IN THE COURT OF APPEAL OF BOTSWANA HELD AT GABORONE

CACGB-104-12
High Court Case No. MAHLB-000836-10

In the matter between:

MOLEFI SILABO RAMANTELE	**Appellant**
and	
EDITH MODIPANE MMUSI	**1st Respondent**
BAKHANI MOIMA	**2nd Respondent**
JANE LEKOKO	**3rd Respondent**
MERCY KEDIDIMETSE NTSHEKISANG	**4th Respondent**

Mr. T. Tafila for the Appellant
Mr. M. Chamme with Ms. O. Thamuku
for the Attorney General (*amicus curiae*)
G. Budlender SC with Ms. N. Mayosi instructed
by Rantao Kewagamang Attorneys for the Respondent

J U D G M E N T

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

LESETEDI J.A.:

1. This is an appeal against a decision by Dingake J. declaring –

   (a) the Ngwaketse Customary Law rule that provides "that only the last born son is qualified as intestate heir to the exclusion of his female siblings" to be *ultra vires* Section 3 of the Constitution of Botswana in that it violates the respondents' rights to equal protection of the law; and

   (b) that the judgment of the Customary Court of Appeal under Civil Case No. 99-10 dated 22nd September 2010 is, to the extent that it applied such rule, reviewed and set aside.

2. <u>The litigants</u>

   The respondents are the appellant's paternal aunts. They were born of Silabo Ramantele and Thwesane Ramantele who were married to each other. They were members of the Ngwaketse tribe and resided at Mafhikana Ward in the tribal capital –

Kanye Village. Silabo passed away in 1952 and his wife survived until 1988. The appellant's father, one Segomotso was born to Silabo and another woman. His parents were not married to each other. There is no evidence of Segomotso being adopted as a child of the marriage of Silabo and Thwesane nor of him ever staying in the matrimonial home.

3. After Silabo Ramantele died, his livestock and other properties were divided amongst his heirs who included his widow and children. The homestead remained with his widow Thwesane.

4. All the respondents were married, but the first respondent is now widowed. Her husband died in 1988 and after a misunderstanding with her in-laws, she moved back to her late parents' home in 1991 and has been resident there ever since.

5. <u>The dispute</u>

This matter has a long and chequered history. Its litigation

was beset by errors and factual and procedural misdirections which threw the dispute resolution focus out of orbit. For that reason it will be necessary to set out the history of the matter in some detail.

The core dispute between the parties centres around the ownership of the said homestead (hereinafter referred to variously as "the homestead" or "the property"). The respondents claim that as the deceased couple's children and more particularly the surviving children of Thwesane they are entitled to inherit the property from their parents, more particularly their mother, through intestate succession.

6. The appellant on the other hand claims that he inherited the property from his father who had received it from one Banki Ramantele in exchange for other tribal plots which Banki obtained from the appellant's father.

7. A number of factual disputes arose, primarily whether Banki, who was the respondents' full brother and died around 1995

ever had any entitlement to the property, it being the respondents' contention that part of the estate of their late mother including the property was never distributed nor inherited by Banki.

8. The inquiry into that factual dispute raised the question of a customary rule on inheritance of the deceased parents' home (the property) and whether the respondents would be entitled to inherit the property under the said customary rule of inheritance.

9. It was this customary rule of inheritance of the deceased parents' home that subsequently became the focus of the dispute and was dealt by the High Court as a constitutional issue. The determination of the constitutional issue led to the present appeal.

10. <u>The litigation history</u>

The formal litigation between the parties commenced before the Customary Court of first instance presided over by

Headman Ketsitlile in Kanye. He was assisted by three other Court members, to wit, M. Makaba, Gabanakgosi and Pelekekae Pelekekae. The litigants being members of the tribe, and the property in dispute being tribal, the hearing was in a customary forum attended by the parties and the elders, relatives and the ward headman.

11. The dispute and its origins was summed up at the Customary Court of first instance by the Headman of the ward from which the respondents and their late parents originated.

