if they wish to extricate themselves from the regime it creates, they must make a will. Only those with sufficient resources, knowledge, education or opportunity to make an informed choice will be able to benefit from that provision. Moreover, the section provides that some categories of property are incapable of being devised by will but must devolve according to the principles of "Black law and custom".[87]

[86] Id at paras 22-3.

[87] Section 23(1) and (2) of the Act above at para 35.

[67] The racist provenance of the provision is illustrated in the reference in the regulations to the distinction drawn between estates that must devolve in terms of "Black law and custom" and those that devolve as though the deceased "had been a European".[88] The purported exemption of certain Africans – who qualify – from the operation of "Black law and custom" to the status of a "European" is not only demeaning, it is overtly racist. This provision is to be found in the regulations, not in the statute itself. It nevertheless provides a contextual indicator of the purpose and intent of the overall scheme contemplated by section 23 and the regulations.

[68] I conclude, then, that construed in the light of its history and context, section 23 of the Act and its regulations are manifestly discriminatory and in breach of section 9(3) of our Constitution. The discrimination they perpetuate touches a raw nerve in most South Africans. It is a relic of our racist and painful past. This Court has, on a number of occasions, expressed the need to purge the statute book of such harmful and hurtful provisions.[89] The only question that remains to be considered is whether the discrimination occasioned by section 23 and its regulations is capable of justification in terms of section 36 of our Constitution.

[88] Section 23(10) of the Act above at para 35; regulation 2(b) above at para 36.

[89] *DVB Behuising* above n 80 at para 2. See also *Moseneke* above n 34 at para 23.

Justification inquiry

[69] Section 36 of the Constitution requires that a provision that limits rights should be a law of general application and that the limitation should be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

[70] As was said in *S v Manamela and Another (Director-General of Justice Intervening)*:

> ". . . [t]he Court must engage in a balancing exercise and arrive at a global judgment on proportionality . . . . As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage, but without losing sight of the ultimate values to be protected."[90]

[71] The rights violated are important rights, particularly in the South African context. The rights to equality and dignity are of the most valuable of rights in any open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

[90] 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 32. See also *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

[72] It could be argued that despite its racist and sexist nature, section 23 gives recognition to customary law and acknowledges the pluralist nature of our society.[91] This is however not its dominant purpose or effect. Section 23 was enacted as part of a racist programme intent on entrenching division and subordination. Its effect has been to ossify customary law. In the light of its destructive purpose and effect, it could not be justified in any open and democratic society.

[73] It is clear from what is stated above that the serious violation by the provisions of section 23 of the rights to equality and human dignity cannot be justified in our new constitutional order. In terms of section 172(1)(a) of the Constitution,[92] section 23 must accordingly be struck down.

[74] The effect of the invalidation of section 23 is that the rules of customary law governing succession are applicable. The applicants in both the *Bhe* and

[91] See section 15(3)(a)(ii) of the Constitution which recognises "systems of personal and family law under any tradition, or adhered to by persons professing a particular religion." See also section 30 of the Constitution above n 38, section 31 of the Constitution above n 39 and section 211 of the Constitution above n 41.

[92] Section 172(1) of the Constitution provides that:

> "(1) When deciding a constitutional matter within its power, a court–
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including–
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

Shibi cases, however, launched an attack on the customary law rule of primogeniture. It is to that attack that I now turn.

The customary law of succession

[75] It is important to examine the context in which the rules of customary law, particularly in relation to succession, operated and the kind of society served by them. The rules did not operate in isolation. They were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. This served various purposes, not least of which was the maintenance of discipline within the clan or extended family. Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.

[76] The heir did not merely succeed to the assets of the deceased; succession was not primarily concerned with the distribution of the estate of the deceased, but with the preservation and perpetuation of the family unit. Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the

family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit. The rules of the customary law of succession were consequently mainly concerned with succession to the position and status of the deceased family head rather than the distribution of his personal assets.[93]

[77] Central to the customary law of succession is the rule of primogeniture, the main features of which are well established.[94] The general rule is that only a male who is related to the deceased qualifies as intestate heir. Women do not participate in the intestate succession of deceased estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought among the father's male descendants related to him through the male line.[95]

[93] *Mthembu* (SCA) above n 22 at para 8.

[94] Id

[95] Olivier et al *Indigenous Law* (Butterworths, Durban 1995) 147 at para 142.

[78] The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.

The position of the extra-marital child

[79] Extra-marital children are not entitled to succeed to their father's estate in customary law.[96] They however qualify for succession in their mother's family, but subject to the principle of primogeniture. The eldest male extra-marital child qualifies for succession only after all male intra-marital children and other close male members of the family.

The effect of changing circumstances

[80] The setting has however changed. Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply

[96] *Mthembu* (SCA) above n 22 at paras 19-20.

acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities.[97] In the changed circumstances, therefore, the succession of the heir to the assets of the deceased does not necessarily correspond in practice with an enforceable responsibility to provide support and maintenance to the family and dependants of the deceased.

Customary law has not kept pace

[81] In *Richtersveld*,[98] this Court noted that "indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life."[99] It has throughout history "evolved and developed to meet the changing needs of the community."[100]

[82] The rules of succession in customary law have not been given the space to adapt and to keep pace with changing social conditions and values. One reason for this is the fact that they were captured in legislation, in text books, in the writings of experts and in court decisions without allowing for the dynamism of customary law in the face of changing circumstances. Instead, they have over time become increasingly out of step with the real values and

[97] *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC) 233-4E.

[98] Above n 42.

[99] Id at para 52.

[100] Id at para 53.

circumstances of the societies they are meant to serve and particularly the people who live in urban areas.

[83] It is clear that the application of the customary law rules of succession in circumstances vastly different from their traditional setting causes much hardship. This is described in the report of the South African Law Reform Commission (the Law Reform Commission)[101] which cites three reasons for the plight in which African widows find themselves in the changed circumstances: (a) the fact that social conditions frequently do not make "living with the heir" a realistic or even a tolerable proposition; (b) the fact, frequently pointed out by the courts, that the African woman "does not have a right of ownership"; and (c) the prerequisite of a "good working relationship with the heir" for the effectiveness of "the widow's right to maintenance". In this regard, the report concludes that:

> "Unfortunately, circumstances do not favour this relationship. Widows are all too often kept on at the deceased's homestead on sufferance or they are simply evicted. They then face the prospect of having to rear their children with no support from the deceased's family."[102]

[101] South African Law Reform Commission, *The Harmonisation of the Common Law and the Indigenous Law: Succession in Customary Law*, Issue Paper 12, Project 90 (April 1998) 6-9. For similar views, see also Bennett above n 43, 126-7.

[102] *The Harmonisation of the Common Law and the Indigenous Law* id 9.

[84] Because of this, the official rules of customary law of succession[103] are no longer universally observed. In her affidavit, Likhapha Mbatha, a researcher at the Gender Research Project at the Centre for Applied Legal Studies, observes that the formal rules of customary law have failed to keep pace with changing social conditions as a result of which they are no longer universally observed. These changes have required of customary rules that they adapt, and therefore change. Bennett also refers to trends that reflect a basic social need to sustain the surviving family unit rather than a general adherence to male primogeniture.[104]

[85] The report of the Law Reform Commission makes the point that the rule of primogeniture is evolving to meet the needs of changing social patterns. It states that the order of succession is the theory and that in reality different rules may well be developing, such as the replacement of the eldest son with the youngest for purposes of inheritance, and the fact that widows often take over their husbands' lands and other assets, especially when they have young children to raise.[105]

[86] What needs to be emphasised is that, because of the dynamic nature of society, official customary law as it exists in the text books and in the Act is

[103] For the purposes of this judgment, "official rules" refers to the rules of customary law set in statute, case law and various writings.

[104] Bennett above n 43, 140.

[105] Above n 101, 4-5.

generally a poor reflection, if not a distortion of the true customary law. True customary law will be that which recognises and acknowledges the changes which continually take place. In this respect, I agree with Bennett's observation that:

> "[a] critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency."[106]

[87] The official rules of customary law are sometimes contrasted with what is referred to as "living customary law," which is an acknowledgement of the rules that are adapted to fit in with changed circumstances. The problem with the adaptations is that they are ad hoc and not uniform. However, magistrates and the courts responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies and hardships as a result of changes which have occurred in society. Examples of this are the manner in which the *Bhe* and *Shibi* cases were dealt with by the respective Magistrates.

The problem with primogeniture

[88] The basis of the constitutional challenge to the official customary law of succession is that the rule of primogeniture precludes (a) widows from

[106] Bennett above n 43, 64.

inheriting as the intestate heirs of their late husbands;[107] (b) daughters from inheriting from their parents;[108] (c) younger sons from inheriting from their parents,[109] and (d) extra-marital children from inheriting from their fathers.[110] It was contended that these exclusions constitute unfair discrimination on the basis of gender and birth and are part of a scheme underpinned by male domination.

[89] Customary law has, in my view, been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones. As Nhlapo indicates:

> "Although African law and custom has always had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young. . . . Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense.
>
> . . .

[107] *Madolo v Nomawu* (1896) 1 N.A.C. 12; *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (TkS) 519E. See also Kerr *The Customary Law of Immovable Property and of Succession* 2 ed (Grocott and Sherry, Grahamstown 1990) 99.

[108] *Makholiso* id; *Mthembu* (SCA) above n 22, 876C. See also Robinson "The minority and subordinate status of women under customary law" (1995) 11 *SA Journal on Human Rights* 457-76.

[109] *Mthembu* id; Bekker *Seymour's Customary Law in Southern Africa* 5 ed (Juta & Co., Ltd, Cape Town 1989), 274; Bennett *A Sourcebook of African Customary law for Southern Africa* 1 ed (Juta & Co., Ltd, Cape Town 1991) 399-400.

[110] *Mthembu* id; *Zondi v President of RSA and Others* 2000 (2) SA 49 (N); 1999 (11) BCLR 1313 (N).

> The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became 'outlaws'." [111]

Nhlapo concludes that protecting people from distortions masquerading as custom is imperative, especially for those they disadvantage so gravely, namely, women and children.

[90] At a time when the patriarchal features of Roman-Dutch law[112] were progressively being removed by legislation,[113] customary law was robbed of its

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[111] Nhlapo "African customary law in the interim Constitution" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (Community Law Centre, University of the Western Cape in association with David Philip, Cape Town 1995) 162.

[112] See Zaal "Origins of gender discrimination in SA Law" in Liebenberg id 34, where he concludes that –

> "Roman-Dutch law, like the Roman law upon which it was founded, was neither humanitarian nor egalitarian. In its gender bias, it was similar to other European systems of its time, and its effects on both the South African legal system and South African society have been enormous."

[113] It was only as late as 1993 when the General Law Fourth Amendment Act 132 of 1993 came into operation that the marital power was abolished from all existing marriages in which it was operating. The same Act substituted section 13 of the Matrimonial Property Act 88of 1984 which section was later repealed by section 4 of the Guardianship Act 192 of 1993. The effect of this was the deletion of the reference to the husband's position as head of the family. As stated in Sinclair *The Law of Marriage* vol 1 (Juta & Co., Ltd, Kenwyn 1996) 69:

> "the unambiguous premise of the South African law was that the husband is pre-eminent . . . . After years of government obduracy and unsuccessful campaigning by champions of women's rights, . . . changes to these discriminatory rules were

inherent capacity to evolve in keeping with the changing life of the people it served, particularly of women. Thus customary law as administered failed to respond creatively to new kinds of economic activity by women, different forms of property and household arrangements for women and men, and changing values concerning gender roles in society. The outcome has been formalisation and fossilisation of a system which by its nature should function in an active and dynamic manner.

[91] The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3)[114] of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.

[92] The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of

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> suddenly effected to produce conformity between the content of this branch of the private law and the growing public demand for constitutional guarantees of equality between the sexes."

[114] Above n 31.

their sex and gender. Their dignity is further affronted by the fact that as women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.

[93] To the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves.[115] In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers,[116] the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution.

[94] In view of the conclusion reached later in this judgment, that it is not possible to develop the rule of primogeniture as it applies within the customary law rules governing the inheritance of property, it is not necessary or desirable in this case for me to determine whether the discrimination against children, who happen not to be the eldest, necessarily constitutes unfair discrimination. I

[115] See generally *Fraser* above n 55; *Fraser v Naude and Others* 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC); *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC); *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC).

[116] Female children are denied the right to inherit altogether, while only the eldest male descendant may inherit. Male extra-marital children are not entitled to inherit if there is any other male descendant, even if he is younger than the extra-marital child.

express no view on that question. Nor, I emphasise again, does this judgment consider at all the constitutionality of the rule of male primogeniture in other contexts within customary law, such as the rules which govern status and traditional leaders.

