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

CASE NO. 9489/02

In the matter between:

NONKULULEKO LETTA BHE	First Applicant
ANELISA BHE	Second Applicant
NONTUPHEKO MARETAHA BHE	Third Applicant
and	
THE MAGISTRATE, KHAYELITSHA	First Respondent
MABOYISI NELSON MGOLOMBANE	Second Respondent
THE PRESIDENT OF THE RSA	Third Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

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CONSOLIDATED FOUNDING AFFIDAVIT

I, the undersigned,

NONTUPHEKO MARETHA BHE

make the following statement under oath:

INTRODUCTION

1 I am the third applicant. I am an adult woman and I am unemployed. I live at 35 Jula Street, Makaza, known as Erf 39678 Khayelitsha, Cape Town.

2 I am advised that on 22 January 2003 this court granted the applicants leave to file supplementary affidavits. For convenience and in order to make it easier to read, I have been advised to combine what I said in my original founding affidavit with what I now wish to add. It is therefore unnecessary to read my original founding affidavit as this consolidated founding affidavit replaces and adds to my earlier evidence.

3 I have personal knowledge of the facts to which I depose in this affidavit except where it is apparent from the context that I do not. They are to the best of my knowledge and belief true and correct. The submissions of law I make in this affidavit, are made on the advice of my lawyers. I also rely on the accompanying affidavits of Professor Alistair James Kerr, Ms Likhapha Mbatha, Mr Stuurman and Ms Michelle O'Sullivan.

4 This application concerns the distribution of the estate of the late Vuyo Elius Mgolombane. I will refer to him as "*Vuyo*" or as "*the deceased*". He died on 9 October 2002. He did not leave a will.

5 I am Vuyo's surviving partner. We were never married but lived in a domestic relationship from 1990 until his death in 2002. We have two daughters. They are the first and second applicants. I contend that they are Vuyo's sole heirs.

6 The question that arises in this application, is what the rules are that govern the distribution of his intestate estate. In terms of regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks promulgated by Government Notice R200 of 6 February 1987 in terms of s23(10) of the Black Administration Act 38 of 1927, the distribution of his estate is governed by "*Black law and custom"*. I will submit that under the applicable rules of customary law as developed in terms of the Constitution, our daughters are his only heirs or, if that is not so, that the applicable rules of customary law and/or regulation 2(e) and/or s23(10) are unconstitutional and invalid.

7 I am advised that I do not have any claim to Vuyo's estate because he and I were never married. In case my advice is incorrect and because I may indeed have any claim against Vuyo's estate, I hereby cede and transfer whatever claim I might have against his estate, to our two daughters jointly. I accordingly do not have any interest of my own in the distribution of his estate. I do of course have a very personal interest in our daughters' claims against the estate.

THE APPLICANTS

8 The first applicant is Nonkululeko Letta Bhe. She currently resides at the home of Vuyo's father in Berlin, the Eastern Cape, the further particulars of which I do not know. I assist her in this application in my capacity as her guardian.

9 The second applicant is Anelisa Bhe. She was born on 3 August 2001 of my relationship with Vuyo. She now lives at 35 Jula Street, Makaza, known as Erf 39678 Khayelitsha, Cape Town. I assist her in this application in my capacity as her guardian.

10 I am the third applicant. I was joined as a party in these proceedings by order of this court made on 29 November 2002. I assist Nonkululeko and Anelisa in bringing this application and I also bring it in the public interest and on behalf of the descendants of African people who die intestate and who are:

- female descendants;
- descendants whose parents are not married to one another; or
- descendants other than the eldest descendant.

THE RESPONDENTS

11 The first respondent is The Magistrate, Khayelitsha Magistrate's Court, Western Cape. The present incumbent of that office is a Mrs Van Schalkwyk. She administers Vuyo's estate.

12 The second respondent is Mr Maboyisi Nelson Mgolombane. He is an adult male pensioner who resides in Berlin in the Eastern Cape. He is Vuyo's father. He is joined in this application for two reasons:

12.1 He claims to be Vuyo's sole heir because Vuyo was not survived by any male descendants.

12.2 The magistrate also appointed him as the representative of Vuyo's estate in terms of regulation 4(1). She did so by a certificate of appointment, annexure **"MNB.1"**.

