[REPORTABLE]

IN THE HIGH COURT OF SOUTH AFRICA
CAPE OF GOOD HOPE PROVINCIAL DIVISION

CASE NO: 9489/02

In the matter between:

NONKULULEKO LETTA BHE	1st Applicant
ANELISA BHE	2nd Applicant
NONTUPHEKO MARETHA BHE	3rd Applicant
THE WOMEN'S LEGAL CENTRE TRUST	4th Applicant

and

THE MAGISTRATE, KHAYELITSHA	1st Respondent
MABOYISI NELSON MGOLOMBANE	2nd Respondent
THE PRESIDENT OF RSA	3rd Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	4th Respondent

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JUDGMENT DELIVERED ON THIS 25TH DAY OF SEPTEMBER 2003

NGWENYA, J

1. INTRODUCTION

The crisp point for consideration in this matter is whether a female African person, whose parents were not married, or married according to African

Law and Custom, is entitled to inherit ab intestatio, upon the death of her father.

The first, second and third applicants brought this application essentially against the second respondent, who is the father of the deceased and the grandfather of the first and second applicants. The first, third and fourth respondents are interested parties in this matter and no relief is sought against them. They have accordingly filed notices to abide. The fourth applicant has joined in these proceedings as an interested party and in the public interest. Mr Trengove, who is assisted by Mr Paschke and Ms Cowen, represents all the applicants. Mr Carolissen represents the second respondent, who is opposing this matter.

2. **FACTS**

With the exception of one issue, which I will deal with in due course, the essential issues in dispute in this matter are common cause. The third applicant and the deceased lived together as husband and wife for a period of twelve years. The deceased died on 9 October 2002. Two minor children were born out of the relationship. They are the first and second applicants in these proceedings. The first applicant was born on 18 May 1994 and is now 9 years old. The second applicant was born on 3 August 2001. She is two years old now. The first two applicants, being minors and females, are assisted by their mother, the third applicant. Needless to say, the first three

applicants are Africans and of Xhosa extraction. The third applicant does not seek any relief in her own.

The deceased and the third applicant acquired an immovable property, Erf No 39678, Khayelitsha at 35 Jula Street, Makaza in the City of Tygerberg, Western Cape during their lifetime. Over the years that followed, the deceased applied for and obtained state housing subsidy. He used it to acquire the property and planned to improve and build the house on it, but died before he could do so. The deceased and the three applicants occupied the property until the deceased died. The first three applicants continued to live on the property.

Since the death of the deceased, the second respondent, who lives in Berlin in the Eastern Cape, claims that he is the intestate heir of the deceased by virtue of the African Customary Law and therefore he is entitled to inherit the property of the deceased. Secondly, he says that he is entitled to the guardianship of the two minor children. The issue of custody and guardianship of the first two applicants however is not one of the issues for consideration in this matter. It would appear that second respondent has conceded their custody and guardianship to the third applicant.

The second respondent has indicated that he intends to sell the property of the deceased to defray the funeral expenses incurred as a result of his

death. As a result of this attitude on the part of the second respondent, the first three applicants obtained an interdict pendente lite, restraining the second respondent from alienating or encumbering the property in whatever manner.

3. THE STATUS AND POSITION OF THE AFRICAN CUSTOMARY LAW IN THE SOUTH AFRICAN LEGAL SYSTEM

By the proclamation of Sir David Baird in 1806, the rights and privileges of the inhabitants of the Cape Colony, as they existed under the government of the Dutch East India Company, were expressly reserved to them. This position referred to the Cape Colony as it then existed at the time. In so far as the position of African Customary Law is concerned, Whitfield on **South African Native Law** 2nd Edition 1948 Juta and Co Ltd has this to say:

> "*In this way Roman-Dutch Law was secured to the European people of South Africa, then mostly of Dutch and French descent, by the first legislative Act of the British Government in South Africa. The Natives of South Africa surely had an analogous claim to the recognition of their own social law and customs, particularly as it is now an explicit part of British policy to retain indigenous institutions in Africa and even to avoid tampering with them where it is not strictly necessary to do so in the interest of law and order."* Emphasis added.

This appears to be the correct view, because, irrespective of any shortcomings African Customary Law might have had, it remained a system according to which most Africans lived.

