

DR DINGAKE .J

**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE**

HIGH COURT OF BOTSWANA
CIVIL REGISTRY
LOBATSE

CASE NO: MAHLB-000836-10

2012-06-12

In the matter between:

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EDITH MOSADIGAPE MMUSTI

1ST APPLICANT

BAKHANI MOIMA

2ND APPLICANT

JANE LEKOKO

3RD APPLICANT

MERCY KEDIDIMETSE NTSHEKISANG

4TH APPLICANT

And

MOLEFI SILABO RAMATELE

1ST RESPONDENT

THE PRESIDING OFFICER,

2ND RESPONDENT

CUSTOMARY COURT OF APPEAL

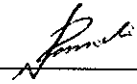
(Herein represented by the Attorney General)

FILING NOTICE

PLEASE FIND FILED HERewith;

1. 2nd Respondent's Heads of Argument.
2. List of Authorities

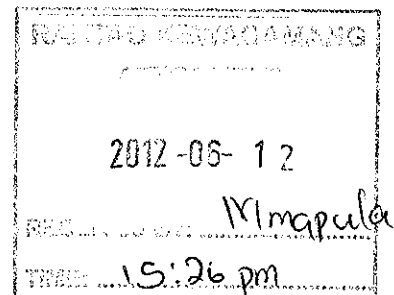
DATED AT GABORONE THIS 12TH DAY OF JUNE 2012.



**Attorney General
Government Enclave
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**TO : THE REGISTRAR OF THE HIGH COURT
Private Bag 001
LOBATSE**

**AND TO: RANTAO KEWAGAMANG ATTORNEYS
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**AND TO: MINCHIN AND KELLY (BOTSWANA)
1st Respondent's Attorneys
Plot 688, Khwai Road
(Off Botswana Road)
P.O Box 1339
GABORONE**

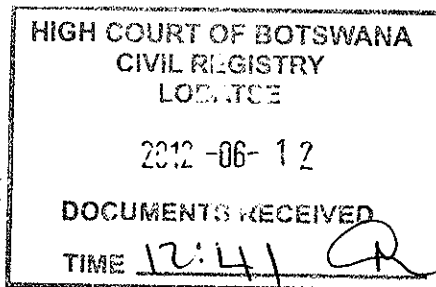
DR DINGAKE .J

**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT LOBATSE**

CASE NO: MAHLB-000836-10

In the matter between::

**EDITH MOSADIGAPE MMUSI
BAKHANI MOIMA
JANE LEKOKO
MERCY KEDIDIMETSE NTSHEKISANG**



**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT**

And

**MOLEFI SILABO RAMATELE
THE PRESIDING OFFICER,
CUSTOMARY COURT OF APPEAL
(Herein represented by the Attorney General)**

**1ST RESPONDENT
2ND RESPONDENT**

ATTORNEY GENERAL'S HEADS OF ARGUMENT

1. **INTRODUCTION**

These are the Attorney General's heads of Argument stemming from of the Court dated the 14th of May 2012.

The applicants have approached the court for the relief set out in their notice of motion, the facts are more concisely set out in the Applicants' motion papers. Most importantly, they seek an order that the customary law of inheritance which permits only males to succeed in intestate succession violates Section 3(a) of the Constitution of the Republic of Botswana, more precisely that the practice violates woman's right to equal protection under the above mentioned section, thus is discriminatory towards females.

The issues which require much deliberation on are as follows:

- a. Whether the Ngwaketse Customary law of inheritance where the family residence is given to the last born son violates Section 3(a) of the Constitution. It should be noted that for convenience sake this law will be referred to as primogeniture.¹
- b. Whether Principles of international law are binding in the present case.

Does Ngwaketse Customary law of inheritance where the family residence is given to the last born son violate Section 3(a) of the Constitution.:

The principle in question is that of Ngwaketse Customary law of inheritance where the family residence is given to the last born son, a principle widely practiced and accepted across the country.

Section 3 of the Constitution of Botswana² provides:

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her 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;

¹ The Attorney General notes that the practice although similar to primogeniture is not the same, that primogeniture gives the first born son the family real estate.

² CHAPTER 1

- (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.