13 The third respondent is the President of the Republic of South Africa of care of the State Attorney at 22 Long Street, Cape Town. He was joined as a party to these proceedings by order of this order made on 24 February 2003 by virtue of his responsibility for the regulations.

14 The fourth respondent is the Minister of Justice and Constitutional Development of care of the State Attorney at 22 Long Street, Cape Town. He was joined as a party in these proceedings by order of this court made

on 24 February 2003 as the responsible minister under the regulations and the Intestate Succession Act 81 of 1987.

15 The applicants do not ask for an order for costs against any of the respondents unless they oppose this application.

CHRONOLOGY OF EVENTS

16 My description of the chronology of events that follows, has been reconstructed largely from memory. While I have done my best to remember all the dates as accurately as possible, I may have made some mistakes. I ask that all my references to dates should be read as being "on or about" the dates in question.

Vuyo's family and home

17 From 1990, Vuyo and I were involved in a monogamous relationship or "*domestic partnership*". Vuyo was a carpenter while I worked as a domestic worker when I could find work. During our lives together, Vuyo and I were very poor with few possessions between us. I still live in poverty.

18 In 1991 Vuyo and I moved onto the immovable property situated at No 35 Jula Street, Makaza, known as Erf 39678 Khayelitsha in the City of Tygerberg, Division Cape, Western Province ("the immovable property").

Vuyo and I built an informal shelter on the immovable property, which is a temporary structure made out of corrugated iron and wood. We continuously occupied the immovable property until Vuyo's death and I still do.

19 Our first daughter, Nonkululeko, was born on 18 May 1994.

20 In June 1994 my father sent a representative to Vuyo to demand compensation ("*hlaula*") in the amount of the equivalent of five cattle for having made me pregnant. Vuyo said that instead of paying compensation, he would rather *lobolo* me and take me for his wife. He could however not afford to pay the *ikhazi* (the cattle that would be required for *lobolo*) as he was unemployed and too poor to afford the amount required. Vuyo asked his father to help him to raise the money but he refused and said it was Vuyo's responsibility.

21 My father said that Vuyo should return to him to negotiate the amount to be paid for *lobolo* once he could afford it. Hence there was never an agreement between Vuyo and my father about *lobolo* and my father did not consent to my marrying Vuyo. Unfortunately, Vuyo died before he was in a position to pay for *lobolo*. Accordingly, the sole reason for Nonkululeko and Anelisa's illegitimacy is the poverty of their father.

22 As evidence of Vuyo's intention to marry me (and legitimise his children), he bought me ceremonial marriage clothing known as "*mokothe*" clothing or "*daake*". This clothing is worn by married women. I was never able to wear this clothing because I was never married. I kept these clothes until recently when I had to sell them to buy food for Anelisa and me.

23 Vuyo applied for and was awarded a housing subsidy from the Department of Housing. He used an amount of R7,496.00 from the subsidy to purchase the immovable property on 17 April 1997 as is indicated by the Title Deed number T 33570/97, annexure **"NMB.2"**.

24 Vuyo and I decided that when Nonkululeko turned six, she should attend school. We were informed that the junior school in Cape Town would, however, not accept her until she was seven. We knew that the school in Vuyo's hometown, Berlin, was prepared to admit her. Therefore, in November 2000, we sent Nonkululeko – who had lived with us until then – to live with Vuyo's father in Berlin so that she could start school. Vuyo and I intended that Nonkululeko should remain with his father for a period of two years and then return to us in Cape Town in December 2002.

25 On 9 April 2001 Vuyo applied to the National Department of Housing for a further housing subsidy. They approved his application in the amount of R8,625.00 as indicated by the computer printout, annexure **"NMB.3"**. This money was paid to the South African Homeless Peoples Federation

("the Federation"), a self-help housing scheme operated in conjunction with the National Department of Housing.