However, this was not to be so. The recognition and application of African Customary Law in South Africa has been controversial, spasmodic and inconsistent until 1927. In 1927 the then Union of South Africa passed the Black Administration Act, No 38 of 1927 whereby African Customary Law was partially recognised throughout the then Union subject to the proviso that it was not repugnant to public policy. In the present day KwaZulu Natal there was a Code of Zulu Law which was considered to be a codification of the Zulu Indigenous Law. In that province the Black Administration Act, when it refers to African Indigenous Law, gave further legal recognition to the code of Zulu Law whose origin dates back to 1891 by Sir Theophilus Shepstone. In **Mabuza v Mbatha** 2003(7) BCLR 743 (C) the court at 751F refers to this repugnancy clause as notorious. This observation I share.

African Customary Law at best was and is partially recognised and applied intermittently by our courts. This was despite the provisions of s 11(1) of the Black Administration Act, no 38 of 1927, which gave the Commissioner's Courts (special courts established to decide civil dispute between Africans) a discretion to apply African Customary Law. The High Court required African Customary Law to be proven by expert evidence as if it was foreign law.

(See JC Bekker – **Seymour's Customary Law in Southern Africa** – 5th ed – Juta & Co; AJ Kerr – **The Customary Law of Immovable Property and Succession** 2nd ed. Rhodes University; **The Application of Native Law in the Supreme Court** (1957) SALJ 74 at 313; **Mosii v Motseoakhumo** 1954(3) SA 919 (A); **Ngcobo v Ngcobo** 1929 AD 233.)

Section 11(1) of the Black Administration Act enjoined the court to apply African Customary Law, provided it was not repugnant to public policy or natural justice. Originally this proviso read – "not contrary to civilisation". This remained the underlying rationale in the exercise of the court's discretion. Whatever it meant depended on the presiding Judge's value judgment. (See also Transvaal Law No 4 of 1995 and **Meesedoosa v Links** 1915 TPD 357.)

In Zulu and another v Minister of Justice and another 1956(2) SA 128 (N) a woman sued for damages by reason of loss of support which she enjoyed from her husband to whom she was married according to African Customary Law. Holmes J (as he then was) held that such a relationship did not amount to a statutory recognition that a Black woman married by African Customary Law, had legal rights to maintenance against her husband according to the laws of South Africa.

Despite the outcry this judgment evoked, it was upheld in **SANTAM v Fondo** 1960(2) SA 467 (A). (See 1956 SALJ 402; **Annual Survey** 1956 at 200 and 1961 SALJ 103.) Despite some legislative intervention to this rather regrettable and unfortunate situation, it remained a halfhearted measure. (See **Dlikilili v Federated Insurance** 1983(2) SA 275 (C) at 282; AJ Kerr – **Speculum Juris** (1983) 12 at 37.) The attitude of our courts towards African Customary Law has been a cause for concern. In **Du Plessis v De Klerk** 1996 (3) SA 850 (CC) Mokgoro J said that Customary Law has lamentably been marginalised and allowed to degenerated into a vitrified set of norms alienated from its roots in the community.

4. THE CUSTOMARY LAW OF SUCCESSION

The unwritten African Customary Law is underpinned by male domination. Ownership in African Customary Law is not individualistic. It is collective. Differently put, every member of the family is the owner of common property through the head of the family. With the exception of the Lobedu clan in Limpopo, the head of the clan must be a male. African Customary Law of immovable property generally does not have the same consequences as our Common Law. It is in this area where even legislation has not done much to accommodate the changing needs and demands put to bear on this system of law. Ownership by the family head is akin to trusteeship as regards immovable property under communal ownership. This mode of ownership in this context may be tolerated under such conditions. However, it cannot be

on land in urban environment, which is privately owned. Under African Customary Law there is room for extended family members to participate in whatever decision that has to be taken, as long as the property is communally held. At common law no such space is allowed. Where the immovable property owned by the deceased is under freehold ownership free of communal pressures and sanctions, the head of the family is less accountable to the other family members and his actions are more visibly akin to those of the owner at common law. (See Whitfield at 255.) The chances of abuse of his position are thus greater. Thus the development of African Customary Law must take these eventualities into account.