Justification inquiry: primogeniture

[95] The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centrepiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.

[96] I have already observed that with the changing circumstances, the connection between the rules of succession in customary law and the heir's duty to support the dependants of the deceased is, at best, less than satisfactory.[117] Compliance with the duty to support is frequently more apparent than real. There may well be dependants of the deceased who would lay claim to the heir's duty to support them; they would however be people

[117] Above para 80.

who, in the vast majority, are so poor that they are not in a position to ensure that their rights are protected and enforced. The heir's duty to support cannot, in the circumstances, constitute justification for the serious violation of rights.

[97] In conclusion, the official system of customary law of succession is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny.

The decisions in Mthembu v Letsela

[98] The relationship between customary law and the Constitution was considered in the two *Mthembu* decisions, firstly in the Pretoria High Court and lastly in the appeal heard by the Supreme Court of Appeal. [118] The appellants brought an application in the High Court for an order, declaring the customary law rule of primogeniture and regulation 2(e) to be invalid on the grounds that they gratuitously discriminate against women, children who are not the eldest and extra-marital children in a manner that offends the equality guarantee under section 8 of the interim Constitution. The High Court dismissed the application, holding that neither the rule nor the regulation was inconsistent with the equality protection under the interim Constitution. On appeal, the Supreme Court of Appeal was invited to set aside the order of the High Court and to develop, as required by section 35(3) of the interim Constitution, the rule of primogeniture in order to allow all descendants to participate in

[118] Above n 22.

intestacy. The Supreme Court of Appeal declined to decide the constitutional challenge or to develop the rule on the ground that the interim Constitution does not operate retroactively. It reasoned that the rights of the heir in the estate had vested on the death of the deceased, which was on 13 August 1993 and before the interim Constitution took effect.[119]

[99] In an alternative argument, the Supreme Court of Appeal was urged to conclude that the rule of primogeniture and regulation 2(e) are bad under the common law because they are offensive to public policy or natural justice which are premised on the fundamental value of equality. The Court rejected this contention and dismissed the appeal. It held that neither the rule nor the regulation offended the common law. The regulation, it held, is neither unreasonable nor "*ultra vires* at common law."[120] It merely gives legislative recognition to a well established principle of male primogeniture according to which "many blacks, even to this day, would wish their estates to devolve."[121]

[100] I have held that section 23 is inconsistent with the Constitution and invalid. As a result, regulation 2(e) falls away. I have also found that the customary law rule of primogeniture, in its application to intestate succession, is not consistent with the equality protection under the Constitution. It follows

[119] Id

[120] Id at para 24.

[121] Id at para 23.

therefore that any finding in *Mthembu* which is at odds with this judgment cannot stand.

Remedy

[101] Perhaps the most difficult aspect of this composite case is the issue of remedy. It will be as well, though to keep a few salutary principles in mind. In *S v Bhulwana; S v Gwadiso*, the Court expressed two important principles, namely that:

> "[c]entral to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. . . . In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants".[122]

[102] Factors relevant to any order made by this Court include speed, practicality, clarity and the mitigation of any potential damage resulting from the relief of a temporary nature which this Court may give. Further, as was suggested in the second *National Coalition* case,[123] the Court should not shy away from forging innovative remedies should this be required by the circumstances of the case.

[122] 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

[123] *National Coalition* 2000 above n 56 at para 65.

[103] In the *Bhe* case before the Cape High Court, paragraphs 1 and 2 of the order given declared section 23(10)(a), (c) and (e) of the Act as unconstitutional and invalid, with the consequence that regulation 2(e) fell away. Section 1(4)(b) of the Intestate Succession Act was also found to be unconstitutional and invalid in so far as it excludes from the application of section 1, any estate or part of any estate in respect of which section 23 of the Act applies. The order goes on to declare that "until the aforegoing defects are corrected by competent legislature, the distribution of intestate Black estates is governed by [section] 1 of the Intestate Succession Act".[124] The corresponding part of the order in the *Shibi* application is to similar effect.[125] As pointed out earlier, the application by the South African Human Rights Commission and the Women's Legal Centre Trust has broadened the ambit of the inquiry considerably.[126]

[104] What needs to be determined is the nature and form of the wider relief that should be granted pursuant to the finding that section 23 of the Act is unconstitutional and invalid in its entirety. In terms of section 172(1)(a)[127] of the Constitution, such a finding by the Court must be followed by a declaration

[124] *Bhe* above n 9 at para 3.

[125] *Shibi* above n 10 at para 3.

[126] Above para 31.

[127] Above n 92.

of invalidity, to the extent of the inconsistency. Thereafter, the Court "may make any order that is just and equitable."[128]

[105] In considering an appropriate remedy in this case, various courses present themselves. They are: (a) whether the Court should simply strike the impugned provisions down and leave it to the legislature to deal with the gap that would result as it sees fit; (b) whether to suspend the declaration of invalidity of the impugned provisions for a specified period; (c) whether the customary law rules of succession should be developed in accordance with the "spirit, purport and objects of the Bill of Rights",[129] or (d) whether to replace the impugned provisions with a modified section 1 of the Intestate Succession Act or with some other order.

[106] The question of polygynous marriages and whether or not the order by this Court should accommodate them must also be considered. These are complex issues and that is why it is regrettable that the opportunity given to the Chairperson of the House of Traditional Leaders by the Chief Justice to provide their view did not receive a positive response.

Declaration of constitutional invalidity and suspension

[128] Section 172 (1)(b) above n 92.

[129] Section 39(2) of the Constitution above n 40.

[107] In the circumstances of this case it will not suffice for the Court to simply strike down the impugned provisions. There is a substantial number of people whose lives are governed by customary law and their affairs will need to be regulated in terms of an appropriate norm. It will therefore be necessary to formulate an order that incorporates appropriate measures to replace the impugned framework in order to avoid an unacceptable lacuna which would be to the disadvantage of those subject to customary law.

[108] Nor can this Court afford to suspend the declaration of invalidity to a future date and leave the current legal regime in place pending rectification by the legislature. The rights implicated are important; those subject to the impugned provisions should not be made to wait much longer to be relieved of the burden of inequality and unfair discrimination that flows from section 23 and its related provisions. That would mean that the benefits of the Constitution would continue to be withheld from those who have been deprived of them for so long.

Development of the customary law and the notion of the "living" customary law

[109] I have found that the primogeniture rule as applied to inheritance in customary law is inconsistent with the constitutional guarantee of equality. The question whether the Court was in a position to develop that rule in a manner which would "promote the spirit, purport and objects of the Bill of

Rights"[130] evoked considerable discussion during argument. In order to do so, the Court would first have to determine the true content of customary law as it is today and to give effect to it in its order. There is however insufficient evidence and material to enable the Court to do this. The difficulty lies not so much in the acceptance of the notion of "living" customary law, as distinct from official customary law, but in determining its content and testing it, as the Court should, against the provisions of the Bill of Rights.[131]

[110] It was suggested in argument that if the Court is not in a position to develop the rules of customary law in this case, it should allow for flexibility in order to facilitate the development of the law. The import of this was that since customary law is inherently flexible with the ability to permit compromise settlements,[132] courts should introduce into the system those constitutional principles that the official system of succession violates. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid

[130] Section 39(2) of the Constitution above n 40.

[131] In this regard Kerr asks (Kerr "Role of the courts in developing customary law" 1999 *Obiter* 41, 49-50):

> ". . . is there a sufficient basis for the declaration by a court of a new legal rule to be applied in all future cases if a few learned authors state that a divergence from an existing rule has been observed in a few instances in practice, and the only evidence on the point before the court is that of one of the parties to the case who is, even though sincere and not dissembling in any way, by virtue of being a party to the case vitally interested in the outcome? With respect I suggest that it is not sufficient."

[132] See Bennett above n 43, 61.

unfair discrimination and the violation of the dignity of the individuals affected by it. Those exceptions would, according to this view, constitute the "living" customary law which should be implemented instead of official customary law.

[111] There is much to be said for the above approach. I consider, however, that it would be inappropriate to adopt it as the remedy in this case. What it amounts to is advocacy for a case by case development as the best option. It is true that there have been signs of evolution in court decisions in recent times, where some courts have shown a willingness to recognise changes in customary law.[133] In *Mabena v Letsoalo*,[134] for instance, it was accepted that a principle of living, actually observed law had to be recognised by the court as it would constitute a development in accordance with the "spirit, purport and objects" of the Bill of Rights contained in the interim Constitution.[135]

[112] The problem with development by the courts on a case by case basis is that changes will be very slow; uncertainties regarding the real rules of customary law will be prolonged and there may well be different solutions to similar problems. The lack of uniformity and the uncertainties it causes is obvious if one has regard to the fact that in some cases, courts have applied the

[133] See for example *Mabuza v Mbatha* 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C).

[134] 1998 (2) SA 1068 (T).

[135] Id, 1075B-C.

common law system of devolution of intestate estates.[136] Magistrates and courts responsible for the administration of intestate estates would also tend to adhere to formal rules of customary law as laid down in decisions such as *Mthembu*[137] and its predecessors.

[113] I accordingly have serious doubts that leaving the vexed position of customary law of succession to the courts to develop piecemeal would be sufficient to guarantee the constitutional protection of the rights of women and children in the devolution of intestate estates. What is required, in my view, is more direct action to safeguard the important rights that have been identified.

[114] The Court was urged not to defer to the legislature to make the necessary reforms because of the delays experienced so far in producing appropriate legislation. This was an invitation to the Court to make a definitive order that would solve the problem once and for all. That there have been delays is true and that is a concern this Court cannot ignore. The first proposal by the Law Reform Commission for legislation in this field was made more than six years ago. According to the Minister, the need for broad consultation before any Bill was finalised has been the cause of the delays. Moreover, he was unable to give any guarantee as to when the Bill would become law.

[136] See for example *Makholiso* above n 107.

[137] Above n 22.

[115] I consider, nevertheless, that the legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession.[138] What should however be borne in mind is that the task of preventing ongoing violations of human rights is urgent. The rights involved are very important, implicating the foundational values of our Constitution. The victims of the delays in rectifying the defects in the legal system are those who are among the most vulnerable of our society.

[116] The Court's task is to facilitate the cleansing of the statute book of legislation so deeply rooted in our unjust past,[139] while preventing undue hardship and dislocation. The Court must accordingly fashion an effective and comprehensive order that will be operative until appropriate legislation is put in place. Any order by this Court should be regarded by the legislature as an interim measure. It would be undesirable if the order were to be regarded as a permanent fixture of the customary law of succession.

The appropriateness of substituting the Intestate Succession Act

[138] See Kerr "Inheritance in customary law under the interim Constitution and under the present Constitution" 1998 (115) *SA Law Journal* 262, 270.

[139] *Moseneke* above n 34 at para 26.

[117] The effect of the High Court orders, in both the *Bhe* and *Shibi* cases is that a modified form of section 1 of the Intestate Succession Act[140] should be put in place as a substitute for the impugned legislative framework pending appropriate legislation by Parliament. Reservations were however expressed in this Court about whether the Intestate Succession Act was the correct mechanism for this purpose. It will be useful at this stage to give a broad indication of the effect of the detailed provisions of section 1 of the Intestate Succession Act. The section provides for the surviving spouse to inherit in the absence of descendants,[141] for descendants to inherit in the absence of a surviving spouse[142] and for the surviving spouse to inherit the share of a single child (subject to a minimum if there is too little in the estate) if the deceased is survived by both the surviving spouse and descendants.[143] Where the deceased is survived neither by descendants nor by a surviving spouse, the parents of the deceased and, in some circumstances, the parents' descendants and blood relations will benefit. It must be noted that the Intestate Succession Act makes provision for a single surviving spouse only and that extra-marital children are included under the term "descendants".[144]

[140] Section 1 of the Intestate Succession Act is fully set out in n 37.

[141] Section 1(1)(a).

[142] Section 1(1)(b).

[143] Section 1(1)(c), with the calculation to be made in accordance with section 1(4)(f).

[144] Above n 37.

[118] The objection against resorting to the Intestate Succession Act was that its provisions would be inadequate to cater for the various factual situations that arise in customary law succession as the Intestate Succession Act was premised on the nuclear family model. The suggestion was that it would, for instance, not naturally accommodate extended families which are a feature of the customary environment, nor would it have regard to polygynous unions.[145] It was contended that the provisions of the Intestate Succession Act would also have a negative impact upon vulnerable groups such as poor rural women.