There is a need to note that the courts have expressed jealously their attitude towards guarding the rights of citizens against violations of those rights by the legislature but the protection of such rights was subject to the limitations contained in s 3, viz that the enjoyment of such rights did not prejudice the rights and freedoms of others or the public interest.

The public interest therefore always has to be a factor of consideration of legislation, particularly where such legislation reflected a public concern. In making a decision, parliament must inevitably take a moral position in tune with what it perceived to be the public mood. Botswana being a culturally inclined nation thus extensively practicing customary law the time has not come, though in its way, whereby the society of Botswana has shown a clear concise definite move from the current customary practice of the principle of male primogeniture.

In the case of **KANANE v. THE STATE**³ the Appellant sought to have the charge of committing indecent practices with another male contrary to section 167, as read with section 33, of the Penal Code (Cap 08:01) and alternatively with committing an unnatural offence contrary to section 164(c) of the Penal Code held to be ultra vires Section 3 of the Constitution. The Court held that There was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women required a decriminalization of those practices, even to the extent of consensual acts by adult males in

³ 2003 (2) BLR 67 (CA)

private. The trend was not to move towards the liberalization of sexual conduct by regarding homosexual practices as acceptable conduct but showed a hardening of a contrary attitude.

In the present case the practice sought to be rendered ultra vires the constitution is Ngwaketse Customary law of inheritance . As much as one might appreciate that there is a slight move being made in the direction of obtaining total equality, such has yet not been achieved, thus it would be bold to hold that the cultural practice that forms a part of the Traditional rules of Tswana Culture is ultra vires the Constitution.

In terms of 15 of the Constitution of Botswana⁴, which reads as follows;

- (1) *Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.*
- (2) *Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
- (3) *In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*
- (4) *Subsection (1) of this section shall not apply to any law so far as that law makes provision-*
 - (a) *for the appropriation of public revenues or other public funds;*
 - (b) *with respect to persons who are not citizens of Botswana;*

⁴ CHAPTER 1

- (c) *with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;*
- (d) *for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or*
- (e) *whereby persons of any such description as is mentioned in subsection of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.*

Although the Constitution of Botswana contains a provision on non-discrimination, under clause 15(4)(c) the prohibition does not apply to: "adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" and Customary Law. Thus the principle of male primogeniture being part of personal law and Customary Law enjoys such protection captured under Section 15(4)(c) and (d) .

We submit that the practice of male primogeniture is not in contravention of Section 3 of the constitution in that though Botswana society might be multicultural, majority of the culture is that of Tswana, meaning that our society has not yet reached a point of doing away with some of its cultural practices, one of them being that of succession. This is clearly so for the Bangwaketse as was confirmed by the Customary Court of first instance and the Customary Court of Appeal. Further this practice is protected by Section 15(c) and (d) of the Constitution. Thus it cannot be held to be in contravention of Section 3 of the Constitution. In holding that the practice does violate the constitution would mean that the Constitution can violate itself which in essence is not practical.

The Constitution of the Republic of Botswana as it stands today is not the same as it was a decade ago at the time of the Unity Dow case, it has undergone amendments some noteworthy

such as the inclusion of the word “sex” in section 15(3). For one to allege an act of discrimination, the proper Section to apply to move this honourable court is Section 15 which is more specific, and not Section 3. Since the word “sex” now appears in both Section 3 and Section 15(3) the court is duty bound to apply the exceptions captured under Section 15(4)(c) and (d).

As much as one might appreciate the fact that international law is against any form of discrimination, it is not always the case that such a position will be adopted by every state that has ratified the treaty or convention embodying such. In this particularly case the discrimination in question is that against women, captured in the principle of male primogeniture. The relevant convention dealing with such discrimination is CEDAW⁵. The Convention defines discrimination against women as “...*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*”⁶

Before a convention can be legally binding in a particular state, there are two systems to be looked at and one of the two is to be applied to a state depending on the system in place. Those two systems are, monism and dualism. Botswana having a “dualist system”, international law is not directly applicable domestically. International law as such can confer no rights cognisable in the municipal courts. It is only insofar as the rules of international law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations.⁷

⁵ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly

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⁷ James Atkin, Baron Atkin, in M. Akehurst, *Modern Introduction to International Law*, Harper Collins, London, p. 45.