IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

COURT OF APPEAL CIVIL APPEAL NO. CACGB-104-12
HIGH COURT CIVIL CASE NO. MAHLB-000836-10

In the matter between:

MOLEFI SILABO RAMANTELE — **APPELLANT**

and

EDITH MOSADIGAPE MMUSI — **1ST RESPONDENT**
BAKHANI MOIMA — **2ND RESPONDENT**
JANE LEKOKO — **3RD RESPONDENT**
MERCY KEDIDIMETSE NTSHEKISANG — **4TH RESPONDENT**

Mr Attorney T. Tafila for the Appellant
Mr Attorney M. Chamme (with Ms O. Thamuku for the Attorney General (*amicus curiae*)
Adv. G. Budlender SC (with Ms N. Mayosi) for the Respondents

J U D G M E N T

CORAM: **KIRBY J.P.**
TWUM J.A.
FOXCROFT J.A.
LEGWAILA J.A.
LESETEDI J.A.

KIRBY J.P.

1. I have read the judgment of Lesetedi JA, and I agree entirely both with his reasoning, and with the order to be made. This is an important case, however, and I would like to add a short analysis and a few remarks of my own.

2. The factual background is fully set out by Lesetedi JA, and I need not repeat it all. In short, the late Silabo Ramantele had a yard in Kanye, which he occupied with his wife Thwesane. He died in 1952 and his estate was distributed among his heirs. His widow, Thwesane, remained with the yard. This was subsequently developed, for her and for themselves, by his five daughters (four of whom are the respondents herein) by building three dwellings of various sizes, utilizing their own resources. The largest house was built by the first respondent (now Edith Mmusi). His two sons by Thwesane, Basele and Banki, did not assist, nor did his other son, Segomotso, born before all the others from an earlier relationship with another woman.

3. Thwesane died in 1988. Her estate was not distributed. Basele died in the early 1990s. Banki died in 1995. Segomotso died in 2006. In 1991 Edith returned to the family yard following the death of her husband, and she has lived there, in the house she built, ever since. She is now over 80 years of age and in

the evening of her years. Her occupation of the yard was not challenged, nor was any claim made to it during their lifetimes by Basele, by Banki, by Segomotso, or by anyone else. It was only after Segomotso's death that his son Molefi, the appellant, claimed the yard for himself. He averred that Banki had inherited this from Thwesane, and had then exchanged it for his father's plot, many years previously. It was now his, he said, as he was his father's heir.

4. Edith resisted his claim. She had lived in the main home in the yard for close to 20 years, and asserted her right to it (with her sisters) as the successors to her mother. The uncles and elders could not agree. Some felt that according to Ngwaketse custom Banki, as the youngest son, should, all things being equal, have inherited the yard from his mother. Others said he died before her estate had been distributed, and that in any event he did not qualify as he had long left the yard (having been banished), and had built his own home elsewhere.

5. There followed three conflicting customary court decisions:

A. Headman Ketsitlile, in the lower customary court, after hearing a range of evidence, found that under "our Ngwaketse culture ... a male child never leaves his parents' home except when he marries, or due to bad behaviour which his parents do not condone ... As for the girl child she only leaves her parents' home when she gets married, and that is where her inheritance will be." He found that "the home was given to Segomotso", and accordingly awarded it to Molefi as his heir, giving Edith six months to vacate the plot.

B. On appeal to the Higher Customary Court, Kgosi Lotlaamoreng II held that since the male issue of Silabo and Thwesane had all passed on before the property was distributed, it now devolved upon the remaining children. He ordered that "this home belongs to all children born of Silabo and Thwesane and further that they all have a

right to use it as they wish whenever they have a common event."

C. The Customary Court of Appeal saw things differently. Without hearing further evidence, it held that "the family home was given to Banki, the rightful heir as the last born boy child." He had passed this on to Segomotso, who left it to Molefi. Accordingly Kgosi Mosielele awarded the home to Molefi and ordered Edith to vacate it with all her belongings within three months.