[119] A further concern was the fear that the utilisation of the Intestate Succession Act would amount to an obliteration of the customary law of succession, a development that would be undesirable, having regard to the status customary law enjoys under the Constitution. In considering the views above, I must also have regard to the proposals contained in the report of the Law Reform Commission which are set out below.

The proposals of the South African Law Reform Commission

[120] The Law Reform Commission's proposals in this regard are based on the assumption that the Intestate Succession Act, suitably adjusted,[146] is capable of accommodating much of the customary law of succession. In addition, the

[145] See Mbatha "Reforming the customary law of succession" 2002 (18) *SA Journal on Human Rights* 259, 285.

[146] An example would be to give the Master of the High Court powers to resolve a dispute among parties (South African Law Commission Project 90 *Customary Law of Succession* 2004, 65).

proposals suggest changes to other statutes, apart from the Act and the Intestate Succession Act, that have an impact on succession as a whole.[147] What the proposals amount to is that provisions of other legislation should be taken into account, together with the Intestate Succession Act, in fashioning appropriate legislation to replace the current legislative framework.[148] The report recommends that the provisions should ensure that spouses and children should enjoy preference over other dependants of the deceased. It further recommends the extension of the application of the Intestate Succession Act to enable it to accommodate categories of Africans who are presently subject to the customary law of succession. This however does not extend to persons who are not subject to customary law, namely: (a) parties who entered into a civil marriage; (b) those persons who entered into a customary union after the coming into operation of the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act); and (c) those who have changed their matrimonial property regime in terms of section 7(4) of the Recognition Act, and (d) persons who made a will.[149]

[147] Id 67-8 where it is suggested that the Administration of Estates Act 66 of 1965 be amended as part of the repeal of all the regulations regarding intestate succession by Africans.

[148] In this respect, the South African Law Reform Commission refers to the impact of the Recognition of Customary Marriages Act 120 of 1998, section 7 of which provides for community of property in every customary marriage. It proposes that widows of such customary unions be treated as spouses of their late husbands and that children born from such unions be regarded as dependants of the deceased, id 70.

[149] Id 77.

[121] It should be noted that the recommendations of the Law Reform Commission are meant for the consideration of the legislature. However, in fashioning an appropriate order for this case, I have had due regard to the objections against the replacement of the impugned provisions with the Intestate Succession Act as well as to the Law Reform Commission's proposals.

Polygynous unions

[122] In light of the wider relief requested by the South African Human Rights Commission and the Women's Legal Centre Trust, the relief given by the High Courts in both the *Bhe* and the *Shibi* cases falls to be reconsidered. It is now necessary to deal also with the applicability of the order by this Court to polygynous marriages.

[123] Although the Court must be circumspect in taking decisions on issues when those affected have not been heard, the exclusion of spouses in polygynous unions from the order would prolong the inequalities suffered by those subject to the customary law of succession. An order that best fits the circumstances must accordingly be made to protect rights.

[124] An appropriate order will therefore be one that protects partners to monogamous and polygynous customary marriages as well as unmarried women and their respective children. This will ensure that their interests are

protected until Parliament enacts a comprehensive scheme that will reflect the necessary development of the customary law of succession. It must, however, be clear that no pronouncement is made in this judgment on the constitutional validity of polygynous unions. In order to avoid possible inequality between the houses in such unions, the estate should devolve in such a way that persons in the same class or category should receive an equal share.

[125] The advantage of using section 1 of the Intestate Succession Act as the basic mechanism for determining the content of the interim regime is that extra-marital children, women who are survivors in monogamous unions, unmarried women and all children would not be discriminated against.[150] However, as has been pointed out, the section provides for only one surviving spouse and would need to be tailored to accommodate situations where there is more than one surviving spouse because the deceased was party to a polygynous union. This can be done by ensuring that section 1(1)(c)(i)[151] and section 1(4)(f)[152] of the Intestate Succession Act which are concerned with providing for a child's share of the single surviving spouse and its calculation should apply with three qualifications if the deceased is survived by more than one spouse. First, a child's share would be determined by having regard to the fact that there is more than one surviving spouse. Second, provision should be

[150] The provisions are summarised at para 117 above.

[151] Above n 37.

[152] Above n 37.

made for each surviving spouse to inherit the minimum if there is not enough in the estate. Third, the order must take into account the possibility that the estate may not be enough to provide the prescribed minimum to each of the surviving spouses. In that event, all the surviving spouses should share what is in the estate equally. These considerations will be reflected in the order.

Retrospectivity

[126] Section 172(1) of the Constitution empowers this Court, upon a declaration of invalidity to make any order that is just and equitable, including an order to limit the retrospective effect of that invalidity. The statutory provisions and customary law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered. However, an order which exempts all completed transfers from the provisions of the Constitution would also not accord with justice or equity. It would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit him or her were to be challenged in a court. That was the position in the *Shibi* case.

[127] To limit the order of retrospectivity to cases in which transfer of ownership has not yet been completed would enable an heir to avoid the consequences of any declaration of invalidity by going ahead with transfer as speedily as possible. What will accordingly be just and equitable is to limit the retrospectivity of the order so that the declaration of invalidity does not apply to any completed transfer to an heir who is bona fide in the sense of not being aware that the constitutional validity of the provision in question was being challenged. It is fair and just that all transfers of ownership obtained by an heir who was on notice ought not to be exempted.

[128] The next issue to be decided is whether it is just and equitable that the order of invalidity should date back to 4 February 1997 when the Constitution became operative. The question is relevant because the deceased in *Shibi* died during 1995, while the interim Constitution was in force. The impugned provisions in this case became inconsistent with the interim Constitution in 1994 when it came into force. It would accordingly be neither just nor equitable for affected women and extra-marital children to benefit from a declaration of invalidity only if the deceased had died after 4 February 1997, but not if the deceased had died after the interim Constitution had come into force but before the final Constitution was operative. I am accordingly of the view that the declaration of invalidity must be retrospective to 27 April 1994 in order to avoid patent injustice.

[129] To sum up, the declaration of invalidity must be made retrospective to 27 April 1994. It must however not apply to any completed transfer of ownership to an heir who had no notice of a challenge to the legal validity of the statutory provisions and the customary law rule in question. Furthermore, anything done pursuant to the winding up of an estate in terms of the Act, other than the identification of heirs in a manner inconsistent with this judgment, shall not be invalidated by the order of invalidity in respect of section 23 of the Act and its regulations.

The facilitation of agreements

[130] The order made in this case must not be understood to mean that the relevant provisions of the Intestate Succession Act are fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way. The spontaneous development of customary law could continue to be hampered if this were to happen. The Intestate Succession Act does not preclude an estate devolving in accordance with an agreement reached among all interested parties but in a way that is consistent with its provisions. There is, for example, nothing to prevent an agreement being concluded between both surviving wives to the effect that one of them would inherit all the deceased's immovable property, provided that the children's interests are not affected by the agreement. Having regard to the vulnerable position in which some of the surviving family members may find themselves, care must be taken that such agreements are genuine and not the

result of the exploitation of the weaker members of the family by the strong. In this regard, a special duty rests on the Master of the High Court, the magistrates and other officials responsible for the administration of estates to ensure that no one is prejudiced in the discussions leading to the purported agreements.

The effect of this judgment

[131] It needs to be emphasised that this judgment is concerned with intestate deceased estates which were governed by section 23 of the Act only. All such estates will henceforth be administered in terms of this judgment. The question arises as to the role of the Master of the High Court, magistrates and other officials appointed by the Master. Section 4(1A) of the Administration of Estates Act[153] provides that the Master shall not have jurisdiction over estates that devolve in terms of customary law.[154] The effect of this judgment is to bring about a change in this respect. The Master is no longer precluded from dealing with intestate deceased estates that were formerly governed by section 23 of the Act since they will now fall under the terms of this judgment and not customary law.

[153] Act 66 of 1965.

[154] Section 4(1A) reads:

> "The Master shall not have jurisdiction in respect of any property if the devolution of the property is governed by the principles of customary law, or of the estate of a person if the devolution of all the property of the person is governed by the principles of customary law, and no documents in respect of such property or estate shall be lodged with the Master, except a will or a document purporting to be a will."

[132] The procedure under the Administration of Estates Act is somewhat different to the procedure under the Act and its regulations. The Administration of Estates Act_was recently amended to permit the Master to designate posts in the Department of Justice to exercise the powers and perform the duties delegated to them on behalf of, and under the direction of the Master.[155] The same provision requires service points to be established where these officials may exercise the powers referred to. The Court has not been informed what steps have been taken by the Master in terms of these provisions. Section 18(3) of the Administration of Estates Act (somewhat similarly to section 23(6) of the Act) permits the Master to dispense with the appointment of an executor if the estate does not exceed a stipulated amount (currently set at R125,000).[156] Section 18(3) also permits the Master to "give directions as to the manner in which any such estate shall be liquidated and distributed." The terms of this provision are broad enough to permit the Master to hold an inquiry to facilitate the liquidation of the estate as is currently the practice under regulation 3. In the circumstances, I do not think it inappropriate to order that in future all new estates shall be wound up in terms of the provisions of the Administration of Estates Act. However, in case such an order causes dislocation or harm, I include in the order a provision permitting any interested person to approach this Court on an urgent basis, in

[155] Section 2A(1) and (2) introduced into the Administration of Estates Act by Act 47 of 2002.

[156] Government Gazette 25456 GN R1318, 19 September 2003.

the event of serious administrative or practical problems being experienced as a result of this order.

[133] It will be necessary, however, that estates that are currently being wound up under section 23 of the Act and its regulations, continue to be so administered to avoid dislocation. The order will accordingly provide that the provisions of the Act and its regulations shall continue to be applied to those estates in the process of being wound up. All estates that fall to be wound up after the date of this judgment shall be dealt with in terms of the provisions of the Administration of Estates Act.

[134] Finally, a word or two about the High Court judgments in the *Bhe* and *Shibi* cases. Both dealt extensively with the difficult issues which were the subject of the two applications and were of great assistance to this Court. It will however be necessary to set aside the two High Court orders in order to accommodate the broadened ambit of the issues canvassed as a result of the application to this Court by the South African Human Rights Commission and the Women's Legal Centre Trust.

Costs

[135] No costs have been asked for in this matter and there will accordingly be no order for costs made.

The Order

[136] The following order is accordingly made:

1. The orders of:

   (a) the Cape High Court in the matter of *Bhe and Others v The Magistrate, Khayelitsha and Others*, and

   (b) the Pretoria High Court in the matter of *Charlotte Shibi v Mantabeni Freddy Sithole and Others*

   are hereby set aside.

2. Section 23 of the Black Administration Act 38 of 1927 is declared to be inconsistent with the Constitution and invalid.

3. The Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200) published in Government Gazette No. 10601 dated 6 February 1987, as amended, are declared to be invalid.

4. The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.

5. Section 1(4)(b) of the Intestate Succession Act 81 of 1987 is declared to be inconsistent with the Constitution and invalid.

6. Subject to paragraph 7 of this order, section 1 of the Intestate Succession Act 81 of 1987 applies to the intestate deceased estates that would formerly have been governed by section 23 of the Black Administration Act 38 of 1927.

7. In the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse:

   (a) A child's share in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;

   (b) Each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and

Constitutional Development by notice in the Gazette, whichever is the greater; and

(c) Notwithstanding the provisions of sub-paragraph (b) above, where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided between the surviving spouses.

8. In terms of section 172(1)(b) of the Constitution, the orders in paragraphs 2, 3, 4, 5 and 6 of this order, shall not invalidate the transfer of ownership prior to the date of this order of any property pursuant to the distribution of an estate in terms of section 23 of the Black Administration Act 38 of 1927 and its regulations, unless it is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicants brought challenges in this case.

9. In terms of section 172(1)(b) of the Constitution, it is declared that any estate that is currently being administered in terms of section 23 of the Black Administration Act 38 of 1927 and its regulations shall continue to be so administered, despite the provisions of paragraphs 2 and 3 of this order, but subject to paragraphs 4, 5 and 6 of this order, until it is finally wound up.

10. Any interested person may approach this Court for a variation of this order in the event of serious administrative or practical problems being experienced.

11. (a) In the matter of *Bhe and Others v The Magistrate, Khayelitsha and Others:*

    (i) it is declared that Nonkululeko Bhe and Anelisa Bhe are the sole heirs of the deceased estate of Vuyo Elius Mgolombane, registered at Khayelitsha Magistrates' Court under reference no 7/1/2-484/2002;

    (ii) Maboyisi Nelson Mgolombane is ordered to sign all documents and to take all other steps reasonably required of him to transfer the entire residue of the said estate to Nonkululeko Bhe and Anelisa Bhe in equal shares;

    (iii) The Magistrate, Khayelitsha, is ordered to do everything required to give effect to the provisions of this judgment.