Succession to status is distinct to inheritance, which is in itself treated differently. The word "status" in this context is used in three senses to refer to the head of the family the head of the house and the head of the clan. (See **Seymour's Customary Law in Southern Africa** supra; AJ Kerr **The Customary Law of Immovable Property and Succession** Second Addition Rhode's University; Whitfield supra; TW Bennett **Customary Law in Southern Africa** First Addition Juta & Co Ltd; D Coetze **Apparent Conflict in the Indigenous Law of Succession and Inheritance in "Southern Africa in Need of Law Reform"** (AJGM Sanders Editor Butterworths). It is not necessary for purposes of this case to discuss in great detail the question of inheritance and succession appertaining to a polygamous relationship.

Women do not participate in the intestate succession of the deceased's estate, save the house personal property. Intestate succession in terms of African Customary Law is based on the principle of primogeniture. The general rule is that only a male who is related to the deceased through a male line, qualifies as intestate heir. In a monogamous family the elder son of the family head is his heir. If the elder son does not survive his father, then his (the elder son's) eldest male descendent is the heir. If there is no surviving male descendant in the line of the deceased's eldest son, then an heir is sought in the line of the second, third and further sons, in accordance with the principle of primogeniture. If the deceased is not survived by any male descendant, his father succeeds him. If his father also does not survive him, an heir is sought in the father's male descendants relating to him through the male line. (See Kerr **The customary Law of Immovable Property and Succession** supra; **Southern Africa in Need of Law Reform** supra; **Customary Law in Southern Africa** supra; Whitfield **Native Law in Southern Africa**; **Mthembu v Latsela** 2000(3) SA 867 (SCA) para 8.)

It is this system of succession and inheritance, which Mr Trengove submits, is unconstitutional, discriminatory and irrational. We are asked to either develop this system commensurate with the Constitutional imperative or to declare it to be unconstitutional and therefore invalid. Before dealing with the argument in any detail, it is appropriate at this juncture to refer to the only issue in dispute in this matter.

5. ISSUE IN DISPUTE

One issue, which arises peripherally and yet remains unresolved on the papers, is whether the first two applicants are legitimate or not. Counsel for both parties, however, approached the matter as if that dispute has been resolved. In her founding affidavit the third applicant states that the deceased could not pay lobolo for her and hence they could not get married. On the other hand the second respondent refutes that allegation and states that the deceased did pay lobolo for the third applicant and therefore he is entitled to the guardianship and custody of the first applicant. According to Xhosa custom he can only claim guardianship and custody of his grandchild if the deceased did pay lobolo for her mother even though marriage might not have been consummated. (See JC Bekker – **Seymour's Customary Law in Southern Africa** at 251.)

In accordance with **Plascon Evens Paints v Van Riebeeck Paints** 1984(3) SA 623 (A) this issue must be resolved in favour of the second respondent. This means that the first two applicants are legitimate. Furthermore, there is one misconception on the part of the third applicant which requires correction. She averred that had it not been the inability of the deceased to pay lobolo for her, they would have been married before he died. It has never been a prerequisite under African Customary Law to pay lobolo before marriage is consummated. There must be agreement, however, as regards lobolo. It may be deferred as long as circumstances do not permit payment.

It is not uncommon that lobolo be paid upon the couple's eldest daughter being "lobolaed". (See JC Bekker **Seymour's Customary Law in Southern Africa** at 112-113.) Payment of lobolo alone, however, does not mean that the parties are married. Save what I have said above as regards the legitimacy of the first two applicants, nothing turns on this point. Whether the first two applicants are legitimate or not, does not alter the consequences flowing from the status of the legal relationship between their parents at the time of their father's death.

6. DOES THE PRINCIPLE OF PRIMOGENITURE PASS CONSTITUTIONAL MUSTER?

Mr Trengove submitted that the lines of differentiation arising out of the principle of primogeniture irrationally differentiates in violation of the right to equality in section 9(1) and against the prohibition of discrimination in section 9(3). Furthermore, he contended that this principle unfairly discriminates on grounds of gender and sex between male and female descendants and other relatives; it differentiates on the grounds of age and birth between the eldest descendant and all other descendants; it differentiates on the grounds of social origin and birth, between legitimate and illegitimate descendants; it differentiates on the grounds of race between African descendants and other descendants.