6. This outcome was, on any view of the facts, manifestly unjust, and this was the conclusion of both Dingake J. and of Lesetedi JA, with which I agree.

7. So, when the matter came before Dingake J. in review proceedings brought on constitutional grounds (the time allowed for an appeal having expired), he had before him three conflicting outcomes all purportedly arrived at by applying

Ngwaketse customary law principles on intestate succession to the same facts. He did not deal with those facts, as Lesetedi JA has now done, and thus failed to arrive at the correct conclusion without resorting to the Constitution at all, as he should have done.

8. Instead he permitted counsel for the two private parties (who were not qualified to determine rules of customary law themselves) to formulate a special case in which they sought a decision as to the constitutionality of two mutually contradictory purported "rules" of customary law; namely

(1) "... the customary law rule of primogeniture which is that only a male who was related to the deceased through a male line qualified as intestate heir," and

(2) "... the customary law principle by which the right of inheritance belongs to the youngest son."

(The Attorney General did not participate in this formulation).

9. In one rule the first born son is to inherit, while in the other the last born son is to inherit. As it turns out from Lesetedi JA's

analysis neither 'rule' correctly reflected Ngwaketse customary law at all.

10. The presentation of the stated case enabled Dingake J. to embark on a lengthy and erudite analysis of equality before the law and of gender discrimination in customary law, calling in aid cases from all over the world. Unfair discrimination against women was, of course, outlawed in Botswana as being unconstitutional many years ago in the seminal case of **ATTORNEY GENERAL vs DOW 1992 BLR 119 CA**. Since then the Government has taken steps to progressively eliminate this wherever it occurs (see, for example, The Abolition of Marital Power Act Cap 29:07, The Married Persons Property Act Cap 29:03 (as amended), and The Constitution Amendment Act No. 9/2005). The Judge's analysis in this case was undertaken without the benefit of expert evidence on the actual form and content of the alleged customary laws being impugned, or on the rationale behind these laws, or of findings of fact leading to their application, if indeed they were applied in this case.

These matters have been fully dealt with by Lesetedi J.A. There are two other aspects of Dingake J's approach to constitutional analysis, however, which should not pass unmentioned.

11. The first relates to the special rules of constitutional interpretation. There are three of these, of which the Judge restated and dealt with two in considerable detail, namely that provisions granting fundamental rights are to be broadly and generously construed, and that provisions derogating from such rights are to be restrictively interpreted. Among the many cases he cited were the leading Botswana cases of **DOW** (supra) and **PETRUS vs THE STATE (1984) BLR 14 CA**, both decisions of the full bench of this Court. The third rule was also dealt with in those cases – it is that no single provision of a constitution is to be considered in isolation, but all provisions touching upon the subject in question are to be considered together. In **DOW (at 165 B-C)** Aguda J.A. quoted with approval the words of Justice White in **SOUTH**

DAKOTA vs NORTH CAROLINA (1904) 192 US 286; 48 L Ed. 448 at 465 where he said:

> "I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view to be so interpreted as to effectuate the great purposes of the instrument."

See also **NTESANG vs THE STATE (1995) BLR 151 CA at 160**.

12. In the present case the Judge omitted to mention this well-known rule and proceeded, improperly in my view, to consider section 3 of the Constitution in isolation in regard to gender based inequality before the law, without fully considering, as he was bound to do, section 15 which deals specifically with discrimination on the ground of sex. He sought to justify this omission on the ground that counsel for the applicant before him

> "no longer contends that the Ngwaketse customary law ought to be invalidated on the basis that it violates section 15 of the Constitution of Botswana,"

but contends that

"... the customary law of inheritance which permits only males to succeed in intestate succession violates section 3(a) of the Constitution, more specifically that the practice/customary law rule violates women's rights to equal protection under the above-mentioned section."

This is made even plainer on page 46 of the judgment, where the learned Judge states that:

> "... clearly discrimination against women was not justifiable in terms of the South African Constitution. However, as the applicants possibly realized, it may not be possible to reach a similar conclusion on the basis of s.15 of the Botswana Constitution given the saving clause. This may explain the applicants' focus on section 3(a) of the Constitution."