12. The appellant, who was presented before the Customary Court as the complainant, contended that the property was inherited from the respondents' parents by Banki, in his capacity as the youngest son of the deceased parents. He claimed that Banki subsequently exchanged the property with the appellant's father, Segomotso. It was the appellant's case that he had a right to inherit the property from his father, Segomotso who was also late, having passed on in 2006.

13. The proceedings before the Customary Court commenced on the 15th of August 2007, about 12 years after the death of Banki and about a year after the death of Segomotso.

14. In presenting the dispute to the Customary Court of first instance, the Mafhikana Headman stated:

> "Your Honour, this case was once brought before me in 1999. At the time, some of their uncles were still alive and realizing that the issue was about the rightful beneficiary to this estate, I sent them back to decide between themselves at home. Thereafter they kept on coming to see me one by one, however I reminded them that they should discuss the matter at home and come back to me with their decision as a family not individually. Eventually they came back to me as a family however it was evident that they had not reached any agreement. This prompted me to forward this case to your court and as such I have summoned all the concerned parties to appear before you today. That is all your Honour."

The Headman in answer to a question from the Presiding Officer stated:

> "The elders including the uncles who are Molefi's father's elder and younger brothers are saying Molefi is the rightful heir. Other elders are saying they do not know if there has ever been the division of the properties and as such they cannot say whether the place was given to the man or not.

> Even Edith Mmusi and her other siblings are claiming ignorance and contend that because the estate belong (sic) to their parents they are entitled to a share."

15. Quite clearly, when the matter was brought before the Customary Court of first instance the family elders including the uncles and the surviving children of the deceased parents could not reach any agreement on who the rightful heir to the property was, or as to whether that part of the estate had been distributed. This was also later demonstrated by the evidence before that court.

16. After the ward Headman had reported the dispute, one of the witnesses who gave evidence before the Customary Court on the existence of this dispute was Elias Ramantele, a paternal uncle of the respondents. But all he did was to give an account of how the first respondent had at one time come to him about her needing to stay on the disputed property and of subsequent events up to the time when it became clear that the dispute between the parties was really one of inheritance. His evidence was not helpful on whether indeed after the

passing on of the respondents' mother, the uncles and other elders met and decided as to who was to inherit the property.

17. After his testimony, one of the maternal uncles, Motlhalane Kgasa who was a brother to Thwesane gave evidence in which he expressed surprise that it was claimed that the yard had been given to someone as according to his knowledge Thwesane's plot had not been given to anyone. Mr. Kgasa's evidence was that if there was a distribution he would have been the one to do it. He further pointed out that if he was to distribute he would give it to the respondents, they being the ones who had developed it. I will deal with the testimony of the respondents later on the aspect concerning the development of the property.

18. Under cross-examination, the witness was steadfast that he had not distributed the property. His evidence that the property had not been distributed found support in the evidence of the first respondent, the second respondent, and the third respondent, Jane Lekoko.

19. Another witness who gave evidence was one Rankabang Itumeleng, an uncle to the late Thwesane. As the appellant was later to hold on to the testimony of this witness as being supportive of the contention that there was a distribution of the estate in which Banki was given the homestead, I need to set out his short evidence in full as given:

> "I came from Moshupa answering a call about my niece Thwesane. After finishing what I had come to do, I called my Nephews and told them that I had finished my part. I told Banki that he should take responsibility of the family home. Banki responded by saying I do hear you uncle however I have built myself a home up there I have a wife with whom I am staying. I have given this home to my brother Segomotso. At the time I was not dividing the estate, I was just making orders."
>
> (Underlining for emphasis).

20. Although the sentence, "I have given this home to my brother Segomotso" is not in quotation marks, it is evident that, that statement was being attributed to the late Banki. It is however apparent even on the account of this witness that he was communicating with his nephews and he does not say that the

respondents were present when this transpired nor that there were any other uncles present. But most importantly, the witness on his own account was not dividing the estate but merely issuing orders on the responsibility for the home.

21. Although the witness subsequently said that according to his knowledge the homestead belonged to the appellant's father no foundation therefor was laid.

22. The respondents' elder sibling, Mogaetsho Dintwe, gave testimony which did not shed light on the division of the property and so did one Thuso Ramantele.