26 On 26 June 2001 the Federation approved a plan for the construction of a more permanent home on the immovable property as indicated by annexure **"NMB.4"**. The Federation will use the allocated subsidy to purchase the building material for the construction of the house. Upon payment of an administration fee of R120.00, Vuyo would have been entitled to take possession of the material.

27 Vuyo was not able to exercise his right to claim the building material prior to his departure to the Eastern Cape, due to his advanced illness and he was not able to do so before he died. I have been advised that the right to claim the building material is an asset that forms part of his estate.

28 On 3 August 2001 Vuyo and I had our second daughter, Anelisa. She lived with Vuyo and I and she still resides with me at the immovable property.

29 Vuyo supported Nonkululeko, Anelisa and me while he was alive and we were, in turn, dependant upon him. Vuyo and I lived together for 12 years.

Vuyo's death

30 Before Vuyo died, he and I knew that he was suffering from the late stages of a terminal illness. We discussed what should happen in the event of his death.

31 Vuyo wished to be buried in Berlin but he and I realised that, if he died in Cape Town, I would probably have to sell the immovable property to pay for the return of his body to the Eastern Cape for burial. Vuyo wanted to avoid the immovable property being sold after his death and told me that he wanted Nonkululeko, Anelisa and me to continue to live there.

32 We knew that the costs of travelling from Cape Town to Berlin while Vuyo was still alive, were considerably less than the costs of transporting a body over the same distance. With the knowledge that his illness was in the advanced stages, Vuyo returned to his family home in the Eastern Cape to die on 22 September 2002. He did so in order to preserve the immovable property for his daughters and me.

33 Less than two weeks after his departure from Cape Town, Vuyo died in the Cecilia Makalwane Hospital in East London on 9 October 2002. Annexure **"NMB.5"** is a copy of his death certificate.

Vuyo's estate

34 Vuyo did not leave a will. Nonkululeko and Anelisa are his only descendants. The provisions of regulations 2(b) to (d) are not applicable to the distribution of his estate because he did not die in the circumstances contemplated by those regulations. In terms of regulation 2(e), his estate must accordingly be distributed according to "*Black law and custom"*.

35 Vuyo's estate consists of the immovable property, situated within the jurisdiction of this Court, and various items of movable property that he and I jointly owned. I am informed that pursuant to the order of this court made on 29 November 2002, my attorneys filed an inventory on 3 December 2002, listing all the movable property in my possession and forming part of the deceased estate. For the reasons stated above, it is submitted that the deceased estate also consists of the right to claim the building materials currently in possession of the Federation.

Discussions with Vuyo's relatives

36 In the days after Vuyo's death I had a number of visits from several of Vuyo's relatives including Mamela Njobo ("Njobo"), Siphiwe Mabala ("Mabala"), Michael Maqhina ("Maqhina"), Moses Mbabiwe ("Mbabiwe"), Patrick Penick ("Penick"), Zoyisile Nconto ("Nconto"). They informed me that Vuyo's father intended to sell the immovable property to pay for

Vuyo's funeral and that I would receive nothing but two doors. They could not tell me where Nonkululeko, Anelisa and I were supposed to live if the immovable property were sold.

37 On 12 October 2002, three days after his death and while I was still mourning Vuyo's passing, his relatives visited me accompanied by members of the area Street Committee (an informal civic structure comprising members of the local community which resolves disputes referred to it by community members). Vuyo's relatives were aggressive and hostile and I was in a state of grief, shock and exhaustion. In my vulnerable state and in circumstances of extreme pressure and duress, I agreed with Vuyo's relatives that the immovable property would be sold for R15,000. It was agreed that any arrangement in respect of the payment of the purchase price must be made in the presence of Vuyo's relatives, the Area Street Committee and me and that a portion of the proceeds of the sale would be used to pay for the funeral while another portion would be used to secure alternative accommodation for Nonkululeko, Anelisa and me. At the time, I did not know about Nonkululeko and Anelisa's rights and did not at all, or at least not fully, appreciate the consequences of my agreement to the sale.

