

BEFORE DR DINGAKE J.

IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA

HELD AT LOBATSE

CASE NO: MAHLB-000836-10

In the matter between:

**EDITH MOSADIGAPE MMUSI** 1st Applicant

**BAKHANI MOIMA** 2nd Applicant

**JANE LEKOKO** 3rd Applicant

**MERCY KEDIDIMETSE NTSHEKISANG** 4th Applicant

and

**MOLEFI SILABO RAMANTELE** 1st Respondent

**THE PRESIDING OFFICER,** 2nd Respondent

**CUSTOMARY COURT OF APPEAL**

(herein represented by the Attorney-General of Botswana)

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**APPLICANTS' HEADS OF ARGUMENT**

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## INTRODUCTION

1. Ensuring the elimination of discrimination against women is a fundamental principle of any modern democracy and a value to which Botswana has indicated its full support.
2. In addition, preserving the core of the family unit in our current modern society remains a challenge.
3. In this matter, we submit removing the blanket ban on women inheriting intestate would not only end the inherent inequality against women, but also strengthen the family unit.
4. To that end, applicants in this matter seek to set aside the judgment of the Customary Court of Appeal under Civil Appeal case number 99 of 2010 as it violates their right to equal protection under section 3(a) of the Constitution of Botswana.
5. Alternatively, applicants seek an order finding the rule of male primogeniture, which permits only male offspring from intestate inheritance as violating sections 3(a) of the Constitution.<sup>1</sup>
6. We submit that the Customary Court of Appeal judgment applying the rule of male primogeniture to the extent that it denies applicants the right to inherit intestate solely on the basis of their sex violates their constitutional right to

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<sup>1</sup> Refer to BHE AND OTHERS v MAGISTRATE, KHAYALITSHA AND OTHERS, 2005 (1) SA 580 (CC) at 617, para.77 for the definition.

equality under section 3(a) of the Constitution of Botswana. We make this submission by reference *inter alia* to:

6.1 the relevant provisions of the Constitution;

6.2 Botswana's international and regional legal obligations; and

6.3 jurisprudence from comparable countries.

7. The heads of argument follow the structure set out in the table of contents.

## BRIEF BACKGROUND

8. This application is based on the Customary Court of Appeal judgment of 22 September 2010<sup>2</sup> in which the said Court overturned the decision of the higher Customary Court presided over by Paramount Chief Lotlamoreng of Borolong.

9. On or around 15 May 2007 the lower Customary Court heard and determined in favour of the 1<sup>st</sup> respondent a dispute concerning the inheritance of the estate of the parents of the applicants.<sup>3</sup> At that stage, the dispute was between the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent. The 1<sup>st</sup> applicant was ordered to vacate the home in issue within thirty days of the Order. She appealed to Kgosi Lotlaamoreng's court who, on 4 November 2008, ordered that "*with the given reasons the court orders the present elders to go and convene a meeting with*

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<sup>2</sup> Refer to pages 84 to 87 of the paginated bundle ("the bundle").

<sup>3</sup> Page 84 of the bundle.

*all concerned parties and identify the one child who will take care of this home on behalf of the elders.”*<sup>4</sup>

10. This judgment of Kgosi-kgolo Lotlamoreng was overturned by the Customary Court of Appeal on the basis that, in Sengwaketse culture and traditions, “*if the inheritance is distributed, the family home is given to the last born child*”.<sup>5</sup> The 1<sup>st</sup> applicant was therefore ordered to vacate the family home within three months of the Order and same was granted to the 1<sup>st</sup> respondent.<sup>6</sup>
11. The Customary Court of Appeal accepted the 1<sup>st</sup> respondent’s version that the home was inherited by the last born male child of the applicants’ parents, Banki Modiegi Ramantele,<sup>7</sup> in accordance with the Sengwaketse culture, and that he, Banki, entered into an agreement with the 1<sup>st</sup> respondent’s father whereby he passed on “ownership” to the latter. It is on that basis that the 1<sup>st</sup> respondent is entitled to inherit the said property to the exclusion of the applicants.
12. The applicants then launched the current application wherein they argued that the said rule of Customary Law is unconstitutional on the basis that it violates the right to equal protection of the law or equality in terms of section 3(a) of the Constitution of Botswana.

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<sup>4</sup> Page 85 of the bundle.

<sup>5</sup> Page 85 of the bundle.

<sup>6</sup> Page 86 of the bundle.

<sup>7</sup> Pages 11 and 86 of the bundle.