23. It emerged on the evidence of a number of witnesses during the hearing before the Customary Court that under normal circumstances the Ngwaketse customary law of inheritance is that the last born boy inherits the parents' home. No evidence was however given as to when the circumstances would not be normal and what would then happen. One of the respondents'

maternal aunts however posed a rhetorical question which took this form:

> "I have been listening to the deliberations on inheritance. When one dies who is entitled to inherit? My brother's children are asking to be given this home though they have their own. My question is: "are they not entitled to inherit?"

24. A senior elder of the Customary Court (Ralekgotla) responded that –

> "As for us we took a decision to give the home to our younger brother. Normally the home is given to a boy child."

25. This statement along with the preceding rhetorical question tends to show further that such custom is not an inflexible one. This was further pointed out by another member of the community who was at the Kgotla who stated that a woman's inheritance is normally at the home into which the woman is married but that the unmarried girl child remains at the parents' home with her brother (presumably until she gets married, if she does get married). How a widowed woman like

the first respondent, who had to return from her matrimonial home because of conflicts with her in laws, can reasonably be expected to inherit from those same in-laws, was never explained. It was also unclear as to what happens when she does not get married and/or the youngest brother moves out of the deceased parents' home to build his own home with his own family. It was not said what would happen if the distribution only took place after all the male born children were already dead. One lone voice from a member of the community at the Kgotla came up clearly to say that a girl child never inherits a family home. No reason was given for such an inflexible rule, let alone who would inherit when there was no boy child. Clearly there was also a dispute as to when that rule would apply. That left the question of what would happen when no boy child was born or where there was no surviving boy child unanswered.

26. I now turn to the evidence of the two protagonists (the appellant and the first respondent) led at the Customary Court.

27. The appellant's evidence was that some years previously, his uncle Banki exchanged the property with Segomotso by taking Segomotso's plot to pass on to someone else while giving Segomotso the property in question so that the latter could remain in the ward. He further stated that the aunt (presumably the first respondent) developed the property fully aware of the plan (exchange) as they (the aunts) had agreed to it. He pointed out that there was never a sign that the aunts (the respondents) were complaining. According to him the problem arose after his father's death when the paternal uncles wanted to carry out the deceased (Segomotso)'s wish to be buried on the property, but the first respondent who resided at the property objected. The funeral was subsequently carried out from the appellant's own yard.

28. The respondents' evidence was first set out in detail by Edith Mmusi. She gave a detailed account of how after their father's death in 1952 the house they were staying in fell down and how she and her other sisters moulded bricks to build another

one as their mother was without shelter. Their father's livestock had been distributed. The witness went with an aunt to harvest thatching grass and the cow which had been given to the mother as her inheritance was sold to pay the builder. None of the brothers assisted in the project. The witness then contributed some money to build another house. She went on to fence the homestead. She even hired people to clear the yard. In doing these developments she informed her mother that she was improving the mother's life and that whoever inherited the property would have to refund the expenses. In her testimony Mrs Mmusi went further to narrate how she, at times with the assistance of her sisters and an aunt further developed the property first by building a two roomed dwelling, then by adding the four roomed house, in which she had lived ever since. Banki, who was the last born son but was older than a number of the sisters, had even refused to buy his mother fencing for the yard.

29. Mrs Mmusi also testified that her brothers never did anything for their mother, although they did not abuse their sisters (the

respondents and one Flora Keikitse who did not participate in the dispute). She said the property belonged to their mother (Thwesane) and they were entitled to inherit it. Under long and sometimes hostile cross-examination, including from the presiding officer, she was not in any way questioned on the veracity of her account nor did anyone put it to her that indeed Banki inherited the property.

30. The presiding officer, going against the grain of the testimony placed before him, found that there was overwhelming evidence that the estate had been distributed and that the home was given to Segomotso; thus the appellant was entitled to inherit the property from his father. In delivering his decision he however made the following important observations:

> "I will take in consideration our Ngwaketse culture where a male child never leave [sic] his parents [sic] home except when he marries or due to bad behaviour which the parents do not condone. However in the case of bad behaviour he could be reprimanded. As for the girl child she only leaves her parents [sic] home when she gets married and that is where her inheritance will be."