38 On 15 October 2002 I learnt that Vuyo's relatives had secretly "sold" the immovable property for R6,000 – without the knowledge of either the Area Street Committee or me. The following day, at a meeting attended by the Area Street Committee, I told Vuyo's relatives that I was no longer wanted

to sell the immovable property as they had not done what they said they would do and also I was concerned that they would deliberately exclude Nonkululeko, Anelisa and me from benefiting from the sale.

39 On 19 October 2002, at a scheduled meeting with the Area Street Committee, Mabala suggested that I had caused Vuyo's death by bewitching him and that had he been the deceased's brother, he would shoot me and forcibly evict me from the immovable property. Mabala threatened that if I did not agree to sell the immovable property, I would be in trouble. In the face of the threatening and aggressive behaviour by Vuyo's relatives, the Area Street Committee instructed them not to speak to me and referred the matter to a meeting on 21 October 2002 with Executive Committee of the Street Committee Branch.

40 Despite this instruction, Vuyo's relatives returned on 20 October 2002 with a Councillor named Mbongeni Ngombane ("Ngombane") and again insisted that the immovable property must be sold.

41 On 21 October 2002, Vuyo's relatives and I went to the scheduled meeting at "the Container" of the Executive Committee of the Street Committee Branch which was attended by the Branch chairperson, Mr Stuurman ("Stuurman"). I told Stuurman and the meeting of the history of my relationship with Vuyo and of Vuyo's wishes regarding the immovable property. I told the meeting of Vuyo's relatives threatening, hostile and intimidating behaviour towards me. The Street Committee advised me to

obtain a domestic violence interdict against Vuyo's relatives. On 24 October 2002 I went to the Khayelitsha Magistrate's Court to obtain the interdict.

42 That same week, a second meeting was held with the Executive Committee of the Street Committee Branch and I, which was also attended by Vuyo's relatives. Vuyo's relatives were unruly and aggressive and a result of their behaviour the Branch Chairperson, Stuurman, cancelled the meeting. I refer in this regard to Stuurman's affidavit.

43 On 26 October 2002 Vuyo was buried in Berlin. I did not attend the funeral partly because I could not afford the travel costs and partly because relations between Vuyo's relatives and me had become extremely strained and I felt that I would not be welcome at the funeral.

44 On 10 November 2002 Vuyo's father arrived in Cape Town and at a meeting with me he was adamant that he intended to sell the immovable property despite my clear objection to such a sale.

45 Vuyo's father told me that he wished to take Anelisa away from me and return with her to Berlin on the grounds that, according to him, Vuyo had paid *lobolo* for me and, accordingly, he should have custody of Anelisa in terms of African Customary Law. Vuyo's father's claim that *lobolo* had been paid is false and I therefore disputed with him that *lobolo* had ever been paid.

46 Vuyo's father was threatening, abusive and disrespectful towards me. He stated that here in the Cape "whores have the right to take someone's house". He accused me of having spent all of his son's money. That allegation is untrue as Vuyo had not been earning money as he had been too ill to work for a long time prior to his death. Vuyo's father threatened to sabotage the future of Nonkululeko and Anelisa.

47 I told Vuyo's father that I did not want to give him custody of Anelisa and that, in fact, I wished him to return Nonkululeko to me. Vuyo's father refused. This discussion with Vuyo's father was heated and argumentative.

48 I reported the argument with Vuyo's father, as described above, to the Police at the Khayelitsha Police Station on 11 November 2002.

49 On Friday, 25 November 2002 a meeting was held between Vuyo's father, two court officials and me at the Khayelitsha Magistrate's office. Relatives of Vuyo's father and my brother, Leon Bhe, were also present. After ascertaining the circumstances concerning Vuyo's deceased estate, one of the court officials announced that the immovable property could be sold by Vuyo's father and that he would be entitled to inherit the proceeds of such a sale. I said that I was not prepared to accept this outcome and stated that I wished this matter to be heard by the Court, and asked to see the Magistrate but I was denied access to the Magistrate.

The appointment of Vuyo's father as representative of his estate

50 I am advised that on 27 November 2002 by virtue of the powers vested in her by Regulation 4(1) of the Regulations, the First Respondent appointed Vuyo's father as the representative of the deceased estate.