13. But such a consideration cannot justify the Judge's departure from that third imperative rule of constitutional construction.

14. As it happens, that foreseen conclusion was not necessarily correct either, as Lesetedi J.A. has found. The saving clauses in section 15 are not an open licence to discriminate unfairly in matters of personal law or under customary law. Such laws must still pass constitutional muster, in that they must be in the

public interest, and they must have due regard to the rights and freedoms of others.

15. The other statement of Dingake J. on which I must comment is that, according to him,

> "The justices of this court have shunned the apologetic value oriented model that derives its substance from the moral choices of the majority or the public mood/opinion."

16. It is not clear to which justices he is referring – whether of this Court or of the High Court, since no examples are given. Certainly, to have due regard to the moral choices of the majority (from which all our laws derive their legitimacy) is an imperative of this Court and all courts, and is the cornerstone of a constitutional democracy and of the rule of law. It is Parliament (and not the courts) which is given the power "to make laws for the peace, order and good government of Botswana" – and it is Parliament which is elected by the majority of Batswana in the exercise of their democratic rights.

17. It is true that the right to make laws is always "subject to the Constitution," but it is equally true that just as the courts are creatures of the Constitution, so too is the Constitution a creation of the people. It is only the majority, through its representatives in Parliament, and in some cases after a referendum, that has the power to amend or to replace the Constitution in terms of section 89, including the entrenched provisions conferring fundamental rights. In the final analysis it is the people, through their majority view, who enjoy ultimate sovereignty in this country. No apology need be offered for respecting the moral choices of the majority, as reflected in the laws passed by Parliament and in the Constitution itself.

18. That is not to say that the courts do not have a sacred duty, which they must exercise objectively, and without fear or favour, to test any law passed by Parliament against the imperatives of the Constitution, and to strike down any law, including a customary law, that does not pass constitutional muster. That will always be so.

19. As Chaskalson C.J. said in **S vs MAKWANYANE 1995 (3) SA 391 CC**, in a passage quoted by the court a quo,

> "Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour."

With those sentiments I am in respectful agreement. I agree, too, with Mahommed A.J.A. in **ATTORNEY GENERAL, NAMIBIA: IN RE CORPORAL PUNISHMENT BY ORGANS OF STATE 1991 (3) SA 76 (NMS) at 86**, when he stressed the need to take into account contemporary norms, when testing legislation against the Constitution. He said:

> "... It is however, a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations, and sensitivities of the Namibian people, as expressed in its national institutions and its Constitution ...",

and no doubt as expressed in its current laws as well. And in **KANANE vs THE STATE (2003) 2 BLR 67 CA at 79**, a full bench of this Court approved the words of Lord Bingham in

PATRICK REYES vs THE QUEEN (2002) 2 WLR 1034 PC,

that:

> "In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences,"

and added that:

> "In making such a decision Parliament must inevitably take a moral position in tune with what it perceives to be the public mood. It is fettered in this only by the confines of the Constitution."

20. So prevailing public opinion, as reflected in legislation, international treaties, the reports of public commissions, and contemporary practice, is a relevant factor in determining the constitutionality of a law or practice but it is not a decisive one. This is repeated in section 24(1) of the Interpretation Act Cap 01:04. To the extent that such mood or sentiment reflects legitimate concerns, it is a component of the "public interest", twice referred to in section 3 of the Constitution. Further, the Judicial Oath, by which all Judges of the High Court and Justices of Appeal are bound, enjoins us

> "to do justice in accordance with the Constitution of Botswana as by law established and in accordance with the laws and usage of Botswana ..." (my emphasis)

We do not endorse Dingake J's

> "outright rejection of any suggestion, however remote, that the Court must take into account the mood of society in determining whether there is any violation of constitutional rights ..." (Judgment p.61)

This is particularly so in an evaluation of a rule of customary law, which, as will appear, constantly evolves over time in line with contemporary norms and standards.