31. The respondents, being dissatisfied with the decision of the Customary Court, appealed to the Higher Customary Court and the appeal was presided over by Kgosi Lotlaamoreng II. The Kgosi, presumably after perusal of the record, clearly understood the issue which had to be resolved and the evidence. He made the following findings:

> "Mr. Ketsitlile's court which presided over this case agreed with the complainant's claim stating Thwesane's remaining children were all married and had their own homes. This court does not agree with this decision because even if Thwesane's remaining children are married and have their own homes, the fact remains, this is their parents' property. Also according to them their remaining elders have never met to distribute their late parents' property.
>
> *This court orders that this home belongs to all children born to Silabo and Thwesane and further that they all have a right to use it as they wish whenever they have a common event.* Further may the relevant elders who are present go and convene a meeting for all the concerned parties where one child will be appointed to look after this home on behalf of the others."
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> (Italics for emphasis)

32. The appellant was dissatisfied with the decision of Lotlaamoreng II and he filed an appeal to the Customary Court of Appeal. In response to that notice of appeal, the respondents also filed a detailed document in which they not only opposed the appeal on its merits but raised a procedural point that the appellant had filed his appeal 63 days after the decision which he challenged and that he had no right of hearing. On the merits the respondents argued that the implementation of a customary practice which disentitled them to inherit the homestead of their parents would be unconstitutional.

33. The Customary Court of Appeal did not address the issue of the late filing of the appeal. It proceeded with the hearing and on 5th September 2007 upheld the first finding that according to Ngwaketse Customary Law and culture it is the last born male who inherits the parents' homestead and therefore that the appellant was entitled to the disputed property. It ordered

the first respondent to vacate the property with all her belongings within three months.

34. The respondents were dissatisfied with this decision of the Customary Court of Appeal and though they had the opportunity to file an appeal to the High Court against that decision as provided under Section 42(3) of the Customary Courts Act (Cap 04:05) of the Laws of Botswana, they failed to do so, but instead applied later to the High Court for a stay of execution pending an application for review to be brought on constitutional grounds. Their counsel confirmed that although this provision was not referred to, the constitutional relief was sought under Section 18 of the Constitution.

35. The review/constitutional application was filed out of time on the 1st February 2011 without any express grant of leave. As set out under Order 61(8) of the High Court rules, no application for review could be brought out of time except with leave of the judge on good cause shown. The application was supported by the affidavit of the first respondent to which the

proceedings before the Customary Courts were annexed. The application was amended several times with the following substantive remedies finally being sought:

1. The judgment of the Customary Court of Appeal be reviewed and set aside.

2. The said judgment be declared to violate the Respondents' Constitutional right to equal protection of the law in so far as it was held that only the Appellant is entitled to inherit the Respondents' parents' home in Kanye to the exclusion of the Respondents on the basis of Customary law.

3. That the said decision of the Customary Court of Appeal violates the Respondents' right not to be discriminated against on the basis of sex in so far as it was held that only the Appellant is entitled to inherit the Respondents' home in Kanye.

4. Alternatively, that the Customary law principle of primogeniture which is that only a male who was related to the deceased through a male line qualified as intestate heir is

unconstitutional in that it violates the Respondents' right to equal protection of the law; and further,

5. Alternatively, a Customary Law principle of primogeniture which is that only a male who was related to the deceased through a male line qualified as intestate heir is unconstitutional in that it violates the Respondents' right not to be discriminated against on the basis of sex.