13. On 23 March 2012 the applicants' attorneys and the 1<sup>st</sup> respondents' attorneys signed and then filed with this Honourable Court a stated case in terms of Order 35 of the High Court rules<sup>8</sup> wherein they ask for the court's opinion on the issues referred to at paragraph 12 above. They also agree that, for purposes of the same opinion, the court will rely on the papers filed of record, the respondents not having filed any substantive papers on the merits.<sup>9</sup>

14. We must point out at this stage that the applicants will not pursue arguments under paragraphs 1.3 and 1.4 of the stated case notice<sup>10</sup> for the reasons which shall become apparent hereinafter. In short, the applicants shall only rely on the breach of section 3(a) of the Constitution, to wit, breach of their rights to equality before the law or equal treatment of the law under that provision. The right not to be discriminated against under section 15 of the Constitution shall be referred to only for comparison purposes.

#### KEY PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

15. The Constitution is the supreme law of the land. Any customary law rule which contravenes provisions of the Constitution is invalid.

15.1 In *Attorney-General v Dow*,<sup>11</sup> the Judge President referencing “*patrilineal customs and traditions of the Batswana people*” noted that “[a] constitutional guarantee cannot be overridden by custom.” He allowed that where possible custom would be read to be in line with the

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<sup>8</sup> Pages 92 and 93 of the bundle.

<sup>9</sup> Page 93 of the bundle.

<sup>10</sup> Page 92 of the bundle.

<sup>11</sup> [1992] BLR 119.

Constitution but where that was not possible “*it is custom, not the Constitution which must go.*”<sup>12</sup>

15.2 This is supported by Aguda J.A.’s concurrence in *Dow* where he makes clear that any rule of customary law which violates rights enshrined in the Constitution must be abrogated to the extent of the violation.<sup>13</sup>

16. It is now clear that courts have accepted the principle of a living constitution, meaning that the provisions in the Constitution must be interpreted in light of modern conceptions of justice.

16.1 In *Dow*, the Aguda J.A. stated: “*the courts must continue to breathe life into [the Constitution] from time to time as the occasion may arise to ensure the healthy growth and development of the State through it... We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the demands of the society of a certain age such construction may not meet those of a later age... To hold otherwise would be to stultify the living Constitution in its growth.*”<sup>14</sup>

17. In addition, it is now widely accepted that constitutional provisions providing rights should be given a broad, generous reading; while provisions limiting fundamental rights should be given a narrow reading.

17.1 Quoting *Attorney-General v Moagi*, the Judge President in *Dow* affirmed that “*a constitution such as the Constitution of*

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<sup>12</sup> [1992] BLR at 137 E-F.

<sup>13</sup> [1992] BLR at 166.

<sup>14</sup> [1992] BLR at 166 A-D.

*Botswana...should as far as its language permits be given a broad construction.*<sup>15</sup>

17.2 Similarly, the Judge President in *Dow* affirmed that “*where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms should be narrowly or strictly construed.*”<sup>16</sup>

17.3 Courts since *Dow* have continued to apply these principles when interpreting the ambit of constitutional provisions.<sup>17</sup>

18. These fundamental principles of constitutional interpretation should guide the court as it determines the application of sections 3 of the Constitution to the rule of male primogeniture.

## DOES THE RULE OF MALE PRIMOGENITURE VIOLATE SECTION 3(a) OF THE CONSTITUTION?

19. Section 3 reads:

*“Fundamental rights and freedoms of the individual*

*Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely—*

*(a) life, liberty, security of the person and the protection of the law;*

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<sup>15</sup> [1992] BLR at 130 D.

<sup>16</sup> [1992] BLR at 132 A.

<sup>17</sup> See *Makuto v The State*, 2000 (2) BLR 130 (CA)

(b) *freedom of conscience, of expression and of assembly and association; and*

(c) *protection for the privacy of his or her home and other property and from deprivation of property without compensation,*

*the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”*

20. Section 3(a) provides for the right to equal protection and treatment under the law. It is a substantive section conferring rights on the individual.<sup>18</sup>

20.1 In the seminal discrimination case, *Attorney-General v Dow*, the Court of Appeal stated that section 3(a) conferred the right to equal protection of the law on individuals, likening the language with the 14th Amendment of the United States Constitution which forbids the state to “*deny to any person within its jurisdiction the equal protection of the laws.*”<sup>19</sup>

20.2 In *Kamanakao I v Attorney General*,<sup>20</sup> the High Court held that the “***protection of the law***” in section 3(a) was more than protection

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<sup>18</sup> [1992] BLR at 133.