(b) In the matter of *Charlotte Shibi v Mantabeni Freddy Sithole and Others:*

    (i) it is declared that Charlotte Shibi is the sole heir of the deceased estate of Daniel Solomon Sithole registered at

Pretoria North Magistrate District of Wonderboom under the reference no 7/1/2-410/95;

(ii) Mantabeni Freddy Sithole is ordered to pay Charlotte Shibi the sum of R11,505.50;

(iii) Jerry Sithole is ordered to pay Charlotte Shibi the sum of R11,468.02.

Chaskalson CJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J concur in the judgment of concur in the judgment of Langa DCJ.

NGCOBO J:

Introduction

[137] This trilogy of cases raises two important questions concerning the application of indigenous law of succession. The first question relates to the constitutionality of section 23 of the Black Administration Act of 1927 (the Act)[1] read together with the Regulations for the Administration and

[1] Act 38 of 1927.

Distribution of Estates of Deceased Blacks (the regulations)[2] framed under the Act and read further with section 1(4)(b) of the Intestate Succession Act 81 of 1987.[3] These enactments determine the circumstances under which indigenous law of succession is applicable to African people. The second question concerns the constitutional validity of the indigenous law principle of male primogeniture.

[138] In substance, the impugned provisions put in place a succession scheme that applies only to African people and determines when indigenous law of succession applies to them. The scheme was challenged on the grounds that it violates the right to equality and the right to human dignity. The indigenous law of succession which the scheme makes applicable involves the principle of male primogeniture. In terms of this principle, the eldest of the male issue succeeds to the deceased family head. This principle was challenged on the grounds that it discriminates against women and other children of the deceased.

[139] I have read the judgment prepared by the Deputy Chief Justice. Regrettably, I am unable to concur in that judgment. He concludes that (a) it is inappropriate to develop the rule of male primogeniture; and (b) the Intestate

[2] Government Gazette 10601 GN R200, 6 February 1987 as amended by Government Gazette 24120, GN R1501, 3 December 2002.

[3] Section 1(4)(b) of the Intestate Succession Act provides that:

> "'[I]ntestate estate' includes any part of an estate . . . in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply".

Succession Act should, in the interim, govern all the estates that were previously governed by section 23 of the Act. I do not agree. In my view, the rule of male primogeniture should be developed in order to bring it in line with the rights in the Bill of Rights. Pending the enactment of the legislation to determine when indigenous law is applicable, both indigenous law of succession and the Intestate Succession Act should apply subject to the Constitution and the requirements of fairness, justice and equity, bearing in mind the interests of minor children and other dependants of the deceased family head.

[140] The factual background relating to these cases has been set out in the main judgment. It need not be repeated here. For the purposes of this judgment, it is sufficient to say that these cases concern the rights of daughters and sisters to a deceased African male to succeed such a deceased male person. In the *Bhe* matter, the right is asserted by the two minor daughters of the deceased. In the *Shibi* matter, that right is asserted by the sister of the deceased. These cases therefore do not concern the right of widows to succeed to their deceased husbands.

The constitutional validity of section 23 of the Act, regulations and section 1(4)(b) of the Intestate Succession Act

[141] Section 23 must be understood in the context of the scheme of the Act. As its name suggests, the Act is aimed at regulating all aspects of life of

African people. The Act was one of the pillars of the apartheid legal order, and together with other racially based statutes, it was part of the edifice of the apartheid legal order. The Act has been described as "an egregious apartheid law" that "anachronistically has survived our transition to a non-racial democracy."[4]

[142] Section 23 deals with succession and inheritance to estates of deceased African people. It prescribes circumstances under which the property of deceased African people may devolve according to "Black law and custom". In addition, it makes provision for the State President to make regulations dealing with matters relating to inheritance and succession to estates of deceased African people. It regulates the manner in which estates of deceased African people may be administered and distributed; defines the rights of widows in regard to the use and occupation of certain land; and prescribes tables of succession. The regulations were in effect choice of law rules which determined when indigenous law was applicable to estates of deceased African people. Section 1(4)(b) of Intestate Succession Act excluded estates of African people that fall within the purview of section 23 of the Act from the scope of the Intestate Succession Act.

[143] The unconstitutionality of section 23 of the Act can hardly be disputed. The Act is manifestly racist in its purpose and effect. It discriminates on the

[4] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 1.

grounds of race and colour. Section 23 of the Act, the regulations and section 1(4)(b) of the Intestate Succession Act are interlinked. They stand or fall together. Their combined effect is to put in place a succession scheme which discriminates on the basis of race and colour applying only to African people. The limitation that this scheme imposes on the right of African people to equality can hardly be said to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The discrimination it perpetrates is an affront to the dignity of those that it governs.

[144] Section 23 is therefore inconsistent with the right to equality guaranteed in section 9(3) as well as the right to dignity protected by section 10 of the Constitution. The regulations and section 1(4)(b) of the Intestate Succession Act must suffer the same fate.

[145] The High Court only declared invalid section 23(10)(a), (c) and (e) of the Act, regulation 2(e) and section 1(4)(b) of the Intestate Succession Act. In my view, the whole of section 23 must go. The same goes for the regulations. To this extent, I concur in the judgment of the Deputy Chief Justice.

[146] It will be recalled that in terms of the regulations, in particular, regulation 2(e), indigenous law of succession is made applicable to intestate estates that do not fall under regulation 2(b) to (d).[5] And the central feature of

[5] See para 36 of the main judgment.

indigenous law of succession is the principle of male primogeniture. This is a rule that was applied by the magistrates in the *Bhe* and *Shibi* matters. The constitutionality of this rule was challenged too. It will therefore be convenient to consider the constitutional validity of the rule before considering the remedy that is appropriate in these cases.

The constitutional challenge to the principle of male primogeniture

[147] This rule was challenged on the basis that it discriminates unfairly on the grounds of gender, age and birth. In order to evaluate the cogency of the challenge, it is necessary to understand the nature of indigenous law and, in particular, the concept of succession in indigenous law. All of this provides the context in which the constitutional validity of the rule must be determined. But first, what is the place of indigenous law in our constitutional democracy?

Place of indigenous law in our democracy

[148] Our Constitution recognises indigenous law as part of our law. Thus section 211(3) enjoins courts to "apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law." The Constitution accords it the same status that other laws enjoy under it. In addition, courts are required to develop indigenous law so as to bring it in line with the rights in the Bills of Rights.[6] While in the past

[6] Section 39(2) of the Constitution provides that ". . . when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights." See also *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 197.

indigenous law was seen through the common law lens, it must now be seen as part of our law and must be considered on its own terms and "not through the prism of common law."[7] Like all laws, indigenous law now derives its force from the Constitution.[8] Its validity must now be determined by reference not to common law but to the Constitution.[9]

[149] But how do we ascertain the applicable rule of indigenous law?

How to ascertain indigenous law?

[150] There are at least three ways in which indigenous law may be established. In the first place, a court may take judicial notice of it. This can only happen where it can readily be ascertained with sufficient certainty. Section 1(1) of the Law of Evidence Amendment Act 45 of 1988 says so.[10]

Compare *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at paras 37-40.

[7] *Alexkor Ltd and Another v Richterveld Community and Others* 2003 (12) BCLR 1301 (CC) at para 56.

[8] Id at para 51. Compare *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 44.

[9] Section 2 of the Constitution states that, "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." See also *Mabuza v Mbatha* 2003 (4) SA 218 (T); 2003 (7) BCLR 743 (T) at para 32.

[10] Section 1(1) provides that "[a]ny court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy and natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles." In view of the constitutionalisation of indigenous law, there are substantial doubts as to whether the first proviso still applies. See also *Mabuza* id.

Where it cannot be readily ascertained, expert evidence may be adduced to establish it.[11] Finally, a court may consult text books and case law.[12]

[151] Caution, however, must be exercised in relying on case law and text books.[13] In *Alexkor*[14] we emphasised the need for caution and said:

> "Although a number of text books exist and there is a considerable body of precedent, courts today have to bear in mind the extent to which indigenous law in the pre-democratic period was influenced by the political, administrative and judicial context in which it was applied. Bennett points out that, although customary law is supposed to develop spontaneously in a given jural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term 'customary law' emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people."[15]

[152] It is now generally accepted that there are three forms of indigenous law: (a) that practised in the community; (b) that found in statutes, case law or textbooks on indigenous law (official); and (c) academic law that is used for

[11] Above n 7 at para 52; *Masenya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T); *Hlophe v Mahlalela & Another* 1998 (1) SA 449 (T) at 457E-F; and *Mabuza* above n 9.

[12] Above n 7at para 54; and *Mabuza* id at 448D-F.

[13] *Alexkor* id.

[14] Id

[15] Id at para 52 n 51.

teaching purposes.[16] All of them differ. This makes it difficult to identify the true indigenous law. The evolving nature of indigenous law only compounds the difficulty of identifying indigenous law.

The evolving nature of indigenous law

[153] Indigenous law is a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates. It is not a fixed body of classified rules. As we pointed out in *Alexkor*:

> "In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution."[17] (footnote omitted)

[154] The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort

[16] Above n 7 at para 52; Bekker and De Kock "Male primogeniture in African customary law — are some now more equal than others?" (1998) 23 *Journal for Juridical Science* 99 at 112-113. See also *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1074-1075B.

[17] Above n 7 at para 53.

the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version.

[155] In these cases, no attempt was made to ascertain the living indigenous law of succession. These matters were approached on the footing that indigenous law of succession is that which is described in the textbooks and case law. Whether that is the proper approach to a system of law that is dynamic and evolving is not free from doubt. However, in both the *Bhe* and *Shibi* matters, the magistrates concerned applied the indigenous law of succession as described in *Mthembu v Letsela*[18] and textbooks. It is that law which we must evaluate in these cases. But first, it is necessary to understand the concept of succession in indigenous law.

The concept of succession in indigenous law

[156] The concept of succession in indigenous law must be understood in the context of indigenous law itself. When dealing with indigenous law every attempt should be made to avoid the tendency of construing indigenous law concepts in the light of common law concepts or concepts foreign to indigenous law. There are obvious dangers in such an approach. These two systems of law developed in two different situations, under different cultures and in response to different conditions.[19] In *Alexkor*, this Court approved the

[18] 2000 (3) SA 867 (SCA); [2000] 3 All SA 319 (A) at para 8.

[19] *Alexkor* above n 7 at para 56.

following passage by the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*:[20]

> "Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufractuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists . . . . In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."[21]

[157] However, because of our legal background and, in particular, the fact that indigenous law was previously not allowed to develop in the same way as other systems of law, the tendency may at times be unavoidable. But even

[20] [1921] 2 AC 399.

[21] Id at 402-404.

then, common law concepts should be used with great caution in indigenous law.

[158] In common law, concepts of "succession" and "inheritance" are sometimes used interchangeably. However, in the context of indigenous law, it is necessary to distinguish these concepts. As Bennett explains:

> "The words 'succession' and 'inheritance' are often used as synonyms, but for analytical purposes they should be distinguished. The latter denotes transmission of rights to property only, and in those societies emphasizing material wealth (which will also have a highly evolved notion of property) inheritance predominates. Succession is more general; it implies the transmission of all the rights, duties, powers, and privileges associated with status. So in the case of customary law one should speak of a process of succession rather than inheritance."[22]

[159] The significance of distinguishing between "succession" and "inheritance" appears from the following passage by Himonga:

> "Succession refers to the process of succeeding to the estate, office or status of the deceased person, while inheritance refers to the process of inheriting the property of the deceased. The person selected as successor does not, in Zambian systems of succession, as in many other African systems, inherit all the property, although he may have the power to administer the estate and a right to the larger portion of it. Otherwise, the right of inheritance belongs to a much wider group entitled to inherit from the deceased according to the operative system of kinship."[23] (footnotes omitted)

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[22] Bennett *"A Sourcebook of African Customary law for Southern Africa"* (Juta, Cape Town 1991) at 383.

[23] Himonga "The law of succession and inheritance in Zambia and the proposed reform" (1989) *International Journal of Law and the Family 3* 160 at 161.