36. In the application the presiding officer of the Customary Court of Appeal was cited as the second respondent, being represented by the Attorney General. He chose not to join issue, although the Attorney General filed heads of argument *amico curiae* and motivated those heads in oral submissions. The appellant filed a notice of opposition, but did not tender any affidavit nor raise any points of law in opposition to the application, despite the expiry of time limits set by Order 61(5)(b) of the High Court rules (for the review) and by Order 70(3)(1) (for the constitutional relief). Close to a month after

the filing of the appellant's notice of opposition, the parties settled a stated case for determination by the High Court in terms of Order 35 of the High Court rules. The stated case posed questions to be answered by the court but no settled facts upon which the court could determine those questions were set out. The court was merely asked to have regard to the papers filed of record in answering the questions. To demonstrate the point, I will reproduce the full substance of the stated case, which reads:

> **"SPECIAL CASE FOR THE COURT: In terms of Order 35 of the High Court Rules:**
>
> 1. **BE PLEASED TO TAKE NOTICE** that the Applicants and the 1st Respondent are agreed that the following questions of law arise in the papers filed by the Applicants herein.
>
> 1.1 whether or not 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 is unconstitutional in that it violates section 3(a) of the Constitution of Botswana, Chapter 1? (sic); alternatively,
>
> 1.2 whether or not 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.

1.3 Whether or not the said rule of primogeniture is unconstitutional in that it violates section 15 of the Constitution of Botswana, Chapter 1? (sic); alternatively,

1.4 Whether or not the Customary Law principle by which the right of inheritance belongs to the youngest son is unconstitutional in that it violates section 15 of the Constitution of Botswana.

2. **BE PLEASED TO TAKE FURTHER NOTICE** that the parties agree that this Honourable Court can have regard to the papers filed of record in order to answer the above questions only.

3. **BE PLEASED TO TAKE FURTHER NOTICE** that the parties agree that, subject to the Honourable Court's directions, the future conduct of this matter shall depend on the answers the Honourable Court gives to the above questions."

37. It is unclear how, where no evidence was led before the Customary Court of Appeal, the High Court could rely on the papers filed on record in order to determine the nature, scope and justification, if any, for the application of the custom

being impugned. This is particularly so since no answering affidavit was filed; nor did the evidence led in the Customary Court show the existence of any such rule, let alone an invariable one. The three tiers of the customary court system could also not agree on its existence let alone its application to this case. It is important to note that a court should not be too quick to consider the constitutionality of a Customary Law unless it is possessed of sufficient evidence regarding the existence and content of such custom, its application and the rationale thereof. Should a court do so, it is likely to find itself making decisions which have got no contextual and factual foundation, yet with far-reaching consequences. In the stated case no mention of the family homestead is made, although this was the subject of the inheritance dispute.

38. Secondly, as the parties and the judge himself were later to recognize, no customary rule of primogeniture ever featured in this case and the two questions relating to that rule were purely theoretical with no factual foundation. It is

questionable whether there is in any event such an Ngwaketse custom, in the absence of evidence to that effect.

39. Thirdly, paragraph 3 of the stated case does not indicate what further directions the parties contemplated after the constitutional questions had been answered; whether such answers would merely constitute a preliminary ruling, pending the outcome on the further directions; what the nature and form of such further directions should be; and what effect the ruling might have on the determination of the real dispute between the parties. To demonstrate the latter point, if, as it in fact turned out, the decision of the High Court was final and appealable, what was the remedy of the respondents? How would they move on thereafter? Should they go back to the Customary Court of Appeal to rehear the appeal and if so on what directions? If not, would they go back to have the dispute on the distribution of the homestead determined by the Customary Court or by the elders? If so, what would happen to the decision of Kgosi Lotlaamoreng II? Assuming the matter went back to the customary courts, what question was

there to be answered having regard to the fact that Kgosi Lotlaamoreng II's decision stood unchallenged by the respondents?

40. These are all imponderables which unfortunately merely served to unnecessarily lengthen the litigation and increase the cost to the litigants. The constitutional question did not advance the determination of the case in any way and not much thought seems to have been given to this aspect either by the judge or counsel representing the parties. The wheels of justice must not be mired and slowed by philosophical and theoretical issues which do not advance the dispute resolution process, nor by uncalled for piece-meal determination of litigation. See, **R. v. JANTJIES 1958 (2) S.A. 273 (A.D.)**

41. It is a well-recognized general rule of decision-making that where it is possible to decide a case before the court without having to decide a constitutional question, the court must follow that approach. See, **S v MHLUNGU AND OTHERS 1995 (3) SA 867 (CC) @ 895E.** On this submission made before us,

appellant's counsel was right. Had he taken that stance at the High Court, instead of opting for the inappropriate stated case, the course of the litigation may have been different.