<sup>19</sup> [1992] BLR at 134-135.

<sup>20</sup> [2001] 2 BLR 54.

**by law enforcement but mandated that laws must treat all people equally.**<sup>21</sup>

21. This definition of equal protection under the law is affirmed under Botswana's international and regional obligations. Though not binding on this Court, these obligations can provide useful guidance on the nature and scope of existing constitutional rights.<sup>22</sup>

22. The International Covenant on Civil and Political Rights ("ICCPR"), ratified by Botswana on 8 September 2000, in article 26 provides for the equal protection of the law much like section 3(a) of the Constitution. Article 26 states:

*"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

22.1 The Human Rights Committee ("HRC"), tasked with monitoring country compliance with the ICCPR and with elaborating on the rights enshrined in the ICCPR, has interpreted the right to equal protection as not only providing for equality before the law and equal protection, but

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<sup>21</sup> [2001] 2 BLR at 664- 665.

<sup>22</sup> *See Dow*, [1992] BLR at 151.

also a guarantee “*to all persons equal and effective protection against discrimination on any of the enumerated grounds,*” including sex.<sup>23</sup>

23. Botswana has also ratified regional treaties which similarly provide for the right to equality. The African Charter on Human and Peoples’ Rights (“the Charter”), ratified in 1986, provides under article 3 for the equal treatment under law and equal protection. Article 3 states:

“1. *Every individual shall be equal before the law*

2. *Every individual shall be entitled to equal protection of the law*”

23.1 The African Commission on Human and Peoples’ Rights (“African Commission”), tasked with interpreting the scope and application of the rights in the Charter, has defined article 3(2) as meaning “*that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law.*”<sup>24</sup> In expanding on the content of article 3(2), the African Commission has favorably quoted the US Supreme Court in *Brown v Board of Education of Topeka*, 347 US 483 (1954), which held that the 14th Amendment of the US Constitution which guarantees the equal

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<sup>23</sup> Human Rights Comm., General Comment No. 18: Non-discrimination, 37th session (1989), para 12.

<sup>24</sup> *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm. 294/04 para 99.

protection of the law encompassed the right of all persons “*to be treated equally by the law and courts, both in procedures and in the substance of the law.*”<sup>25</sup>

24. An analysis under section 3(a) must proceed as follows:

24.1 Is there an infringement to section 3(a)?

24.2 If so, is the infringement justifiable either because it would otherwise prejudice the rights and freedoms of others or on the grounds of public interest?

25. This is similar to the test used by the South African courts when determining a violation of section 9(1) of the Constitution of the Republic of South Africa, 1996, which provides for equal protection.<sup>26</sup>

### ***Infringement***

26. In Woolman *et al* on *Constitutional Law of South Africa* (2<sup>nd</sup> ed) Catherine Albertyn and Beth Goldblatt give a helpful account of the approach of the Constitutional Court in South Africa in determining whether there is an infringement of section 9(1) of the Constitution of the Republic of South Africa. They say *inter alia* the following:

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<sup>25</sup> *Id.* para 100.

<sup>26</sup> Which provides that: “*Everyone is equal before the law and has the right to equal protection and benefit of the law*”.

“(i) *Has there been a differentiation between individuals or groups?*”

Differentiation between individuals or groups triggers ... s 9(1) scrutiny. The Constitutional Court has suggested that this differentiation can either be direct or indirect, although there is no reported case on differentiation. If there is no differentiation, then there can be no violation of ... s 9(1). If the differentiation is on a prohibited ground, then it is possible to proceed directly to an enquiry under ... s 9(3) or (4). ... s 9(1) is thus not a necessary step in an equality claim. ...

27. In this case, the Customary Court of Appeal found that the applicants were not entitled to inherit the family property due primarily to their gender.<sup>27</sup> The Court held that inheritance was determined under customary law where the family home was given to the last born *boy* child. (emphasis added).<sup>28</sup>

28. Thus, under the customary law rule as articulated by the Customary Court of Appeal, women regardless of where they are in the birth order would be categorically denied intestate inheritance as opposed to their brothers.

29. We submit this blanket ban on all women from intestate inheritance as articulated by the Customary Court of Appeal is an infringement on the applicants’ right to equal protection of the law as it treats similarly-situated persons differently.

### ***Justification***

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<sup>27</sup> Page 86 of the bundle.

<sup>28</sup> Pages 85 and 86 of the bundle.