The starting point in this regard is the Constitution Act of the Republic of South Africa 1996 (Act No 108 of 1996), the Constitution. Section 2 of the Constitution reads:

> *"This 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."*

In **Mabuza v Mbatha** supra the court said at 752D-F said:

> *"The proper approach is to accept that the Constitution is the Supreme Law of the Republic. Thus, any custom which is inconsistent with the Constitution cannot withstand Constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African Customary Law should not be opposed to the principles of public policy or natural justice. To say that, is fundamentally flawed as it reduces African Law (which is practiced by the vast majority in this country) to foreign law -- in Africa!"*

I associate myself with these views. The basic premise in our current constitutional regime is to test any law, be it common law, statute or African Customary Law against the values enshrined in the Constitution. At issue here is a rule which is originally derived from unwritten rule of African Customary law. The principle of primogeniture; the principle has received legislative recognition in the Black Administration Act and the Regulations promulgated thereunder. S 23(10) of the Act gives the President powers to

make regulations not inconsistent with the Act. The Act predates the Constitution. Pursuant thereto, the President made such regulations in 1987. They appeared in the Government Gazette No 10601 dated 6 July 1987.

The intestate succession regarding an African in South Africa is briefly as follows. Only in exceptional circumstances, to which I shall make reference shortly, does the estate of a deceased African get wound up in terms of the laws of the country like all other race groups. As a general rule, the devolution of the deceased intestate estates of Africans must evolve in accordance with the principle of primogeniture. The instances where it will devolve otherwise than in accordance with the principle of primogeniture are the following.

(a) When an African was issued with a letter of exemption by the President in terms of s 31 of the Black Administration Act. The letters of exemption mean that a particular African would be exempt from the application of African Customary Law. I doubt very much that there are any Africans in this day and age who make use of the provisions of s 31. What is curious with this provision is that there are many Africans who are not originally from South Africa, and who are thus not familiar with African Customary Law as practiced by a large majority of African South Africans. Nevertheless, the law, as it stands, dictates that their estates, unless they are exempted in terms of s 31

or under the two instances to which I shall refer, must be administered according to the principle of primogeniture.

(b) When a deceased was a partner in a marriage in community of property or under antinuptual contract.

(c) In instances where the Minister has decided that the estate must be so administered if in his opinion the circumstances are such as to render the application of African Customary Law inequitable or inappropriate.

I now proceed to deal with the approach of our courts to the principle of primogeniture, which is under attack in these proceedings. Mr Carolissen, on behalf of the second respondent, submitted that we are bound by the decision in **Mthembu v Letsele and another** 1997(2) SA 936 (T), which was confirmed by the Supreme Court of Appeal; in **Mthembu v Letsele and another** 2000(3) SA 867 (SCA). Mr Trengove on the other hand submitted that we are not bound by that judgment. The reason thereof is that while the facts are similar to the facts before us, there is a profound difference. In that case the court held that the interim Constitution which was applicable at the time the judgment was handed down did not take away the right which accrued before the Constitution came into operation. Mr Trengove further submitted that the only reason why the first two applicants are not entitled to inherit from their father's estate ab interstatio in these proceedings is threefold. Firstly, they are Black, secondly they are females and thirdly they

are illegitimate. As regards the latter, I have already said that, in my judgment, the first two applicants are legitimate on the second respondent's own version. However, this does not take the matter any further, because the principle of primogeniture is not altered by their legitimacy. They remain females. In my view, even if they were illegitimate, this would not have been a ground to refuse them the relief in the light of the constitutional era in which we live.

The principle must now be tested against the constitutional values. S 9 of the Constitution deals with equality and reads:

> *"(1) Everyone is equal before the law has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoinment 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.

The Black Administration Act is not a Code of African Customary Law. It is an Act of Parliament like all other legislation. However, its fundamental premise was racial inequality. In **Moseneke and others v The Master and another** 2001(2) SA 18 at 29 Sachs J says:

"*The Black Administration Act has been described by this court as:*

'an egregious apartheid law which anachronistically has survived our transition to a non-racial democracy.'