51 My attorneys obtained a copy of a certificate of approval dated 27 November 2002, (annexure **"NMB.6"**) purportedly issued to Vuyo's father in terms of Regulation 4 of the regulations. I am advised that the certificate presents no bar to the relief sought in this matter because:

51.1 it does not specify any immovable property and is consequently a legal nullity or at least does not apply to the immovable property in the deceased estate;

51.2 it merely seeks to approve a transfer and does not purport to effect any actual transfer, which has not yet taken place; and

51.3 if it is valid and applicable to the immovable property, there is no principled obstacle to the First Respondent approving transfer of the immovable property to Nonkululeko and Anelisa.

The first urgent application

52 After the meeting at the magistrate's court held on 25 November 2002, I approached a non-governmental organisation, FAMSA for help. FAMSA referred me to the Women's Legal Centre ("WLC") for legal assistance. Upon learning of the First Respondent's appointment of Vuyo's father as the representative of the estate on 27 November 2002 and in the light of my fear that there would be an imminent sale of the immovable property, the WLC assisted me in bringing the urgent application contained in Part A of the Notice of Motion which, essentially, aimed to preserve the *status quo* concerning the property in the deceased estate pending the final determination of this application.

53 On 29 November 2002 this Court considered the urgent interim relief sought in Part A of the Notice of Motion.

54 My attorney, Ms O'Sullivan, who was present during the proceedings, informed me that Vuyo's father, together with one of his relatives, appeared in person, but un-represented, before the Honourable Mr Acting Justice Bozalek in his chambers. After hearing from both my legal representatives and, through a court interpreter, from Vuyo's father, this Court granted interim relief, in the form of a rule *nisi*, which *inter alia*:

54.1 interdicted the First Respondent from approving the transfer of the immovable property;

54.2 interdicted Vuyo's father from alienating or passing transfer of the immovable property and all movable property in the deceased estate; and

54.3 interdicted the Third Respondent from passing transfer of the immovable property.

55 The Judge, through the aforementioned interpreter, carefully and clearly explained the impact of the order to Vuyo's father. The Judge furthermore explained to Vuyo's father that he had an obligation to leave the *status quo* unchanged. See in this regard the affidavit of Ms O'Sullivan.

The second urgent application

56 At the time that the interim interdict was granted under Part A of the Notice of Motion, the immovable property was occupied by Anelisa, my brother Leon and me. My third daughter (from a relationship before I met Vuyo), Amanda Mandisa Bhe ("Amanda"), resides mainly with my sister but on occasion visits me and stays with me at the immovable property.

57 On Monday, 2 December 2002 at the Khayelitsha Magistrates' Court, my legal representative, Ms O'Sullivan and Ms Van Wyk, my aforementioned brother, Leon and I encountered Vuyo's father, Penick and Mbabiwe. Vuyo's father said that he wanted the immovable property sold and that

Anelisa, Amanda, Leon and I must leave. Vuyo's relatives made various threats. Penick warned that Amanda must not visit me at the immovable property and should they have sight of her at the immovable property then they will hit her. Vuyo's father told me that if he did not obtain possession of the immovable property then he would use his powers as a *sangoma* to bewitch me. I was frightened by this threat.

58 Ms O'Sullivan told Vuyo's father that, in accordance with this court's order on 29 November 2003, we had the right to remain at the immovable property and that neither Vuyo's father nor anybody acting on his behalf may go to the immovable property or remove any of the movable property forming part of the deceased estate.

59 Later that day, Monday, 2 December 2002 Vuyo's father, accompanied by various relatives came to see me at the immovable property notwithstanding the instructions that very morning from my attorney for them not to go to the immovable property. Vuyo's father told me that the police at Harare police station had told him that he must lock me and the other occupants out of the immovable property until 21 January 2003 (that being the return day of the rule *nisi* for the interim relief in this matter). In response, I said that I would not leave the immovable property unless the police evicted me nor would I hand over my keys to the property.