42. In the event, the determination of the Constitutional question had no relevance to the real dispute between the parties, having regard to the evidence which was called at the court of first instance, and without the Appellant having filed a substantive answering affidavit to shed more light by providing the factual context in respect of which he contended for the Constitutional compliance of a Customary Law which entitled only the last born boy child to inherit the parents' homestead.

43. The appellant herein, having been the claimant who sought to evict the first respondent from the respondents' parents' home, had to satisfy a number of requirements to succeed in his claim. First and foremost, he had to show as a fact that indeed Banki did inherit the property from his deceased parents. Secondly he had to show that such inheritance to the extent that it unfairly excluded the respondents, was in accordance

with an Ngwaketse custom which invariably only entitled a last born son to inherit the parents homestead to the exclusion of all the other children. Thirdly, he had to show that if there was such a custom, the last born son was entitled to deal with the homestead for his own benefit, by exchange or sale, to the exclusion of his siblings. Fourthly, he had to show that to the extent that the said custom was applicable, it constituted a law in terms of the definition of Customary law as contained under Section 2 of the Customary Law Act (Cap. 16:01 of the Laws of Botswana) and if so, or if there was a doubt as to such compliance, whether to the extent that such custom if a law, was discriminatory or did not afford the respondents equal protection, it was constitutional and enforceable. He then had to show that there was, in fact, after such an inheritance, an agreement between Banki and Segomotso in terms of which Banki gave ownership of the property to Segomotso.

44. That was the case the respondents were to meet. The first respondent had, on the evidence, been in undisturbed

possession of the property for over twenty years. No evidence was led at the trial in the Customary Court, of any distribution of the property to Banki. All the witnesses gave evidence to the contrary, including those upon whom the presiding officer purported to rely for his finding. There is no evidence of Banki ever having asserted ownership of the property in his lifetime, let alone Segomotso having done so. On this level alone the appellant's case would, on the facts, have fallen.

45. Had he succeeded at this level, then he would have had to establish the existence of the customary rule he contended for. On this too the evidence was contradictory as to the existence of an inflexible rule where only the last born son inherited the homestead. Even from the perspective of the proponents for such a rule, it applied on the premise that the last born son never leaves the parents' home except when he marries or due to bad behaviour which the parents do not condone. It was not in dispute that Banki had long left his parents' home, got married and established a home of his own with his family.

46. Before the High Court there was also the undisputed evidence in the respondents' affidavits that Banki was banished by his uncles in 1981 for bad behaviour and never returned to his parents' home in their lifetime. No evidence of condonation of his behaviour was ever brought forward. On this evidence too, the High Court might have found Banki would not have been entitled as of right, to inherit the property to the exclusion of his other siblings. At the very least this was an issue that had to be canvassed.

47. Had this hurdle been surmounted, the next hurdle would have been whether the customary rule satisfied the legal test to constitute an enforceable customary law. The Customary Law Act defines customary law to mean:

> "in relation to any 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.*"
>
> (Italics for emphasis)

48. For purposes of this case, the above can be read with Section 10 (2) of the same Act which provides that:

> "If the system of customary law cannot be ascertained in accordance with subsection (1) 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.*"
>
> (Italics for emphasis)

49. One can easily discern from the above two provisions the values that are required of a customary law rule to receive recognition of the status of a "law". A customary rule to receive the status of a law and thus be enforceable by the courts must not be inconsistent with the values of or principles of natural justice. It must not be unconscionable either of itself or in its effect. Nor should it be inhuman. Customary law must be applied in accordance with the set out principles of morality, humanity or natural justice with the object of achieving justice and equity between the disputants.

50. A customary rule that denies those children of a deceased parent who played a major role in developing a particular part of the estate for the benefit of the deceased, a right on intestacy to any share of that asset, in favour of a child who has refused to play any part in the building up and maintenance of that part of the estate, without any compensatory award, goes against any notion of fairness, equity and good conscience. It does not qualify to be given the status of a law nor should it be applied or enforced by the courts. On this ground too, the appellant's case would have failed.