The rights and freedoms enshrined under section 3(a) are subject to two limitations: where the rights and freedoms at issue prejudice the rights and freedoms of others and on the grounds of public interest.

*Limitation on rights and freedoms of others*

30. In this matter, we submit that the applicants are merely asserting their right to be treated equally under the law and in so doing are not prejudicing the rights and freedoms of others. Indeed, holding that women are equally entitled to inherit intestate serves to broaden the rights of others.

*Public interest limitation*

31. In *Student Representative Council v Attorney General*, the Judge President permitted that laws and regulations can differentiate between men and women, but that they must be “*reasonable and fair, made for the benefit of the welfare of the gender, without prejudice to the other*”. The Judge President went on to caution against laws that were punitive to one gender.<sup>29</sup>

32. It is important to note that the rule of male primogeniture under customary law did indeed serve an important public interest function in the past, as was detailed by the Constitutional Court of South Africa in *Bhe and Others v Magistrate, Khayelitsha and Others*,<sup>30</sup> holding that the customary law rule of male primogeniture violated among others, the right to equality.

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<sup>29</sup> 1995 BLR 178 (CA).

<sup>30</sup> 2005 (1) SA 580 (CC).

33. In that case, Langa CJ noted that the rule of male primogeniture operated as part of a broader system

*“which fitted in with the community’s way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community. This served various purposes, not least of which was the maintenance of discipline within the clan or extended family. Everyone, man, woman and child had a role and each role, directly or indirectly, was designed to contribute to the communal good and welfare.*

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

*[78] The exclusion of women from heirship and consequently from being able to inherit property was in keeping with a system dominated by a deeply embedded patriarchy which reserved for women a position of subservience and subordination...”<sup>31</sup>*

34. However, Langa CJ then noted how modern changes in society have resulted in the rule of male primogeniture no longer serving the important public interest function outlined above. He noted:

*“[80] The setting has however changed. Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased’s estate*

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<sup>31</sup> 2005 (1) SA 580 at para 75-78.

*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.*"<sup>32</sup>

35. Similarly in Ghana, the High Court in *Akrofi v Akrofi*,<sup>33</sup> addressed a challenge to the rule of male primogeniture. In that matter, the applicant, the daughter of the deceased argued persuasively that though her uncle had taken over her deceased father's properties, he had failed to continue maintaining her mother and herself. In reaching its decision that women can inherit, the Court noted that a custom of only male inheritance would have "*out-lived its usefulness and is at present not in conformity with public policy. Our customs if they are to survive the test of time must change with the times.*"<sup>34</sup>

36. We submit that this is similarly the case in Botswana. In particular, in this matter, the applicants have spent considerable time reviving the property at issue. Despite the statements made by the Customary Court of Appeal, the applicants have made the ancestral home their home and have deep ties to the

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<sup>32</sup> 2005 (1) SA 580 at para 80.

<sup>33</sup> [1965] GLR 13.

<sup>34</sup> [1965] GLR at 16.

property and community.<sup>35</sup> On the other hand, the 1st respondent does not have such ties and fits the description Langa CJ outlined above of those who live separate from their extended families. In this context, a blanket rule denying all women intestate inheritance is not narrowly tailored to address the public interest of ensuring the continuation of the family unit.

37. The Botswana government has indicated its concern that unequal inheritance rights often leave women in vulnerable financial and physical situations. In its report to the **Committee on the Elimination of All Forms of Discrimination Against Women**, the Botswana government stated: *“In the traditional setup women have limited inheritance rights as evidenced by the application of Customary Law...Daughters generally have no rights to inherit...In this regard the law tends to treat men and women differently. It is more pronounced in circumstances of un-married women living in their parent’s homestead. Upon the death of their parents unmarried women are likely to be evicted by the heir.”* (emphasis added).<sup>36</sup> Leaving unmarried women with no support undermines the foundation of the public interest in preserving the family unit.

38. The blanket ban on female intestate inheritance is also contrary to Botswana’s obvious support of ending discrimination against women as seen from its decision to ratify key international and regional treaties prohibiting discrimination against women.

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<sup>35</sup> Pages 11 and 12 of the bundle.

<sup>36</sup> Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined Initial, Second and Third Periodic Reports of States Parties (Botswana), CEDAW/C/BOT/3 (20 October 2008), para 192 [hereinafter CEDAW Report].

38.1 The ICCPR under article 3 requires all countries to ensure the equal right of men and women to fundamental civil and political rights outlined in the convention.