60 Vuyo's father alleged that the immovable property was no longer in Vuyo's name but had been transferred into Vuyo's father's name and stated that he intended to take possession of the keys to the immovable property. I asked Vuyo's father why he had not said this to my legal representatives earlier in the day. He replied that he believed my legal representatives were not "proper" lawyers and that they were "state" lawyers and "street" lawyers because they had held discussions with him outside the Magistrate's Court rather than in an office and that was not the conduct of real lawyers.

61 Vuyo's father told me that the other occupants and I must leave the immovable property by no later than Thursday, 5 December 2002 because Vuyo's father had potential buyers for the property and for that reason he required the property to be vacant by Friday, 6 December 2002.

62 Mbabiwe said that we must not think that they would personally evict us. He said that others would be sent to do so on their behalf. Vuyo's father told Leon and me that he would "show us". We understood this as a threat of violence and were afraid. When Vuyo's father departed he again repeated his threat to bewitch me.

63 On 4 December 2002, Leon reported the threats made by Vuyo's relatives to the Khayelitsha police station.

64 On Thursday, 5 December 2002, Leon and I unsuccessfully attempted to obtain an interdict from the Khayelitsha Magistrate's Court against Vuyo's father and those acting on his behalf. We were told that we did not qualify for a domestic violence interdict.

65 I again contacted the WLC who advised us, based on the continued threats of violence, harassment and intimidation experienced by Leon, my minor children and me, to bring an urgent application before this court to interdict such conduct.

66 Accordingly, on 6 December 2002 an application was brought against Vuyo's father, Penick, Njobo and Masondo under case number 9681/02. This Court granted a rule *nisi* (a copy of which is attached hereto marked **"NMB.7"**) which *inter alia*:

66.1 declared that Leon, my minor children and I may not be evicted from the immovable property without an order of Court made after considering all the relevant circumstances;

66.2 interdicted Vuyo's father, Penick, Nojobo and Masondo from evicting Leon, my minor children and me from the immovable property or enlisting the help of another person to evict us from the immovable property without an order of Court made after considering all the relevant circumstances;

66.3 interdicted Vuyo's father, Penick, Nojobo and Masondo from:

66.3.1 physically assaulting or threatening to assault Leon, my minor children and me;

66.3.2 entering or approaching within 100 metres of the immovable property provided that the Njobo and Masondo may do so for the purposes of being at or *en route* to or from their place of residence;

66.3.3 communicating with or approaching within 100 metres of Leon, my minor children and me provided that Njobo and Masondo may do so for the purposes of being at or *en route* to or from their place of residence;

66.3.4 enlisting the help of another person(s) to commit the acts specified in paragraphs in the above three subparagraphs.

67 On 21 January 2003, the return day of the rule *nisi* granted under case number 9681/02, this Court confirmed the aforementioned rule *nisi*. A copy of the order is attached hereto marked **"NMB.8"**.

68 On 21 January 2003, this Court also confirmed the rule nisi granted by the Honourable Acting Justice Bozalek on 29 November 2002 in respect of Part A of the Notice of Motion in this matter.

Attempts to secure the return of the Nonkululeko

69 Notwithstanding my demand, Vuyo's father has failed to return Nonkululeko to my custody in Cape Town.

70 My attorneys of record have made numerous attempts to locate the exact whereabouts of Nonkululeko and arrange for her safe return to me and I refer in this regard to the affidavit of Ms O'Sullivan. I have requested my attorneys to keep up with their attempts to secure the safe return of Nonkululeko.

THE APPLICABLE RULES OF CUSTOMARY LAW

71 I have no personal knowledge of the law. What I say below is based on the advice received from my legal representatives. I am advised that the devolution of the deceased's intestate estate is governed by "*black law and custom*" in terms of section 23(10) of the Black Administration Act 38 of 1927 ("the Black Administration Act") read with Regulation 2(e). The immovable property is not land in a tribal settlement held in individual tenure upon quitrent conditions nor has the movable property been allotted by the deceased or accrued under black law or custom to any woman with whom Vuyo lived in a customary union or to any house. Accordingly ss23(1) and (2) of the Black Administration Act are not of application.