[160] Inheritance of property is not always linked to succession to status.[24] The successor does not inherit the family property. He steps into the shoes of the deceased by taking over the control of the family property. That is not to say that the concept of inheritance was unknown. It is not necessary in this case to determine the circumstances in which inheritance to property occurred. Indigenous law of succession is therefore not solely concerned with the transfer of rights in property. The transfer of status and roles traditionally form an essential component of succession.[25]

[161] It is in this context that the terms "succession" and "inheritance" must be understood. But this must be understood against the background of the origin, nature and purpose of the indigenous law of succession.

The social context in which the law developed

[162] To understand the concept of succession in indigenous law, it is instructive to look at the social context in which it originated. The rules of indigenous law, in particular, the rule of primogeniture, have their origin in traditional society. This society was based on a subsistence agricultural economy. At the heart of the African traditional structure was the family unit.

[24] Bekker and De Kock "Adaptation of the customary law of succession to changing needs" (1992) 25 *Comparative and International Law Journal of Southern* Africa 366 at 368; and Maithufi "The constitutionality of the rule of primogeniture in customary law of intestate succession" (1998) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 142 at 147.

[25] Ndulo "Widows under Zambian customary law and the response of the court" (1995) *Comparative and International Law Journal of Southern Africa* 90 at 92.

The family unit was the focus of social concern. Individual interests were submerged in the common weal.[26] The system emphasised duties and responsibilities as opposed to rights. At the head of the family there was a patriarch or a senior male who exercised control over the family property and members of the family.[27] The family organization was self-sufficient. Within this system, the position of each member of the family was based on an equitable division of labour.

[163] A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of *ubuntu* — *umuntu ngumuntu ngabantu*[28] — a dominant value in African traditional culture. This concept encapsulates communality and the inter-dependence of the members of a community. As Langa DCJ put it, it is a culture which "regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of

[26] *Magaya v Magaya* 1999 (1) ZLR 100 (S) at 108E-G.

[27] Bennet *Human Rights and African Customary Law under the South African Constitution* (Juta, Cape Town 1995) at 5; and id.

[28] As Mokgoro J put it in *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 308, "*ubuntu* . . . metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation." (footnotes omitted) Further, Mohamed J held in *Makwanyane* at para 263 that "[t]he need for *ubuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by." See also *Makwanyane* at para 237.

rights".[29] It is this system of reciprocal duties and obligations that ensured that every family member had access to basic necessities of life such as food, clothing, shelter and healthcare.

[164] As Ndulo explains:

> "Pre-colonial African society in which these rules were developed, was based on an agricultural subsistence economy characterised by self-sufficient joint family organisation. In general a woman's position in traditional society was based on an equitable division of labour. Women were primarily responsible for planting, weeding and harvesting while men performed certain heavy tasks such as clearing the bush and farming. Most Africans were born, grew, married and died without ever leaving the region in which their tribe lived. A sense of community prevailed from which developed an elaborate customary law system of reciprocal obligations between family members. For example, in most polygamous marriages each wife represented a separate unit of production. Her husband had a responsibility to give her land and equipment with which to farm and provide her with adequate shelter. She in turn was expected to feed herself and her children and, along with her co-wives, to provide food for her husband. African traditions and customary law served the needs of the tribal communities from which they developed and together the traditional practices and customary rules, ensured that all members of the community had access to food, clothing and shelter."[30] (footnotes omitted)

[165] It was in this social context that the rule of succession in indigenous law, in particular, the principle of male primogeniture, developed and operated. The head of the family had the responsibility to provide food, shelter, clothing and

[29] Id at para 224.

[30] Above n 25 at 99.

basic healthcare for his dependants. And upon his death, someone had to take over this responsibility.

[166] The obligation to care for family members is a vital and fundamental value in African social system. This value is now entrenched in the African (Banjul) Charter on Human and Peoples' Rights. The Preamble to the Charter urges Member States to take "into consideration the virtues of their historical traditions and values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights". Article 27(1) provides that "every individual shall have duties towards his family and society". Article 29(1) provides that an individual shall . . . have the duty: "to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need".

The nature and purpose of the law of succession

[167] The main purpose of succession was to keep the family property in the family.[31] This was essential to the preservation of the family unit. Land and livestock were the most important property. They provided the whole family with a source of livelihood and a place to live. They constituted family property and as such belonged to the family. The father was the head of the family and he held the property on behalf of and for the benefit of the family.

[31] South African Law Commission Project 90 *Report on Customary Law of Succession*, 2004 at 15; Bekker and De Kock above n 22 at 366; and Bennett above n 25 at 382.

He was responsible for the maintenance of the family from the property. Upon his death, two objectives had to be achieved: the perpetuation of the family; and getting someone to take over the powers and duties of the deceased family head. This was achieved by providing rules for the transmission of the deceased's rights and obligations to the eldest son.[32]

[168] The indigenous law of succession was concerned with two objectives: (a) the perpetuation and the preservation of the family; and (b) getting someone to take over the duties and obligations of the deceased family head. The preservation of the family required the preservation of family property. Family property consisted mainly of land and livestock. These were the primary sources of livelihood. And these were viewed as the property of the family and not that of each individual. The father was viewed as the caretaker and manager of the common property and thus the family head. He was responsible for the maintenance of the family from the family property. To enable the successor to carry out the duties and obligations of the deceased, family property had to be kept in the family.

[169] Indigenous law preserved the family unit and its continuity by transferring responsibilities of the family head to his senior male descendant.[33]

[32] Bennett above n 22 at 383.

[33] Ndulo above n 25 at 100.

This descendant is referred to as *indlalifa* or *successor*.[34] It is this male descendant who is equated with the heir under common law.[35] But there are important differences between the two. *Indlalifa* takes over the powers and responsibilities of the deceased family head. The powers relate to the right to control and administer the family property on behalf of and for the benefit of the family members. The responsibilities relate to the duty to support and maintain all the dependants of the deceased. This process is metaphorically expressed by the phrase "the *indlalifa* steps into the shoes of the deceased family head and takes over control of the family property".

[170] As pointed out earlier, inheritance of property is not always linked to succession to status.[36] In the context of indigenous law of succession it is perhaps more accurate to speak of *indlalifa* as succeeding to the status of the deceased. The status of the deceased includes both his rights and obligations.[37] By providing *indlalifa* with all the powers necessary to continue managing family property, the indigenous law of succession was designed to ensure the welfare of the surviving family. Because *indlalifa* takes over the control of the family assets he is said to "inherit" the family assets. This description of the process has resulted in the distortion of the role of *indlalifa* and to regard him

[34] Maithufi above n 24 at 147.

[35] In this judgment the term *indlalifa* will be used as it is more appropriate in the context of succession in indigenous law.

[36] Bekker and De Kock above n 24 at 368; and Maithufi above n 24 at 147.

[37] South African Law Commission Project 90 above n 31 at 17; and *Magaya* above n 26 at 109E-G.

as the owner of the family assets. Yet he is no more than a person who holds the property on behalf of the family, with powers to administer it on behalf of and for the benefit of the family.[38] He may be said to "inherit" the right to control the family property.

[171] Succession in the context of indigenous law must therefore be understood to refer to the process of succeeding to the status of the deceased. *Indlalifa* steps into the shoes of the deceased.[39] Under indigenous law, the *indlalifa* does not inherit the property. He succeeds to the status and position of the deceased and thus acquires the same rights and obligations that the deceased had. This includes the power to administer the family assets. He holds the family property on behalf of other family members.[40] Once it is accepted that *indlalifa* holds the family property on behalf of and for the benefit of all family members, it cannot be said that he is the owner of the family property or that he inherits it in the sense understood in common law.[41]

[172] The perpetuation and preservation of the family unit and succession to the position and status of the deceased therefore lie at the heart of succession in indigenous law.[42] Like his predecessor, *indlalifa* becomes the nominal owner

[38] *Chihowa v Mangwende* 1987 (1) ZLR 228 (SC) at 231H-232D; and *Magaya* above n 26 at 110B-E.

[39] *Mgoza and Another v Mgoza* 1967 (2) SA 36 (A) at 440E-G.

[40] Above n 38.

[41] Above n 26 at 109E-H.

[42] Bekker and De Kock above n 24 at 366 and 368.

of the family property, and is required to administer it on behalf of and for the benefit of the family. *Indlalifa* acquires the duty to maintain and support the widow and minor children.[43] In dealing with family property, *indlalifa* has to consult the widow who had the right to restrain him from dissipating family assets.[44] When there are insufficient assets to maintain the family, *indlalifa* had to use his own resources to provide maintenance.[45]

[173] The underlying purpose of indigenous law of succession is therefore to protect the family and ensure that the dependants of the deceased are looked after. This is achieved by entrusting the responsibility of seeing to the welfare of the deceased's dependants to one person in return for the right to control the family property.[46] This system ensures that the dependants of the deceased as well as the members of the family always have a home and resources for their maintenance. This prevents homelessness. Those who cannot support themselves such as minor children have someone to maintain and support them. The right of *indlalifa* to control and administer family property therefore goes with the responsibility to look after the dependants of the deceased. Mbatha, however, observes that "poverty and unemployment, together with the failure to look after the interests of the deceased's dependants have distorted the

[43] Rautenbach "Law of succession and inheritance" in Bekker (ed) *Introduction to Legal Pluralism in South Africa Part 1 Customary Law* 109 at 110.

[44] Bekker *Seymour's Customary Law in Southern Africa* 5 ed. (Juta, Cape Town 1989) 298.

[45] Above n 39 at 440E-F.

[46] Mbatha "Reforming the customary law of succession" (2002) 18 *South Africa Journal on Human Rights* 259 at 260.

customary law of succession, undermined its protective value to other family members and forced members to assume the heir's responsibilities for looking after the needy, the sick and the aged."[47]

[174] Succession was based on the principle of male primogeniture. This principle entailed that the eldest male descendant of the deceased succeeded the deceased. Women and other male children were excluded. However, other male children could be considered if the eldest was not available or willing to succeed. *Indlalifa* invariably remained in the common home to enable him to carry out his responsibilities. The rationale for the exclusion of women was the fact that:

> "[W]omen were always regarded as persons who would eventually leave their original family on marriage, after the payment of roora/ lobola, to join the family of their husbands. It was reasoned that in their new situation – a member of the husband's family – they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family."[48]

[175] However, as pointed out earlier, indigenous law is dynamic and it is evolving, adapting itself to the ever-changing circumstance of the communities in which it operates. There are indications that the rule of primogeniture has

[47] Id at 261.

[48] Above n 26 at 109B-E.

developed to allow women to be appointed as heads of the families.[49] It may well be that it has also developed to allow a woman to succeed to a deceased family head. However, this aspect need not be investigated in these cases. No evidence was presented in this regard. The indigenous law that is in issue in this case is the official version, in particular, that which was described by the Supreme Court of Appeal (SCA) in the case of *Mthembu*.[50]

The rule of male primogeniture

[176] Central to the indigenous law of succession, therefore, is the rule of male primogeniture. It was described as follows by the SCA in the judgment of *Mthembu*:[51]

> "The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue, the second son becomes heir; if he is dead leaving no male issue, the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds. . . . Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to

[49] *Mabena* above n 16 at 1073J.

[50] Above n 18.

[51] Id

> support and maintain them, if necessary from his own resources and not to expel them from his home."[52]

[177] Whether this passage reflects the indigenous law of succession actually lived by the people is doubtful.[53] However, that is the law that was applied in these cases. In the *Bhe* matter, the deceased left no son and therefore in accordance with the rule of male primogeniture his father was declared the successor. Similarly, in the *Shibi* matter, the deceased left no male descendants and his cousin was therefore appointed sole *indlalifa*. It is this rule that came under constitutional challenge. And, as pointed out earlier, it is this version of the rule that we must evaluate.

[178] It is against this background that the constitutional challenge to the rule of male primogeniture must be evaluated. First, I deal with the challenge based on discrimination against younger children.

The challenge based on age and birth discrimination

[179] The rule of primogeniture was challenged on the basis that it discriminates unfairly against younger children of the deceased. It will be recalled that only the eldest male succeeds. The rule, no doubt, limits the right of the younger children to succeed to the status of the deceased. The question

[52] Id at para 8.

[53] *Mabena* above n 16 at 1074E-F, where the court found that female family heads were on the increase. See also paras 73-74 and 83 below.

is whether such limitation is reasonable and justifiable under section 36(1) of the Constitution. It is to that question that I now turn.

[180] The primary purpose of the rule is to preserve the family unit and ensure that upon the death of the family head, someone takes over the responsibilities of family head. These responsibilities include looking after the dependants of the deceased and administering the family property on behalf of and for the benefit of the entire family. Successorship also carries with it the obligation to remain in the family home for the purposes of discharging the responsibilities associated with heirship. From the family of the deceased, someone must be found to assume these responsibilities. There may be several conflicting demands. But there is a need for certainty in order to facilitate the transfer of the rights and obligations of the deceased without lengthy deliberations that may be caused by rival claims. The determination of the eldest male as the successor was intended to ensure certainty.