21. Lesetedi J.A. has already found, and I agree, that it was not necessary to make a constitutional determination in order to resolve this case, which turned mainly on the facts. However, counsel for both sides, although conceding this, requested the Court to give guidance for the future on the correct approach when a Court is faced with a challenge to the constitutionality of a rule of customary law and I shall endeavour to do so.

22. The first rule, which I adopt as a firm rule of practice (as did Lesetedi J.A.), is that laid down by Kentridge A.J. (a former Justice of this Court) in **S vs MHLUNGU 1995 (3) SA 867 CC at para 59**, when he said:

> "I would lay it down as a general principle that where it is possible to decide a case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

23. As a corollary to this rule, where a case can be resolved, and appropriate relief can be granted, by an appeal or by review proceedings, even if constitutional issues, among others, are to be raised, that is the procedure which should be adopted, rather than bringing an application under section 18 (1) of the Constitution for constitutional relief. It will be improper to bring a section 18 application to avoid the time constraints of review or appeal proceedings. Rather an application for condonation or for an extension of time should be brought. In the present case there was no need for a constitutional application.

THE CUSTOMARY LAW

24. In considering how properly to mount a challenge to the constitutionality or legal effectiveness of a rule of customary law, it is necessary first to consider the nature of customary law generally, and then of the rule itself in particular.

25. In Botswana, as in many other countries, customary law has existed and evolved since time immemorial. It consists, in the words of the respondents' counsel, of a comprehensive tapestry of interrelated and interdependent rules, covering every aspect of family and societal life. And it may fairly be said that it is the broad adherence to the norms of customary law that provided a firm foundation for all subsequent laws, and for the Constitution itself, to be fashioned in a stable and peaceful Botswana. But while subsequent laws and the Constitution have modified some aspects of the customary law, they have in no way replaced it. Provisions of the Constitution recognizing and governing aspects of the customary law are section

10(12)(b) and (e), section 15(4)(d) and section 88(2). These words of the full Constitutional Court of South Africa in **ALEXKOR LIMITED & ANOTHER vs THE RICHTERSVELD COMMUNITY AND OTHERS 2003 (5) SA 460 CC (at para 51)** are as valid for Botswana as they were for that country, namely that:

> "Customary law must be recognized as an integral part of the law, and an independent source of norms within the legal system ... throughout its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its norms and values consistent with the Constitution."

26. There are two outstanding characteristics of customary law, namely its evolutionary nature and its flexibility. As Amissah P. confirmed in **DOW (supra) at p.137**:

> "Custom and tradition have never been static"

and in the words of Dr Wazha Morapedi:

> "Customary laws consist of norms, practices and traditions that are binding on society. These are flexible, adaptable, and evolutionary"

(*writing on "Customary Law and Chieftainship in Twenty First Century Botswana" – Cambridge University Press: The Future of African Customary Law 2011 at p.250*).

Some changes have been dramatic, such as the ruling of Kgosi Linchwe II in 1963 that in Kgatleng cattle in an intestate estate should no longer be entrusted to the (often unreliable) care of the eldest son, but should be shared equally among the children of the deceased. (*See Comaroff & Roberts: Rules & Processes: The Cultural Logic of Dispute in an African Context – University of Chicago 1981 at p.18*). Other precepts, such as the rule of thumb that the youngest son inherits the family home, have been modified and adapted over time.

27. As early as 1938 Professor Schapera in his "Handbook of Tswana Law and Custom" presented a snapshot of the customary law as it stood in that year. In discussing the rules of inheritance (which was then normally intestate), he traversed general principles in some detail, but added that:

> "... fields and dwellings occupy a somewhat special position, as they may be inherited by either sons or daughters according to their allocation."(4th Ed. 1995 at p.230)

And as to flexibility, Mr Simon Roberts (as he then was) who was engaged by the Botswana Government in 1969 and 1970 to record the customary law, wrote in Restatement of African Law Vol 5 Botswana, Macmillan 1972 (intro at Pp xi and xii) that (in the context of the recording of 'rules' of customary law from decided cases),

> "... the recurrence of similar conclusions must be sought before the tentative formulation of a rule. Even then it must be recognized that other instances will be found which do not conform. In the Tswana Courts the search for black-letter law is unfruitful, if not wholly misconceived" ... "(stated legal norms) are seldom a reliable guide to the law actually applied in dispute settlement."