38.2 Similarly, the Charter under Article 18(3) requires countries to ensure the elimination of discrimination against women.

38.3 The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), acceded to by Botswana on 13 August 1996 is comprehensive in its requirements that countries proactively end discrimination against women in law and practice.

38.3.1 The Botswana government has noted in its submission to the Committee on the Elimination of All Forms of Discrimination Against Women that the unequal inheritance rights between men and women contravene CEDAW.<sup>37</sup> In response, the Committee on the Elimination of All Forms of Discrimination Against Women has urged Botswana to “*take appropriate measures to eliminate all forms of discrimination against women with respect to ownership and inheritance of land*” as the current law violated Botswana’s obligations under CEDAW.<sup>38</sup>

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<sup>37</sup> CEDAW Report, *supra* note 36, paras 46, 106, 192.

<sup>38</sup> Concluding Observations of the Committee on the Elimination of Discrimination Against Women (Botswana), CEDAW/C/BOT/CO/3 (26 Mar 2010), paras 39-40.

## RELATIONSHIP BETWEEN SECTIONS 3 AND 15

39. In this matter, we are specifically alleging a violation of the applicants' rights under section 3 of the Constitution. However, we submit that understanding the relationship between sections 3 and 15, which provides for freedom from discrimination is critical to interrogating the scope of the right under section 3.

40. Sections 3 and 15 though related are separate provisions under the Constitution providing distinct rights and protections as well as distinct exceptions to the breadth and scope of the rights provided.<sup>39</sup>

40.1 In *Dow supra* it was held that the fact that "the word 'discrimination' is not mentioned in section 3, therefore, does not mean that discrimination, in the sense of unequal treatment, is not proscribed under the section".<sup>40</sup>

40.2 In *Kamanakao I*, the High Court held that section 2 of the Chieftainship Act did not violate section 15 given the exception outlined in section 15(9), but it did violate section 3(a).

40.3 *Stratosphere Investments (Pty) Ltd t/a Club Havana and Others v Attorney General*, the Court found that the applicants failed in their claim under section 15. However, the Court noted that the applicants could have alleged a separate violation of section 3.<sup>41</sup>

41. This is similar under Botswana's international legal obligations as well.

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<sup>39</sup> See *Dow*, [1992] BLR at 143.

<sup>40</sup> 1992 BLR 135C

<sup>41</sup> Case No. MAHLB-000576-08 (High Court 2008), para 52.

41.1 Under the ICCPR, which guarantees freedom from discrimination under article 2 and equal protection under article 26, the HRC has noted that “article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right.”<sup>42</sup>

42. As the two provisions are separate, stand-alone provisions, the guarantee of equal protection to all people in Botswana under section 3 is subject only to the limitations outlined under section 3. Similarly, the limitations contained in sections 15(4)-15(9) only apply to challenges under section 15.

42.1 In *Dow*, the Judge President made this point clearly stating that “[w]e must always bear in mind that section 3 confers on the individual the right to equal treatment of the law. That right is conferred irrespective of the person’s sex. The definition in section 15(3) on the other hand is expressly stated to be valid ‘in this section’. In that case, how can it be said that the right which is expressly conferred is abridged by a provision which in a definition for the purposes of another section of the Constitution merely omits to mention sex?”<sup>43</sup>

42.2 This was followed by the High Court in *Kamanakao I*, where the High Court found that section 15 was not violated because of the limitation under section 15, but after specifically holding that this limitation

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<sup>42</sup> Human Rights Comm., General Comment No. 18: Non-discrimination, 37th session (1989), para 12.

<sup>43</sup> [1992] BLR 142H.

applied “for the purposes only of section 15,” the Judge did find a violation of section 3(a).<sup>44</sup>

42.3 This is further supported by the Botswana government, which in its state report to the Committee on the Rights of the Child noted that any laws which failed to give women the same protection as men would be contrary to section 3 despite any limitations under section 15.<sup>45</sup>

#### CASE LAW IN COMPARABLE JURISDICTIONS

43. Numerous countries in Africa and internationally have struck down customary laws which discriminate against women with respect to inheritance.

44. The South African Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha and Others*<sup>46</sup> was confronted with a similar issue of whether the rule of male primogeniture with respect to inheritance and succession violated the constitutional rights to dignity and equality among others. The Court looked at two distinct questions: whether section 23 of the Black Administration Act violated the constitution and whether the rule of male primogeniture under the customary law on inheritance and succession violated key constitutional rights. The Court held that section 23 and the customary law rule of male primogeniture violated the rights to dignity and equality under the Constitution.

