CONSTITUTIONAL COURT OF SOUTH AFRICA
NONKULULEKO LETTA BHE V MAGISTRATE, KHAYELITSHA

JUDGMENT

Case CCT 49/03

LANGA DCJ:

The Bhe case

[1] 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.

[2] 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; (b) in the public interest, and (c) in the interest of the female descendants, descendants other than eldest descendants and extra-marital children who are descendants of people who die intestate. 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 intestate in October 2002. The Women's Legal Centre Trust acted in this application "in the public interest".

[3] 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.

[4] 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 denied. Relying on the rule in *Plascon-Evans*, 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.

[5] 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.

[6] 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 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.

[7] 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.

[8] 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".

[9] 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.

[10] 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.

[11] 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.
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> 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."

[12] 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.

The legislative framework

[13] 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."

[14] 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) . . .

(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."

[15] 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.

[16] 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."

[17] 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."

The approach to customary law

[18] 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.

[19] 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 and 31 of the Constitution entrench respect for cultural 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) 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 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.

[20] 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.

[21] 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)

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. That approach also led in part to the fossilisation and 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".

[22] 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. 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. Secondly, the legislative authority of the Republic vests in Parliament. Thirdly, the Constitution envisages a role for national legislation in the operation, implementation and/or changes effected to customary law.

[23] 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. These valuable aspects of customary law more than justify its protection by the Constitution.

[24] 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

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

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. …

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

[26] The importance of the right to equality 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'."

[27] The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. 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.

[28] 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, also underscore the need to protect the rights of women, and to abolish all laws that discriminate against them as well as to eliminate any racial discrimination in our society.

(3) The rights of children

[29] Section 28 of the Constitution provides specific protection for the rights of children. Our constitutional obligations in relation to children are particularly important for we vest in our children our hopes for a better life for all. 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. Children, therefore, may not be subjected to unfair discrimination in breach of section 9(3) just as adults may not be.

[30] 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.

[31] 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.

[32] In interpreting both section 28 and the other rights in the Constitution, the provisions of international law must be considered. South Africa is a party to a number of international multilateral agreements 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". Article 2 of the Convention requires signatories to ensure that the rights set forth in the Convention shall be enjoyed regardless of "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." 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."

[33] 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. The United States Supreme Court, too, has held that discriminating on the grounds of "illegitimacy" is "illogical and unjust".

[34] 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. 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", 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.

[35] 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 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."

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.

[36] 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 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?

[37] 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.

[38] 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". 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.

[39] 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:

> "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."

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."

Later still, in *Dukuza Kaula v John Mtimkulu and Madhlala Mtimkulu*, 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 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."

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".

[40] In *DVB Behuising*, Madala J referred to the Act as "a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedom". 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" and referred to proclamations made under it as part of a "demeaning and racist" system. 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 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'."

[41] 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."

[42] 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 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.

[43] 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".

[44] 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". 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.

[45] 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. 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.

Justification inquiry

[46] 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….

[47] 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.

[48] 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. 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.

[49] 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, section 23 must accordingly be struck down.

[50] 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 *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

[51] 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.

[52] 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.

[53] Central to the customary law of succession is the rule of primogeniture, the main features of which are well established. 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.

[54] 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

[55] Extra-marital children are not entitled to succeed to their father's estate in customary law. 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

[56] 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 acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities. 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

[57] In *Richtersveld*, 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." It has throughout history "evolved and developed to meet the changing needs of the community."

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

[59] 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) 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."

[60] Because of this, the official rules of customary law of succession 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.

[61] 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

[62] 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 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."

[63] 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

[64] The basis of the constitutional challenge to the official customary law of succession is that the rule of primogeniture precludes (a) widows from inheriting as the intestate heirs of their late husbands; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents, and (d) extra-marital children from inheriting from their fathers. 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.

[65] 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.
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> . . .
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> 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'."

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

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

[67] The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9(3) 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.

[68] 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 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.

[69] 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. In denying female and extra-marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution.

[70] 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 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

[71] 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.

[72] 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. 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 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.

[73] 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.

Declaration of constitutional invalidity and suspension

[74] 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.

[75] 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.