[181] Entrusting these responsibilities to the eldest child is consistent with the role of the eldest child in relation to his siblings. The eldest child has a responsibility to look after his or her siblings. The rule simply recognises this responsibility. Furthermore, one of the cherished values in African culture is respect for elders. Respect is supposed to inculcate good habits such as

humility and courtesy.[54] The old are required to give guidance to the young. This is the basis of mentorship.

[182] Two points need to be stressed here. First, *indlalifa* does not inherit as that term is understood in common law. What happens is best conveyed by the expression that "*indlalifa* steps into the shoes of the family head." Far from getting any property benefit, the *indlalifa* assumes the responsibilities of a family head. He is required to administer the family property for the benefit of the entire family. As pointed out earlier, where there are insufficient assets in the family, *indlalifa* must use his own resources. Second, the selection of the eldest child must also be seen against the flexibility of the rule and the fact that he may be removed from office. If the eldest child considers that he cannot perform the responsibilities, the next eldest takes over the responsibility. What is more, the *indlalifa* may be held to account to the family, if he does not perform his responsibilities. The family may, if he fails to perform his duties, remove him.

[183] Having regard to all these factors, I am satisfied that the limitation imposed by entrusting the responsibilities of a deceased family head to the eldest child is reasonable and justifiable under section 36(1). It follows therefore that the rule is not inconsistent with section 9(3) of the Constitution

[54] Nhlapo "The African family and women's rights: Friends or foes?" (1991) *Acta Juridica* 135 at 141-142.

by reason of discrimination based on age and birth. It now remains to consider the challenge based on gender discrimination.

Gender discrimination

[184] Under the rule of male primogeniture, only men can succeed to the deceased family head. The eldest son succeeds, failing which, the son's eldest male descendants succeed. If the eldest son has predeceased the father, leaving no descendants, the second son succeeds. If he too predeceased the father, leaving no sons, it goes to the next son. Where there are no male descendants, the father of the deceased succeeds. This is what happened in the *Bhe* matter. If the father predeceased the deceased, it will go to his sons and their dependants in their order of birth. The process therefore excludes women.

[185] That the rule of male primogeniture limits the rights of women to be considered for succession to the position and status of the deceased family head cannot be gainsaid. They are excluded regardless of their availability and suitability to acquit themselves in that position. They are overlooked in circumstances where they may be the only child of the deceased. Nor does it matter that they may have contributed to the acquisition or preservation of the family property.

[186] The question is whether such limitation is reasonable and justifiable under section 36(1) of the Constitution.

Justification

[187] The importance of the right to equality in our constitutional democracy cannot be gainsaid. This Court has in the past emphasised the importance of the right to equality.[55] The right to equality is related to the right to dignity. Discrimination conveys to the person who is discriminated against that the person is not of equal worth. The discrimination against women conveys a message that women are not of equal worth as men. Where women under indigenous law are already a vulnerable group, this offends their dignity.

[188] The rule of male primogeniture might have been justified by the social and economic context in which it developed. It developed in the context of a traditional society which was based on a subsistence agricultural economy characterised by a self-sufficient family organisation. Within this system, an elaborate network of reciprocal obligations between members of a family existed which ensured that the needs of every member for food, shelter and clothing were provided for. The roles that were assigned to men and women in traditional African society were based on the type of social structure and economy that prevailed then.

[55] *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 155-156; *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at paras 33-40; *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at paras 15-25; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 58; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 27*;* and *Satchwell v President of the Republic of South Africa and Another* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at paras 17-18.

[189] But all of that has changed. As Ndulo explains:

> "In the modern economy women fend for themselves and help their husbands accumulate property during the course of their marriage. In essence, they have outgrown the status assigned to them in traditional society. Tribal law has lagged behind these economic and social changes. As more and more women begin working outside the home, earning money and acquiring property, the gap between their legal status under customary law and their economic status in society widens . . . . But as we have seen, the joint family is in a state of decline and Africans are now enmeshed in an exchange economy. Development and industrialisation have caused an irreversible breakdown in the traditional African social order. The society is now highly individualistic, competitive and acquisitive. Customary rules do not operate to the benefit of the women in this type of society. The joint families that remain have lost their self-sufficiency. Modernisation, therefore, has had a negative impact on women. It has caused the breakdown of the tribal community and has destroyed the subsistence economy to such an extent that the protection women enjoyed under customary law is rendered useless. Today widows must support themselves by their own efforts. Application of the traditional concepts of customary law of succession to women in a modern context is unjust and discriminatory – a practice outlawed by the Zambian constitution. It also ignores the fact that married women help their husbands accumulate property during the course of their marriage and should not, therefore, be denied an absolute right in any portion of it."[56] (footnotes omitted)

[190] The role that women play in modern society and the transformation of the traditional African communities into urban industrialised communities with all their trappings, make it quite clear that whatever role the rule of male primogeniture may have played in traditional society, it can no longer be

[56] Above n 25 at 99-100.

justified in the present day and age. Indeed, there are instances where in practice women have assumed the role of the head of the family.[57] This may be due to the fact that *indlalifa* is almost always away from the common home, or has decided to establish his home outside the common family home. The rule has therefore lost its vitality to a certain degree.

[191] Jurisprudence from African courts, which have considered the position of women in the context of succession, further demonstrates that the rule in its present form no longer has any place in modern times.

African jurisprudence

Nigeria

[192] Indigenous law of succession in Nigeria varies from one ethnic group to another.[58] It ranges from the rule of primogeniture to the rule of ultimogeniture (according to which inheritance is exclusively by the youngest son).[59] The major ethnic groups in Nigeria include Igbo and Yoruba.[60] For the purposes of this comparison, I focus on the Igbo.

[57] Above n 49 at 1074F-G.

[58] Elias *"Nigerian Land Law and Custom"* (Routledge and Kegan Paul Ltd, London 1951) at 216-235; Ezeilo: *"Laws and practices relating to women's' inheritance rights in Nigeria: An overview"* available at www.wacolnig.org/LawAndPracticesRetakingToWomensInheritNig.doc accessed on 1 June 2004 at 11.

[59] Elias id at 216.

[60] Ezeilo above n 58 at 11.

[193] Within the Igbo community, succession is based on the principle of male primogeniture. Daughters and wives have no right of succession. The only situation in which a daughter could succeed the deceased is where, for example, she chooses to remain unmarried in her father's house with a view to raising children there. The situation occurs where the deceased leaves a substantial estate and without having a son or other male relative to succeed him. It is said that the purpose of this practice is to save the lineage from extinction. The legal interest vests in her until she gives birth to her own children. If she bears children, only sons, and not daughters, succeed to her.

[194] In *Mojekwu v Mojekwu*,[61] the Igbo succession rule was challenged on the ground that it discriminated against females. The court of appeal held that the rule of male primogeniture was unconstitutional and contrary to democratic values. Justice Tobi wrote:

> "All human beings - male and female - are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional. Any form of societal discrimination on ground of sex, apart from being unconstitutional, is antithesis to a society built on the tenets of democracy which we have freely chosen as a people . . . . Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oli-ekpe' custom of Nnewi, is repugnant to natural justice, equity and good conscience."[62]

[61] [1997] 7 NWLR 283.

[62] Id at 305A-D.

Zimbabwe

[195] In Zimbabwe, the courts initially used the Legal Majority Act[63] to improve the position of women. But this trend was later reversed by the Supreme Court. It is instructive to look at those cases that advance the position of women. In *Katekwe v Muchabaiwa,*[64] the Supreme Court of Zimbabwe had occasion to consider the effect of the Legal Majority Act. It held that "parliament's intention was to create equal status between men and women and, more importantly, to remove the legal disabilities suffered by African women because of the application of customary law."[65] In *Jenah v Nyemba,*[66] the court held that protection given by the statute is not restricted to single persons but it extended to married African women aged 18 years or over, who primarily were perpetual minors. In coming to this conclusion, the court relied on subsection 3(3) which provides that the statute "shall apply for the purposes of any law including customary law."[67]

[196] Then in 1987, the Supreme Court confronted head-on the question whether subsection 3(3) of this statute supersedes African law and custom in matters of succession and allows a woman to succeed as intestate heir. This

[63] Act 15 of 1982.

[64] 1984 (2) ZLR 112 (S).

[65] Id at 117G-H.

[66] 1986 (1) ZLR 138 (SC).

[67] Id at 143A.

was in *Chihowa v Mangwende*,[68] a case in which the deceased was survived by two daughters, his wife by whom he had no children, his father and four brothers. The community court appointed the eldest daughter as the intestate heiress to the deceased's estate. An appeal by the deceased's father to the provincial magistrate failed. Hence the appeal to the Supreme Court.

[197] Confining itself to the question of entitlement to inherit the estate of an African male who dies intestate, a bench of three judges of the Supreme Court held:

> "The Legislature, by enacting the Legal Age of Majority Act, made women who in African law and custom were perpetual minors majors and therefore equal to men who are majors. By virtue of the provisions of s 3 of the Act women who attain or attained the age of 18 years before the Act came into effect acquired capacity. That capacity entitles them to be appointed intestate heiresses . . . Now the eldest daughter of a father who dies intestate can take the lot but not for herself only but for herself and her late father's dependants . . . There is nothing in the wording of subs (3) of s 3 of Act 15 of 1982 which remotely suggests that for the purposes of inheritance a women can still be regarded as a minor."[69]

[198] However, in a later case, *Murisa NO v Murisa*,[70] the Supreme Court held that the ruling in *Chihowa*'s case "did not go so far as to say that a widow

[68] Above n 38.

[69] Id at 231E-F and at 232H-233A-B.

[70] 1992 (1) ZLR 167 (S). This case was decided by a bench of three judges.

could be appointed heir *ab intestatio* to her deceased husband's estate."[71] In reaching its decision, the Supreme Court relied amongst other things, upon the fact that:

> "Customary law does not recognise a widow's right to inherit in a direct fashion from her deceased husband's estate. She may be entitled to support from the estate but not to a share therein. In this context the Legal Age of Majority Act cannot be used to grant her a share in the estate".[72]

[199] *Murisa'*s case has been criticized for excluding widows from inheriting from their husbands.[73] It is indeed difficult to reconcile this decision with the *Chihowa* and *Jenah* cases. These two cases held that the purpose of the statute was to confer majority status on African women. The effect of the statute was to give them "the same rights of succession as men." And in *Jenah*, the court held that the protection afforded by the statute is not restricted to single persons but extends to married African women who were perpetual minors. The *Murisa* decision can only be explained on the basis that the absence of blood relation between her and the husband constituted a bar.

[200] In *Magaya v Magaya*,[74] the Supreme Court, in a bench of five judges, overruled its earlier decisions in *Katekwe* and *Chihowa* including *Murisa*,

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[71] Id at 169F-G.

[72] Id at 170A-B.

[73] Stewart "Untying the Gordian knot! Murisa v Murisa S-41-92: A little more than a case note" (1992) 4 No 3 *Legal Forum* at 8.

[74] Above n 26.

holding that these cases were decided wrongly.[75] The court considered two questions, first, whether customary law of succession was exempt from the anti-discrimination provisions of the Constitution; and second, whether the Legal Age of Majority Act conferred substantive rights upon women. In relation to the first question, it found that anti-discrimination provisions of the Constitution do not forbid discrimination based on sex. It further held that "even if they did on account of Zimbabwe's adherence to gender equality enshrined in international human rights instruments", subsections 3(a) and 3(b) of section 23 of the Constitution exempt customary law from the provisions forbidding discrimination.[76]

Tanzania

[201] In Tanzania, three systems of law govern succession, namely, the Indian Succession Act 1865, Islamic law and indigenous law.[77] Each system differs in the rights it accords to women. The Local Customary Law (Declaration)[78] contains rules that regulate intestate succession among patrilineal communities of Tanzania. A distinction is made between self-acquired land and family and clan land. The deceased's children can inherit self-acquired land in diminishing progression as determined by their sexes. Widows are excluded.

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[75] Id at 111B.

[76] Id at 105G-106B.

[77] "Land and property rights of widows: A case study of inheritance customary law in Tanzania" at 6 available at www.widowsrights.org accessed on 12 October 2004.

[78] No 4 Order, 1963.