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<sup>44</sup> [2001] 2 BLR at 675A.

<sup>45</sup> Consideration of Reports Submitted by States Parties Under Art. 44 of the Convention (Botswana), CRC/C/15/Add.2 (10 Jan 2003) , para 104.

<sup>46</sup> 2005 (1) SA 580 (CC).

45. In reaching its decision, the Court helpfully outlined the nature of customary law, highlighting the importance of a “living” customary law which is regularly developing to meet changing community needs. The Court held that “[t]rue customary law will be that which recognises and acknowledges the changes which continually take place.”<sup>47</sup>

46. *In Re Wachokire*,<sup>48</sup> the Kenyan Magistrate Court confronted a customary law rule denying women inheritance rights due to the expectation that they would eventually get married. The Court rejected the justification that women would marry and thus did not require equal inheritance rights, holding that denying women equal rights to inheritance under Kikuyu customary law violated section 82(1) of the Kenyan Constitution which prohibited discrimination on the basis of sex, 18(3) of the Charter, and articles 15(1)-15(3) of CEDAW.

47. In *Ephraim v Pastory*<sup>49</sup> the Tanzanian High Court found that the rule of the Haya customary law according to which daughters had no power to sell inherited land was inconsistent with the Bill of Rights and international and regional law. The High Court furthermore stated that “*the principles enunciated in the [Constitution and relevant international and regional treaties] are a standard below which any civilised nation will be ashamed to fall. It is clear...that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories.*”<sup>50</sup>

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<sup>47</sup> 2005 (1) SA 580 at para 86.

<sup>48</sup> *In re Wachokire*, Succession Cause No. 192 of 2000 discussed in *The Role of the Judiciary in Promoting Gender Justice in Africa* (UNDP, 2008) 19.

<sup>49</sup> (2001) AHRLR 236.

<sup>50</sup> (2001) AHRLR 236 at para 10.

48. In Nigeria, the Court of Appeal in *Mojekwu v Mojekwu*,<sup>51</sup> cited in the South African case of *Bhe* referred to above, also addressed a customary law rule of male primogeniture. The Court held that the rule was unconstitutional and contrary to democratic values. The Court held that “[a]ny form of societal discrimination on the ground of sex, apart from being unconstitutional, is [the] antithesis to a society built on the tenets of democracy which we have freely chosen as a people...Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself.”<sup>52</sup>

49. In Ghana, the High Court in *Akrofi*, discussed in detail above, addressed a customary law denying women the ability to inherit intestate from their deceased parents. In this case, the daughter of the deceased complained that her uncle took ownership of her father’s properties, but failed to maintain her or her mother. The Court declared that the daughter of the deceased was “*within the range of persons entitled to succeed to her father’s estate.*”<sup>53</sup>

## CONCLUSION

50. We submit for the reasons advanced above that the court’s opinion under Order 35 of the High Court rules should be to the effect that the Customary Law rule of primogeniture whereby only a male who was related to the deceased through

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<sup>51</sup> [1997] 7 NWLR 283.

<sup>52</sup> 2005 (1) SA 580 at para 194.

<sup>53</sup> [1965] GLR at 17.

a male line qualified as interstate heir is unconstitutional in that it violates section 3(a) of the Constitution of Botswana, Chapter 1.

51. We further submit that this Honourable Court should opine that the Customary Law principle by which the right of inheritance belongs to the youngest son is unconstitutional in that it violates section 3(a) of the Constitution of Botswana.

52. This Court is empowered under section 18(2)(b) of the Constitution to “*make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.*”

53. We submit section 18(2)(b) permits the Court to overturn the decision of the Customary Court of Appeal on the basis that it violates the applicants’ right under section 3(a) of the Constitution.

54. Alternatively, section 18(2)(b) permits the Court to strike down the customary law rule of male primogeniture as violating the applicants’ rights under section 3(a) of the Constitution.

**THUS DONE AND MADE BY US ON THIS 4<sup>TH</sup> DAY OF APRIL 2012**

**RANTAO KEWAGAMANG ATTORNEYS**

**ON BEHALF OF THE APPLICANTS**

**Per: Tshiamo Rantao**

## **LIST OF AUTHORITIES**

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13. Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined Initial, Second and Third Periodic Reports of States Parties (Botswana), CEDAW/C/BOT/3 (20 October 2008)
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15. Human Rights Comm., General Comment No. 18: Non-discrimination, 37th session (1989)

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## **LITERATURE**

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