72 I have however been advised that the customary law of succession (referred to in regulation 2(e)) is based on the principle of male primogeniture and that this principle is applied to determine who inherits upon intestacy.

73 The general rule of male primogeniture is that only a male who is related to the deceased through a male can qualify as intestate heir. Women do not inherit in customary law. Accordingly, the rights of female descendants, *inter alia*, to equality and not to be discriminated against unfairly on the grounds of sex and gender are violated.

74 In monogamous families the eldest son of a deceased 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 descendants, an heir is sought in the line of his father and his father's descendants. Accordingly, the rights of descendants, other than the eldest (male) descendant, *inter alia*, to equality and not to be discriminated against unfairly on the ground of age are violated.

75 Children born outside of a customary union of marriage cannot generally be heirs under customary law. No right to inherit in the paternal line accrues to an illegitimate child irrespective of whether the child is male or female. An illegitimate male child may inherit in the maternal line but is low down in the order of succession. Accordingly, the right of illegitimate children *inter alia* to equality and not to be discriminated against unfairly on the ground of birth in relation to inheritance at customary law is violated.

76 The rules of succession are based on a traditional ideal that the family unit is preserved through a family head. When the head of the family dies, his heir takes his position as head of the family and becomes owner of the property. He becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor children in the family. He is obliged to support and maintain them, if necessary from his own resources and not to expel them from his home. Although the family head owns the property, it is meant to be owned for the collective benefit of the family members. The family head's powers of control and disposition ought only to be exercised for the benefit of all family members.

77 A paternal heir does not however assume responsibility for the maintenance and support of illegitimate children. This is the responsibility of the head of the maternal family.

78 I refer to the affidavit of Alistair James Kerr who confirms these rules and principles of black law and custom as they have traditionally been interpreted by the courts.

79 Applying these customary law rules, Vuyo's deceased estate would be inherited by his father. Nonkululeko and Anelisa do not stand to benefit from the devolution of the deceased estate at all under such rules.

80 This is so even though Nonkululeko and Anelisa were supported by Vuyo during his lifetime, Vuyo was obliged in law to maintain Nonkululeko and Anelisa as their natural father and Nonkululeko and Anelisa were dependent on Vuyo's support.

81 Nonkululeko and Anelisa likewise do not stand to benefit from their father's deceased estate because they are girls and not boys.

82 I am advised that because there is no customary union in my case, my children do not have personal rights of maintenance and support against their father's family. Their rights are against my family because they are illegitimate. I am responsible for the maintenance of Nonkululeko and Anelisa and I am currently unemployed.

83 In the event that Vuyo's father disposes of the property in the deceased estate, I will not have accommodation for myself or my children. My own parents are dead. I have a sister who lives in Cape Town and an uncle in

Stellenbosch. Both are living in conditions of extreme poverty. I am advised that the applicants have a right to parental care and consequently have a right to have me reside with them. If Vuyo's father were to inherit the entire estate and the administration of it were to become his responsibility in his capacity as the customary law heir, Nonkululeko and Anelisa's financial well-being will depend solely on his good-will. He is not under any customary law or other legal duty to see to their maintenance as the deceased and me were not married.

84 Even were Nonkululeko and Anelisa, or other children who are similarly placed, to have personal rights against the heir this would not be of sufficient help. I am advised that these rights are not necessarily easily exercised or enforced particularly in regard to immovable property, as only real rights in property are capable of being registered.

85 My legal representatives advise me (and I refer in this regard to Ms O'Sullivan's affidavit) that:

85.1 it is also very expensive to enforce these rights and the heir can use the money in the estate to defend any litigation;

85.2 often there is very little money and so it is not possible to enforce these rights in practice; and

85.3 children are often at the mercy of the male heir and can do little if he fails to maintain and support them or if he alienates the estate or its assets without their knowledge or consent.

86 I also refer to the affidavit of Likhapa Mbatha who explains that heirs frequently fail in modern day life to fulfil their responsibilities to support their families.

CAUSES OF ACTION

87 The applicants base their application on all the causes of action open to them in law on the facts disclosed by the evidence before the court including those specified below.