[202] Although daughters are entitled to inherit family land, unlike men, they may not dispose of the land. In *Ibernados Ephraim v Holaria d/o Pastory and Gervazi Keizilege,* in the High Court of Civil Appeal 70/89, this rule came under challenge. The High Court found that this rule is discriminatory and inconsistent with article 13(4) of the Constitution of Tanzania which forbids discrimination against any person.[79]

Ghana

[203] In *Akrofi v Akrofi,*[80] the younger brother of the deceased was appointed *indlalifa* to succeed. The family property consisted of, amongst other things, three farms. The appointment followed a custom in terms of which women were not allowed to succeed to their deceased fathers' estates. A daughter of the deceased challenged the appointment, claiming that she was entitled to succeed her father.

[204] The High Court issued a declarator to the effect that the daughter was "within the range of persons . . . entitled to succeed to her father's estate".[81] The court issued the declarator because under the Ghanaian custom in issue the *indlalifa* was determined at a meeting of family members. The ruling of the

[79] Article 13(4) of the Constitution of the United Republic of Tanzania, 1977 provides that "no person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office".

[80] 1965 G.L.R 13.

[81] Id at 17.

court brought the daughter within the range of persons who could be considered for appointment. In rejecting the reasons given by the paramount chief why a woman cannot succeed, the court said:

> "I consider also the reason given by the paramount chief why a woman cannot succeed to her father's property unsound, because a successor does not acquire an absolute title which will pass to his or her issues. The successor's title at its best is a determinable life interest, that is to say, if he died still possessed of family property, the same will go to the person appointed by the family. The danger envisaged by the paramount chief will not arise. Further in many states in Ghana, women do succeed to family properties but no one will say by reason of their succession and their possible marriage into other families the properties they inherit or succeed to stand in jeopardy of being lost to their families. Again the paramount chief was pressed as to a settlement of the case of Mamasie Ofei and his sister Felipina Adjei which he conducted, when he and the members of the arbitration had to divide the inheritance of a brother and a sister and to give the sister a share in her late father's estate."[82]

[205] Although the court did not find that a custom which excludes women exists, the court nevertheless said:

> "I am of the view that if there be such a custom and I do not so find, whereby a person is discriminated against solely upon the ground of sex that custom has out-lived its usefulness and is at present not in conformity with public policy. Our customs if they are to survive the test of time must change with the times."[83]

[82] Id at 16.

[83] Id

[206] *In re Kofi Antubam (Decd): Quaico v Fosu and Another*,[84] the High Court was concerned, amongst other things, with whether the widows and the children of the deceased had any interest in the estate of the deceased, and if they did, the nature and extent of such interest under Akan customary law. The court found that widows and children have an interest not only in the immovable property but have to be maintained from the whole estate. "Their interests are inextricably mixed up in the indivisible estate and accordingly they are entitled to share in the estate if ultimately the whole estate is converted into money or partitioned."[85]

[207] Concerning the development of customary law, the court remarked:

> "[i]n the last quarter of the last century, customary law in Ghana has progressed and developed in accordance with the tempo of social, commercial and industrial progress. So far as land tenure is concerned, farming rights have been converted into building and residential rights, customs which appear to be repugnant to natural justice, equity and good conscience have been gradually extinguished by judicial decisions. The then legislature played a less effective role in these spontaneous developments engineered by public opinion. The courts have embraced these developments without adhering strictly to the original customary rigid rules."[86]

And then added:

[84] 1965 G.L.R 138.

[85] Id at 148.

[86] Id at 144.

> "Ghana is a developing state with remarkable social and economic transformations which render some of our customary rules antediluvian. If the customary law is to retain its place as the greatest adjunct to statutory law and the common law, it cannot remain stagnant whilst other aspects of the law are in constant motion."[87]

[208] What conclusion can be drawn from the above analysis?

[209] Having regard to these developments on the continent, the transformation of African communities from rural communities into urban and industrialised communities, and the role that women now play in our society, the exclusion of women from succeeding to the family head can no longer be justified. These developments must also be seen against the international instruments that protect women against discrimination, namely: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[88] the African (Banjul) Charter on Human and Peoples' Rights,[89] and the International Covenant on Civil and Political Rights.[90] In particular, CEDAW requires South Africa to ensure, amongst other things, the practical realization of the principle of equality between men and women and to take all appropriate measures to modify or abolish existing laws, regulations, customs

[87] Id

[88] Articles 1, 2, and 5(a). South Africa signed the Convention on 29 January 1993 and ratified it on 14 January 1996.

[89] Article 18(3). South Africa signed the Charter in 1995 and ratified it in 1996.

[90] Articles 2(1) and 26. South Africa ratified the Covenant on 10 March 1999.

and practices that constitutes discrimination against women.[91] As we observed in *S v Baloyi (Minister of Justice and Another Intervening)*:[92]

> "[t]he Convention on the Elimination of Discrimination Against Women imposes a positive obligation on States to pursue policies of eliminating discrimination against women by, amongst other things, adopting legislative and other measures which prohibit such discrimination. Similarly the African Charter on Human and Peoples' Rights obliges signatory States to ensure the elimination of discrimination against women."[93] (footnotes omitted)

[210] This rule might have been justified by the traditional social economic structure in which it developed. It has outlived its usefulness. In the present day and age the limitation on the right of women to succeed to the position and status of the family head, cannot be said to be reasonable and justifiable under section 36(1) of the Constitution. It follows therefore that the rule of male primogeniture is inconsistent with section 9(3) of the Constitution to the extent that it excludes women from succeeding to the family head.

[211] But what should be done with the rule, in particular, should the rule be developed so that it is brought into line with the Constitution? It is to this question that I now turn.

Should the rule be developed in line with the Constitution?

[91] Articles 2 and 5 of the CEDAW.

[92] 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC).

[93] Id at para 13.

[212] We are dealing here with indigenous law. That law is part of our law. Section 39(2) of the Constitution imposes an obligation on courts to develop indigenous law so as to bring it in line with the Constitution, in particular, the rights in the Bill of Rights. In *Carmichele v Minister of Safety and Security and Another*,[94] this Court considered the obligation to develop the common law and held that "where the common law deviates from the spirit, purport and objects of the Bill of Right the courts have an obligation to develop it by removing that deviation."[95]

[213] The rationale for this obligation was outlined as follows:

> "[t]he Constitution is the supreme law. The Bill of Rights, under the IC, applied to all law. Item 2 of Schedule 6 to the Constitution provides that 'all law' that was in force when the Constitution took effect, 'continues in force subject to . . . consistency with the Constitution'. Section 173 of the Constitution gives to all higher Courts, including this Court, the inherent power to develop the common law, taking into account the interests of justice. In s 7 of the Constitution, the Bill of Rights enshrines the rights of all people in South Africa, and obliges the State to respect, promote and fulfil these rights. Section 8(1) of the Constitution makes the Bill of Rights binding on the Judiciary as well as on the Legislature and Executive. Section 39(2) of the Constitution provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights. It follows implicitly that where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation."[96] (footnotes omitted)

[94] Above n 6.

[95] Id at para 33.

[96] Id

[214] The Court stressed that:

> "the obligation of Courts to develop the common law, in the context of the s 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties."[97]

[215] The *Carmichele* case applies equally to the development of indigenous law. Where a rule of indigenous law deviates from the spirit, purport and objects of the Bill of Rights, courts have an obligation to develop it so as to remove such deviation. This obligation is especially important in the context of indigenous law. Once a rule of indigenous law is struck down, that is the end of that particular rule. Yet there may be many people who observe that rule, and who will continue to observe the rule. And what is more, the rule may already have been adapted to the ever-changing circumstances in which it operates. Furthermore, the Constitution guarantees the survival of the indigenous law. These considerations require that, where possible, courts should develop rather than strike down a rule of indigenous law.

[97] Id at para 39.

[216] In view of the decision of this Court in *Carmichele,* there are at least two instances in which the need to develop indigenous law may arise. In the first instance it may arise where it is necessary to adapt indigenous law to the changed circumstances. Like the common law, the indigenous law must be adjusted to the ever-changing needs of the community in which it operates.[98] An illustration of this is to be found in the case of *Mabena.*[99]

[217] Two issues arose in the *Mabena* case. The first one was whether failure by the groom's father to participate in marriage negotiations nullified the marriage. The court held that it did not. It found that in the past there was a need for parents to consent to children's marriages because they provided lobolo but since young men were now in a position to provide for their own lobolo, parental consent is no longer required. The second issue was whether a woman could receive lobolo. The court accepted that there are instances where a woman may act as head of a family and can receive lobolo.[100] As a result, the court had in that case developed indigenous law by incorporating the changing context in which the system operated.

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[98] See the development of the common law relating to delictual liability for an omission in cases such as Minister van Polisie v Ewels 1975 (3) SA 590 (A); Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A); and Schultz v Butt 1986 (3) SA 667 (A). See generally Corbett "Aspects of the role of policy in the evolution of our common law" (1987) 104 South African Law Journal 52.

[99] Above n 49.

[100] Id at 1074F-G.

[218] In the second instance, it may be necessary to develop indigenous law in order to bring it in line with the rights in the Bill of Rights. This is the kind of development that is envisaged in *Carmichele*. Where indigenous law is inconsistent with the rights in the Bill of Rights, courts have an obligation to develop it so as to bring it in line with the rights in the Bill of Rights. Here the Court assesses the rule of indigenous law (the rule of male primogeniture) against the applicable provision in the Bill of Rights. In this instance, the Court is not primarily concerned with the changing social context in which indigenous law of succession operates or the practice of the people. The dearth of authority on what the living indigenous law is, should not therefore preclude a court from bringing a rule of indigenous law in line with the rights in the Bill of Rights. After all:

> "[o]ur Constitution contemplates that there will be a coherent system of law built on the foundations of the Bill of Rights, in which common law and indigenous law should be developed and legislation should be interpreted so as to be consistent with the Bill of Rights and with our obligations under international law. In this sense the Constitution demands a change in the legal norms and the values of our society."[101]

And indigenous law must reflect this change.

[219] By contrast, the development of indigenous law in order to adapt it to the changed circumstances requires the Court to have regard to what people are actually doing. It is here where the living indigenous law — law as actually

[101] *Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC) at para 56.

lived by the people — becomes relevant. It is here too where the problem of identifying living indigenous law arises. The Court must have regard to what people are actually doing in order to adapt the indigenous law to the ever-changing circumstances. That is not to say that in this process courts should not have regard to the Constitution. Of course, in the process of developing indigenous law and adapting it to the ever-changing circumstances, courts are required by section 39(2) of the Constitution to do so in a manner that promotes the spirit, purport and objects of the Bill of Rights.

[220] In these cases we are concerned with the development of the rule of male primogeniture so as to bring it in line with the right to equality. We are not concerned with the law actually lived by the people. The problem of identifying living indigenous law therefore does not arise. At issue here is the rule of male primogeniture which was applied in the *Bhe* and *Shibi* matters. It is that rule which must be tested against the right to equality, and if found deficient, as I have found, it must be developed so as to remove such deficiency.

[221] The rule of male primogeniture may have been consistent with the structure and the functions of the traditional family. The rule prevented the partitioning of the family property and kept it intact for the support of the widow, unmarried daughters and younger sons. However, the circumstances in which the rule applies today are very different. The cattle-based economy has

largely been replaced by a cash-based economy. Impoverishment, urbanization and the migrant labour system have fundamentally affected the traditional family structures. The role and status of women in modern urban, and even rural, areas extend far beyond that imposed on them by their status in traditional society. Many women are de facto heads of their families. They support themselves and their children by their own efforts. Many contribute to the acquisition of family assets. The official traditional version of indigenous law does not therefore reflect nor accommodate this changed role and function.

[222] The defect in the rule of male primogeniture is that it excludes women from being considered for succession to the deceased family head. In this regard it deviates from section 9(3) of the Constitution. It needs to be developed so as to bring it in line with our Bill of Rights. This can be achieved by removing the reference to a male so as to allow an eldest daughter to succeed to the deceased estate.

[223] It is now convenient to consider the remedy for the infringement of the right to equality by section 23, the regulations and section 1(4)(b) of the Intestate Succession Act.

Remedy

[224] Section 23 of the Act, the regulations and section 1(4)(b) of the Intestate Succession Act cannot be allowed to remain on our statute books. To allow

them to remain would mean, as the Deputy Chief Justice put it, "that the benefits of the Constitution would continue to be withheld from those who have been deprived of them for so long."[102] It is true that the regulations in effect are a choice of law mechanism. They regulate the circumstances in which indigenous law applies. Stripped of their racist purpose and effect, some of these provisions are of the kind found in choice of law statutes. However, to cure the constitutional defect in the regulations would require this Court to engage in detailed legislation, a task that belongs to Parliament. Section 23 and the regulations are, in my view, incapable of being cured through the device of "reading-in" or severance.