51. Had the High Court judge been satisfied that the customary rule constituted an enforceable law, he would also have had to satisfy himself of the content of that customary law and the factual matrix providing the context in which it was being challenged and for which it was being supported. Before briefly dealing with the proper constitutional analytical process merely for guidance, I set out a few issue errors which beset the constitutional inquiry carried out by Dingake J.

52. In the special case, the parties set out the constitutional question to be decided by the court to be –

> "whether or not the Customary Law principle *by which the right of inheritance belongs to the youngest son* is unconstitutional".
> (Italics for emphasis)

53. That was not the customary law contended for by the appellant and found to exist by the Customary Court of Appeal. The question related to the youngest son's sole right to inherit only a part of the estate to wit, the deceased parents' homestead.

54. The learned judge compounded the error by setting out a different constitutional question to be answered. At paragraph 5 of his judgment he formulated the question in these words –

> "essentially what the [respondents] seek is an order that the customary *law of inheritance which permits only males to succeed in intestate succession* violates Section 3 of the Constitution of Botswana, more specifically that the practice/customary law rule *violates women's rights to equal protection* under the above mentioned section."
> (Italics for emphasis)

55. There was no such Ngwaketse customary law on the record, let alone arising from the dispute before the Court. Neither am I aware of such an Ngwaketse customary law. This misstatement of the foundational issue for enquiry set the judge on a theoretical course with no factual foundation. This unfortunately was not all.

56. The customary law the judge finally found to be unconstitutional was not the one he set out at paragraph 5 of his judgment at all, but a different one. It lay somewhere between the one outlined by the parties and the one set out in paragraph 5 of his judgment. He held that-

> "The Ngwaketse Customary law rule that provides that only the last born son is qualified as intestate heir to the exclusion of his female siblings is ultra vires Section 3 of the Constitution of Botswana"

(Underlining for emphasis)

57. No explanation or analysis is given by the Judge in his judgment, of how he moved from the original issue stated at

paragraph 5 of his judgment to his finding. The actual issue troubling the parties was whether there was an immutable rule that only the last born son was entitled to inherit the family home on the intestacy of his parents at the expense of his siblings of either gender.

The proper constitutional analysis

58. I now turn to the constitutional analysis. When the question arises as to whether a law is constitutional or not, after the content of the law has been ascertained, the court must first consider whether no proper construction which is consistent with the Constitution can be given to that law, for each law is presumed to be consistent with the supreme law of the land unless otherwise shown. It is only when no such construction can be given that the law can be declared to be in violation of the Constitution. The core question now for consideration is the interpretation of Section 3 *sans* Section 15 of the Constitution. In his analysis of the issue the learned Judge perceived to be before him, the learned judge considered Section 3 of the Constitution to the exclusion of Section 15.

The respondents had abandoned their reliance on Section 15 but the appellant and the Attorney General strongly argued that the effect of the customary law set out in the stated case amounted to a discrimination which is permissible in the limitation of the right against discrimination *vide*, Section 15(4) of the Constitution and considered Section 15 to have no relevance to the inquiry. As shall be shown, in this the learned Judge erred and all the parties, including the respondents in whose favour he ruled, dissociated themselves from his approach. They all accept the centrality of Section 15 to any enquiry of this nature but only differ on whether the limitations to the right against discrimination under Section 15 (4) are subject to Section 3.

59. Section 3 of the Constitution which the Judge found to have been violated by the rule of customary law reads:

> "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;

(b) .....

(c) .....; and

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."

(Underlining for emphasis)

60. As it was the respondents' case that the Customary Law impugned violates their right to equality before the law (they having abandoned any challenge on the ground of discrimination on the basis of sex), it was important that they put before the Court facts upon which *prima facie* such violation as alleged is evident. It was thereafter the appellant's obligation as a respondent in the court below to show the court that such Customary Law either did not violate the said Constitutional provisions or that if it did so, it either was in

the public interest to so discriminate or did not prejudice the rights and freedoms of others.