28. This apparent inconsistency is explained by the overall objective of family councils of elders and of the customary courts, which is to achieve reconciliation and consensus among the disputants in issues brought before them for resolution, in

contrast to the confrontational and adversarial processes of the common law courts.

29. It is for those reasons that it will seldom be an easy task for the court to identify a firm and inflexible rule of customary law for the purpose of deciding upon its constitutionality or enforceability. Before reaching a conclusion in such a case, which may, as Lesetedi J.A. has held, have far-reaching consequences, the Court must have expert evidence, usually with the assistance of assessors, on the existence and the current application of such a rule. It must also have clear evidence, and make findings of fact, on the circumstances of the case before it in which the rule was applied. Neither of those prerequisites was satisfied in the present case. The stated case assumed the existence of rules which were open to doubt, and the facts, which were vigorously disputed in the customary court, were only partially advanced in the High Court, with no answering affidavit being filed.

30. It is also very seldom that a rule of customary law or the application of such a law, will stand to be measured against the Constitution at all. This is because the legal framework has been designed in such a way that the legality or enforceability of rules of customary law falls to be tested in the first instance in terms of a statute designed specifically for that purpose. This is the Customary Law Act Cap 16:01 (Act 51 of 1996, which was the successor to the Customary Law (Application and Ascertainment) Act No. 51/1969). The Customary Law Act provides in section 2 that:

> "Customary law means, in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice." (my underlining)

(and "any written law", of course, includes the Constitution).

31. Section 7 provides that:

> "Notwithstanding the provisions of section 4 (which deals with exceptions), customary law shall be applicable in determining the intestate heirs of a tribesman and the nature and extent of their inheritances."

32. Section 10(2) provides that:

> "If the system of customary law cannot be ascertained in accordance with subsection (1) (dealing with choice of law) or if the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity and good conscience." (again my emphasis)

33. The principles there laid out will apply equally to a particular rule of customary law. Where this is flexible, it cannot, by definition, be concisely defined, and its application will be judged on the facts of the particular case under consideration, against the benchmarks of justice, equity and good conscience. If it does not meet the threshold, the decision will be set aside and replaced with one which is appropriate and passes the test.

34. Section 11 sets out the aids to ascertainment of the relevant rules of customary law – including text books, reported cases and expert opinion. Since the relevant rules were (wrongly) stated as a fact in the court below, Dingake J. did not, as he should have done, make reference to those sources.

35. It is noteworthy that the Customary Law Act is, by section 3, to be applied "by the courts of Botswana." These include the customary courts themselves at all levels, as well as the common law courts. This means that evolving and flexible rules of customary law must be fairly applied according to the facts of each case, and this is what, historically the customary courts have usually done. Where the application of a flexible rule will not in the circumstances be in accordance with the principles of justice, equity and good conscience, it will not be applied and an order appropriate to the circumstances will be made. Where an old or any rule of customary law is contrary to morality, humanity or natural justice, it will not be applied at all. So, essentially, the Customary Courts Act has confirmed by statute what had in any event become the norm in practice – namely that the customary courts operate by and large as courts of equity.

36. It need hardly be said that any customary law or rule which discriminates in any case against a woman unfairly solely on

the basis of her gender would not be in accordance with humanity, morality or natural justice. Nor would it be in accordance with the principles of justice, equity and good conscience.

37. The emphasis in this regard is on unfairness. There may be many cases, particularly in the law of inheritance, where discrimination in one form or another may be for supportable reasons and may be counterbalanced by other benefits or advantages. This is why section 15(4) of the Constitution, dealing with discrimination, exempts from the prohibition in section 15(1), both matters of devolution of property and personal law, and the application of customary law. These exemptions are, as I have said, subject to their own constitutional boundaries.