[225] The determination of the choice of law rule which regulates the circumstances in which indigenous law is applicable involves policy decisions. In particular, it involves a decision on the criteria for determining when indigenous law is applicable. There is a range of options in this regard. The choice of law may be based on, among other things, agreement, the lifestyle of individuals, the type of marriage, the nature of the property such as family land, justice and equity, or a combination of all these factors. The legislature is better equipped to make these policy choices.

[226] In all the circumstances, the appropriate remedy is one of striking down with immediate effect. But once section 23 and the regulations are struck

[102] See para 108 of the main judgment.

down, there will no longer be any legal mechanism that regulates the circumstances in which indigenous law of succession is applicable. Indigenous law is still widely practised within African communities. However, the transformation of African communities from rural into urban communities and the influence of other cultures may render indigenous law of succession not particularly suitable in certain circumstances. Furthermore, there may be disputes as to whether indigenous law is applicable in a particular situation. There will be circumstances where its application may result in an injustice. In others it may not. Until such time that the legislature enacts the relevant legislation, disputes as to whether indigenous law should apply must be managed and regulated.

[227] It now remains to consider the mechanism that can be put in place to regulate the disputes involving the application of indigenous law pending the enactment of relevant legislation by Parliament.

[228] One option is to direct, as the High Courts did and the main judgment proposes, that all intestate estates shall be governed by the Intestate Succession Act in its amended form. This will bring about uniformity in the administration of intestate estates for all races. No doubt, this option recognises that African communities have been transformed from their traditional settings in which the indigenous law developed into modern and urban communities. But that is not true of all communities. And even within this transformative process, a

majority of Africans have not forsaken their traditional cultures. These have been adapted to meet the changing circumstances. The law must recognise this.

[229] In my view, there are factors that militate against the application of the Intestate Succession Act only. First, the Intestate Succession Act is premised on a nuclear family system. By contrast, indigenous law is premised on the extended family system. The provisions of this statute are therefore inadequate to cater for the social setting that indigenous law of succession was designed to cater for.[103] For example, it was not designed to cater for polygynous unions. Second, as pointed out earlier, the primary objective of indigenous law of succession is the preservation and perpetuation of the family unit and succession to the status and position of the family head. This system ensures the preservation of the family unity and that there is always someone to assume the obligation of the family head to maintain and support the minor children and other dependants of the deceased. That is not the object of the Intestate Succession Act. Its application may well lead to the disintegration of the family unit that indigenous law seeks to preserve and perpetrate.

[230] Third, it does not take sufficient account of indigenous law as part of our law. In *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, this

[103] Above n 46 at 285.

Court cautioned that a destructive confrontation between the Bill of Rights and legislation, on the one hand, and indigenous law, on the other, need not take place.[104] The application of common law and the Intestate Succession Act only, may well lead to the obliteration of indigenous law. Yet our Constitution recognises its existence, and contemplates that there are situations where it will be applicable. The Constitution expressly guarantees "the survival of an evolving customary law."[105] And, as the Deputy Chief Justice acknowledges, there is a substantial number of people whose lives are governed by indigenous law and who would wish to have their affairs to be governed by indigenous law.[106] People who live by indigenous law and custom are entitled to be governed by indigenous law. The Constitution accords them that right.

[231] There is a further consideration which, in my view, militates against the interim application of the Intestate Succession Act as the preferred option. The application of this option may lead to an injustice in certain circumstances. Take the case where both parents die simultaneously leaving a number of children, including minor children and other persons who were dependent upon the deceased for maintenance and support. Let us assume that the major asset in the estate is an immovable property which is a family home. Each child will be entitled to a share in the estate. Let us assume that one or two children insist

[104] *Ex Parte Chairperson of the Constitutional Assembly* above n 6 at para 202.

[105] Id at para 197.

[106] See para 107 of the main judgment.

on getting their share and they cannot be bought out. This will require the family property to be sold and the proceeds to be divided equally amongst the children. Once the house is sold, there will be no shelter for the minor children and other dependants of the deceased. There is no duty on any of the other heirs to provide such shelter. Or take the case of a deceased who is survived by dependants but leaves nothing for the maintenance and support of the dependants. Minor children and other dependants of the deceased may be left destitute with no one to assume responsibility for their maintenance and support.

[232] The inappropriateness of the Intestate Succession Act in certain circumstances is demonstrated by the report of the Law Commission on customary law of succession. In its report it advanced several reasons why the institution of family property should be preserved. The rule of primogeniture is inextricably linked to the institution of a family home and its concomitant family property. These reasons include: the fact that despite westernization, the typical African traditional family home still exists; in polygynous unions, distribution of assets in an estate is quite impractical; and many family homes constitute the only means of livelihood and the only homes for family members. If the property concerned should devolve in terms of common law, the family members concerned will be left without a home and livelihood.[107]

[107] South African Law Commission Project 90 above n 31 at 83.

[233] In my view, the reasons advanced by the Law Commission demonstrate that the application of the Intestate Succession Act may lead to unjust results in certain situations and that indigenous law still has a role to play. They underscore the need to have both indigenous law and the Intestate Succession Act apply subject to the requirements of fairness, justice and equity. Indeed, the Law Commission recommends that the institution of family property should be preserved. It further recommends that the destination of family property must be made the subject of an enquiry in appropriate circumstances.[108] The enquiry, which is to be conducted by the Magistrates' Court having jurisdiction, must have regard to: (a) the best interest of the family; and (b) the equality of spouses in customary and civil marriages.[109]

[234] Indigenous law imposes an obligation on *indlalifa* to maintain and support the minor children and other dependants of the deceased. This obligation attaches to the *indlalifa* regardless of whether the deceased left sufficient assets for maintenance and support of the family.[110] The obligation is to administer the estate of the deceased on behalf of and for the benefit of the dependants of the deceased. This ensures that there is always someone to look after the dependants of the deceased. Where there are minor children it may therefore be in their best interests, in certain circumstances, that indigenous law

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[108] Id

[109] Id at 86.

[110] Above n 39.

be applied. It may serve to prevent the disintegration of the family unit and prevent members of the family from being rendered homeless or sent to an orphanage or an old-age home. Similarly, where the deceased is survived by dependants but leaves no assets to maintain and support his minor children and other dependents, the application of indigenous law may serve to protect the dependants.

[235] Ours is not the only country that has a pluralist legal system in the sense of common, statutory and indigenous law. Other African countries that face the same problem have opted not for replacing indigenous law with common law or statutory laws. Instead, they have accepted that indigenous law is part of their laws and have sought to regulate the circumstances where it is applicable. In my view this approach reflects recognition of the constitutional right of those communities that live by and are governed by indigenous law. It is a recognition of our diversity, which is an important feature of our constitutional democracy. The importance of diversity in our country was emphasised by this Court in *Christian Education South Africa v Minister of Education,*[111] where the Court said:

> "[t]here are a number of other provisions designed to protect the rights of members of communities. They underline the constitutional value of acknowledging diversity and pluralism in our society and give a particular texture to the broadly phrased right to freedom of association contained in s 18. Taken together, they affirm the right of people to be who they are

[111] 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

> without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a general norm. These provisions collectively and separately acknowledge the rich tapestry constituted by civil society, indicating in particular that language, culture and religion constitute a strong weave in the overall pattern."[112] (footnotes omitted)

[236] It seems to me therefore that the answer lies somewhere other than in the application of the Intestate Succession Act only. It lies in flexibility and willingness to examine the applicability of indigenous law in the concrete setting of social conditions presented by each particular case. It lies in accommodating different systems of law in order to ensure that the most vulnerable are treated fairly. The choice of law mechanism must be informed by the need to: (a) respect the right of communities to observe cultures and customs which they hold dear; (b) preserve indigenous law subject to the Constitution; and (c) protect vulnerable members of the family. Indigenous law is part of our law. It must therefore be respected and accorded a place in our legal system. It must not be allowed to stagnate as in the past or disappear.

[237] What is equally important is the fact that the traditional social and economic structures have, to a large extent, been replaced by modern social and economic structures. Poverty and greed have undermined the traditional

[112] Id at para 24.

responsibilities of heirs. These days, spouses and children of deceased people are sometimes no longer cared for. As Ndulo observes:

> "The joint family is in a state of decline and Africans are now enmeshed in an exchange economy. Development and industrialisation have caused an irreversible breakdown in the traditional African social order. The society is now highly individualistic, competitive and acquisitive."[113]

And Himonga observes:

> "The disruption of the traditional self-sufficient joint family organization poses the problem of the expense and practicability of maintaining extended families. This may in turn affect the extent to which the kinship group is capable of absorbing spouses and their children and providing them with adequate material support after the dissolution of the marriage by the death of one of the spouses or by divorce."[114]

[238] There must be a balancing exercise. The respect for our diversity and the right of communities to live and be governed by indigenous law must be balanced against the need to protect the vulnerable members of the family. The overriding consideration must be to do that which is fair, just and equitable. And more importantly, the interests of the minor children and other dependants of the deceased should be paramount.

[239] In my view, the question whether indigenous law is applicable should in the first place be determined by agreement. After the burial, it is common for

[113] Above n 25 at 100.

[114] Above n 23 at 165.

the family to meet and decide what should happen to the deceased's estate. If an agreement can be reached there seems to be no reason for any interference. Any dispute relating to the choice of law should be resolved by the Magistrates' Court having jurisdiction. In determining such dispute a Magistrate must have regard to what is fair, just and equitable in the circumstances of the case. And in determining what is fair, just and equitable, the Magistrate must have regard to, amongst other things, the assets and liabilities of the estate, the widow's contribution to the acquisition of assets, the contribution of family members to such assets, and whether there are minor children or other dependants of the deceased who require support and maintenance. Naturally, this list is not intended to be exhaustive of all the factors that are to be taken into consideration, there may be others too. The ultimate consideration must be to do that which is fair, just and equitable in the circumstances of each case.

Conclusion

[240] To sum up therefore, pending the enactment of legislation by Parliament to regulate when indigenous law is applicable, the position should be as follows. Where parties agree that succession to the deceased must be governed by indigenous law of succession, that is, the law that must govern the succession. Any dispute as to whether indigenous law is applicable must be resolved by the Magistrates' Court having jurisdiction. The Magistrate must enquire into the most appropriate system of law to be applied. In conducting

such an enquiry, the Magistrate must have regard to what is fair, just and equitable and must have particular regard to the interests of the minor children and any other dependant of the deceased.

[241] It is not necessary in this judgment to set out in any detail the order I would have made. Such order is already foreshadowed in the discussion of the remedy. It is sufficient for the purposes of these cases to say the following:

(a) In the *Bhe* matter, Nonkululeko Bhe and Anelisa Bhe are the only children of the deceased. They are both minors. The deceased had no other dependants. In addition, the two minor children and their mother have been occupying the property with the deceased until his death. No useful purpose will be served by referring this matter back to the Magistrate. In all the circumstances, it would be just and equitable that the estates of the deceased devolve according to the Intestate Succession Act. Both minors are to be declared the sole heirs. Accordingly, I concur in paragraph 11(a) of the order of the main judgment.

(b) In the *Shibi* matter, Ms Charlotte Shibi is the only sister to the deceased. The latter had no parents or brothers or other sisters. Nor did he have any children. This matter has been going for sometime. It must now be brought to finality. In this case too, it is not necessary to refer the matter back to the Magistrate. On the record,

it is possible to determine the relief. In all the circumstances of this case, it is just and equitable that the estates of the deceased devolve in accordance with the Intestate Succession Act. I therefore concur in paragraph 11(b) of the order of the main judgement.

(c) In addition, I concur in paragraphs 1; 2; 3; and 5 of the order of the main judgment.

Bhe and Others v The Magistrate, Khayelitsha and Others:

For the applicant: W. Trengove SC, R. Paschke and S. Cowen instructed by the Women's Legal Centre.

For the fourth respondent: N. Cassim SC instructed by the State Attorney (Johannesburg).

For the amicus curiae: P. M. Mtshaulana and K. Pillay instructed by Lawyers for Human Rights.

Charlotte Shibi v Mantabeni Freddy Sithole and Others:

For the applicant: V. Maleka SC and K. Pillay instructed by the Legal Resources Centre.

South African Human Rights Commission and Another v President of the Republic of South Africa and Another:

For the applicant: M. Chaskalson instructed by the Legal Resources Centre and the Women's Legal Centre and S. Cowen instructed by the Women's Legal Centre.

For the second respondent: N. Cassim SC and T.I. Bodiba instructed by the State Attorney (Pretoria).