88 The applicable rules of customary law that govern the distribution of Vuyo's estate, have developed or must be developed in terms of s8(3) and/or s39(2) of the Constitution. Under those rules so developed, the estate of a deceased Black person who dies intestate and who is not survived by a spouse but is survived by one or more descendants, is inherited by all the descendants *per stirpes*.

89 Alternatively, if the applicable rules of customary law provide for the application of the principle of male primogeniture, then they are unconstitutional and invalid because they violate the following constitutional provisions:

89.1 The founding value of non-racialism and non-sexism in s1(b) of the Constitution.

89.2 The right to equality in s9(1) and the prohibition of discrimination in s9(3) because they unfairly discriminate,

- against all African descendants other than the eldest male descendant, on the ground of their race;
- against female descendants on the grounds of gender and sex;
- against all African descendants other than the eldest male descendant, on the grounds of social origin and birth, and
- against all African descendants whose parents are not married to one another, on the grounds of social origin and birth.

89.3 The right to dignity in s10 in that they violate the right of all African descendants other than the eldest male descendant, of all female descendants, of all descendants other than the eldest male descendant and of all descendants whose parents are not married to one another, to have their dignity respected and protected.

90 The applicable rules of customary law are for the same reason "*opposed to the principles of public policy and natural justice"* within the meaning of s1(1) of the Law of Evidence Amendment Act 45 of 1988 and are consequently invalid or unenforceable.

91 Regulation 2(e) is for the same reasons mentioned above, also unconstitutional and invalid insofar as it makes the aforegoing rules of customary law applicable to the distribution of the intestate estates of African people.

92 Section 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 are also unconstitutional and invalid in that they provide for the estates of deceased African people to be administered and distributed under regulations made by the President while the administration and distribution of the deceased estates of all other people are governed by acts of parliament and the common law. They thereby relegate the administration and distribution of the deceased estates of African people to an inferior status in violation of,

- the founding value of non-racialism in s1(b) of the Constitution;
- the right to equality in s9(1) and the prohibition of discrimination on the grounds of race in s9(3) of the Constitution, and
- the right of every person to have their dignity respected and protected in terms of s10 of the Constitution.

93 Section 1(4)(b) of the Intestate Succession Act 81 of 1987 is also unconstitutional and invalid insofar as it excludes any estate or part of any estate in respect of which s23 of the Black Administration Act 38 of 1927 applies, from the application of s1 of the Intestate Succession Act. By doing so, it also relegates the administration and distribution of the deceased estates of African people to an inferior status in violation of the

same constitutional rights as those violated by ss23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927.

94 Regulation 2(e) and the customary law rules that it makes applicable to the distribution of the deceased estates of African people who die intestate, have in any event been repealed by s6 read with ss5(1) and (2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Section 6 provides that "*Neither the State nor any person may unfairly discriminate against any person."* This provision binds the state and all other people in terms of s5(1) and prevails over any other conflicting law in terms of s5(2). s6 is incompatible with regulation 2(e) and the customary law rules that it imposes and s6 has accordingly impliedly repealed and superceded them.

95 I understand that these defects ought ideally to be corrected by legislation and that it will probably happen at some future time. Parliament has however procrastinated on the issue for many years and its amending legislation is clearly not imminent (see in this regard the affidavit of Ms O'Sullivan). The interests of justice require that, until the defects are corrected by competent legislation, the succession of the intestate estates of deceased African people should be governed by the rules that govern the intestate estates of all other people in terms of s1 of the Intestate Succession Act 81 of 1987.

CONCLUSION

96 The applicants ask for an order in the terms set out in their notice of motion.

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NONTUPHEKO MARETHA BHE

I certify that this affidavit has been sworn to and signed before me at Cape Town on this the **24th** day of **MARCH 2003** by the above mentioned deponent who declared that she is acquainted with the contents of this affidavit and understood same, that she has no objection to the taking of the prescribed oath and further, that she considers the said oath to be binding on her conscience and which oath was properly taken by me, as required by law.

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COMMISSIONER OF OATHS