38. The issues referred to may be raised in the customary courts at any level, or in the High Court on appeal. It is not necessary or appropriate to raise them in a constitutional application. In the

case of the senior customary courts and the High Court, this has the advantage of enabling the presiding officer or Judge to utilize section 44 of the Customary Courts Act Cap 04:05, and to call to his aid assessors to provide expert assistance on the customary law in question.

39. As a general principle, if the application of a flexible rule of customary law in a particular set of circumstances produces an outcome that is manifestly unjust, then it must not be applied. But the threshold is a high one. In any estate distribution there will be those children who are happy with their portion and those who are not. A mere sense of grievance of a beneficiary, male or female, following the distribution of an estate, will not be a sufficient ground to disturb a reasonable distribution honestly made by the elders and uncles or by the customary court.

40. Returning to the present appeal, whether or not a rule of thumb that the youngest son inherits the family homestead will

be unenforceable in a particular case will depend upon the particular circumstances. There will be many relevant factors to be considered, as Lesetedi J.A. has found. Additional factors to those mentioned by him include the situation of the last born son – (does he live in the house? Did he care for his deceased parents?); the size of the estate (is there more than one dwelling, or are there other balancing assets?); the life style of the heirs (have they abandoned the village homestead for an urban environment?); the situation of the last born son's siblings (are there more deserving or more needful heirs or heiresses?). And there will no doubt be many other factors as well, which will be considered by the elders and uncles when they meet to distribute the estate. Another important factor will be the wishes of the deceased parent expressed during his or her lifetime. Because, just as a testator may for his own reasons disinherit one child and favour another, by means of a will, without offending the law or the Constitution, so too in customary law a parent may express his or her wishes regarding the disposition of his or her estate or parts thereof

when he or she dies, and the elders and the family will generally respect those wishes – *lentswe la moswi ga le tlolwe* (the word of a dead person is not to be transgressed). So, considering these and other factors, there will also be many cases (perhaps most cases) where the application of such a rule is not objectionable, and may achieve its original purposes of ensuring family cohesion, certainty of succession, support of the widow, and provision of a home of last resort to indigent family members.

41. In the case before him, Dingake J. had three conflicting versions of the customary law. It was for the court to identify the correct version on evidence led, not for counsel to decide this in a stated case. While the facts before the customary court were heavily disputed and on record, the evidence before the Judge was contained in the affidavit of Edith Mmusi, the second respondent, which stood uncontradicted as no answering affidavit was filed. It revealed that there was no surviving son, let alone a last born one, at the time of the

application, when the distribution of Thwesane's estate was still to be effected. It revealed that her nephew, and not one of her own children, sought to have her daughter evicted from her home by virtue of dubious and unproven claims, made years later, that Banki had been given the home, and had passed it on to Segomotso. The evidence that Banki had been banished and had moved elsewhere long before his passing, was unchallenged, as was the evidence that all the improvements on the property were made at their own expense by the daughters, (and mainly by Edith) who also cared for their mother until her death. The outcome of the application of the rule by the Customary Court of Appeal was that the 80 year old widow was to be turned out of her home of twenty years without compensation, and with no regard to her future security. It is difficult to imagine a case more manifestly unjust, and the application of the last-born son rule was not justified either by the evidence or by the circumstances. It failed all the tests and the judgment of the Customary Court of Appeal must be set aside.

42. It is for these reasons, as well as the reasons advanced by him, that I fully concur with the judgment and orders of Lesetedi J.A.

DELIVERED IN OPEN COURT AT GABORONE THIS 3rd DAY OF September 2013.

I.S. KIRBY
JUDGE PRESIDENT

I AGREE

DR SETH TWUM
JUSTICE OF APPEAL

I AGREE

J.G. FOXCROFT
JUSTICE OF APPEAL

I AGREE

E.W.M.J. LEGWAILA
JUSTICE OF APPEAL

I AGREE

I.B.K. LESETEDI
JUSTICE OF APPEAL