Subordinate legislation made under it has been referred to as part of a demeaning and racist system, as obnoxious and as not befitting a democratic society based on human dignity, equality and freedom. The Act systematised and enforced a colonial form of relationship between a dominant white minority who were to have rights of citizenship and a subordinate black majority who were to be administered."

See also **DVB Behuising Pty Ltd v North West Provincial Government and another** 2001(1) SA 500 (CC) (2000(4) BCLR 347.) The state, in terms of s 9(3) of the Constitution, shall not unfairly discriminate on grounds inter alia of race, gender or sex. The provisions of Regulation 2(e) of the Regulations promulgated in terms of the Black Administration Act dictate that, on the facts of this case, the first two applicants cannot inherit because, of their gender and race. They are female and Black.

In terms of the Intestate Succession Act No 81 of 1987 (The Intestate Succession Act), (which applies to all races in South Africa) if any person dies intestate, either wholly or in part and is survived by a descendant, but not by his spouse, such descendant shall inherit the intestate estate. (See s 1(b).) "Descendant" means any descendant of the deceased person irrespective of race, gender or status.

In this case we have the deceased, who died intestate and left two descendants, namely the first and second applicants. Can they invoke the provisions of the Intestate Succession Act? The answer is no. The reason why the first two applicants cannot invoke the provisions of the Act is because in terms of s 1(4)(b) intestate includes any part of any estate which does not devolve by virtue of a will or in respect of which s 23 of the Black Administration Act, 1927(Act 38 of 1927) does not apply. Differently put, the only reason why the first two applicants cannot inherit from their father's

estate is because, as Mr Trengove correctly submitted, they are Black and they are females. This, in my judgment, is per se discrimination on grounds of race and gender. It is prima facie unfair and therefore offends against the provisions of s 9(1) and (3) of the Constitution. This court is thus bound to declare such law unconstitutional and invalid. I may add further that, on the facts before us, the second respondent's attitude leaves too much to be desired. It lacks basic humanity, which is the hallmark of ubuntu. We have been urged to develop African Customary Law.

This constitutional imperative cannot be realised on the face of some provisions contained in the Black Administration Act (If not the Act in toto). In the first instance the provisions of s 23 substantially require a revision. In particular the provisions of s 23(10) instruct the President to make regulations consistent with the Black Administration Act. The underlying imperative of the Black Administration Act is that of male preference as against equality of genders and that of African subordination against other races. This is not the occasion, however, where we are called upon to revise the entire Black Administration Act. Suffice it to state that in **Moseneke and others v The Master and another** supra the Constitutional Court has already expressed its concern with the fact that this Act still remains in our statute book. It is up to Parliament to decide when this Act shall be repealed in toto.

For now the following would suffice. We should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents' intestate estate like any male person. This does not mean that there may not be instances where differentiation on gender line may not be justified for purposes of certain rituals. As long as this does not amount to disinherison or prejudice to any female descendant. On the facts before us, therefore, the first two applicants are declared to be the sole heirs to the deceased's estate and they are entitled to inherit equally.

The order I would make here should reflect the constitutional order of the day. Consequently I shall declare those offending provisions of both the Black Administration Act as well as the regulations promulgated thereunder invalid and unconstitutional. Likewise, with the Intestate Succession Act.

In the result I propose the following order:

1. It is declared that s 23(10)(a)(c) and (e) of the Black Administration Act are unconstitutional and invalid and that regulation 2(e) of the Regulations of the Administration and distribution of the estates of deceased Blacks, published under Government Gazette No 10601 dated 7 February 1987 is consequently also invalid.

2. It is declared that s 1(4)(b) of the Intestate Succession Act 91 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 estate 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 court under reference no 7/1/2-484/2002.

5. The second respondent 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 the first and second applicants in equal shares. If the second respondent fails to do so the Deputy Sheriff is authorised and directed to do so in his stead.

6. It is declared that the applicants are exclusively entitled to reside in the house at 35 Jula Street, Makaza situated at Erf 39678 Khayelitsha in the City of Tygerberg until its distribution and transfer in accordance with this order.

7. It is further ordered that any letters of appointment and administration of the deceased's estate issued to the second respondent be and are hereby set aside.

8. There is no order as to costs.

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NGWENYA, J

I agree and it is so ordered.

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HLOPHE JP