61. The appellant's argument both at the High Court and in this Court (on the premise of the application of the custom as found by the Customary Court of Appeal) was that the customary law is not unconstitutional in that it amounts to a discrimination which is allowed under Section 15(4)(c) and (d) of the Constitution which contains permissible derogations from the absolute prohibition against discrimination contained in Section 15(1) of the Constitution which reads that:

> "No law shall make any provision that is discriminatory either of itself or in its effect except under the provisions of subsection (4), (5) and (7)."

62. Section 15(4)(c) and (d) reads:

> "Subsection (1) of this section shall not apply to any law so far as that law makes provision –
>
> (a) .....
> (b) .....

(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) ....."

63. In his extensive judgment, the learned Judge only cursorily dealt with the provisions of Section 15 when discussing the seminal case of **ATTORNEY GENERAL v. DOW 1992 BLR 49,** but not in respect of this case, notwithstanding that that constitutional derogation was at the very centre of the appellant's case. At paragraph 5 of his judgment, the learned Judge noted:

> "Although the notice referred to above raised about three (3) questions for determination, essentially what the applicants seek is 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 Botswana, more specifically that the practice/customary law rule violates

women's rights to equal protection under the above mentioned section."

64. From paragraphs 28 to 42 of his judgment the learned Judge discussed the appellant's argument and pointed out as follows at paragraphs 35 and 36:

> "35. With respect to the main question whether the content and the application of the customary law of inheritance violates provisions of Section 3(a) of the Botswana Constitution, Mr. Tafila argued that although the applicants have abandoned the argument that Ngwaketse Customary law of inheritance is discriminatory, having regard to Section 15 of the Constitution, it is important to highlight the connection between Section 3 and 15 of the Constitution.
>
> 36. He argued that any differentiation between individuals on the grounds stated in Section 15 of the Constitution amounts to discrimination and should be dealt with as such under the same section."

65. It seems to me that the learned Judge would not, even if the constitutional issue was properly before him, have been able to properly analyse the question without a full discussion of the

provisions of Section 15 and showing how Section 15 related to Section 3. Section 15 is not a stand-alone provision. See, **ATTORNEY-GENERAL v. DOW 1992 BLR 119 (CA) @ 133-4.** A proper analysis of the constitutional provisions would have proceeded from the basis that Section 3 is the substantive umbrella section which entrenches the inherence of the set out fundamental rights in each individual or person regardless of irrelevant factors like race, place of origin, sex etc. but of course, subject to the rights and freedoms of others or public interest.

66. Section 3 also explained that the further provisions of Chapter 2 of the Constitution were intended to have effect for the purpose of affording protection of those rights and freedoms (that is, the Section 3 rights and freedoms) subject to such limitations and such protection as contained in those provisions. Those limitations were designed to ensure that the enjoyment of the said rights and freedoms by any individual did not prejudice the rights and freedoms of others or the public interest. It is therefore self-evident that the subsequent

provisions of Chapter 2 of the Constitution were subordinate to the umbrella Section 3 provision and that the subordinate provisions were intended to set out those rights in more detail together with any limitations 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.*"
> (Italics for emphasis)

67. In affording the protection to the rights and freedoms set out in Section 3 or in providing for the derogation from such rights, the subsequent provisions in Chapter 2 had to be tested against the two parameters set out in the umbrella section.

68. With regard to the protection of the law a number of provisions of Chapter 2 of the Constitution have relevance. Section 10 of the Constitution is intended to secure due process of the law for every person either in criminal or civil proceedings. Section 15 is intended to provide for equal protection of the law by prohibiting discrimination save in the limited areas

stated therein. Section 16 provides for further derogations while Section 17 provides for Presidential powers during states of emergency. Section 18 provides for the enforcement of the protection and enforcement of the fundamental rights contained in Chapter 2 of the Constitution.

69. It is well established that in interpreting the provisions of the Constitution more particularly with regard to the fundamental rights the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regard to its liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed. See, **PETRUS AND ANOTHER v. THE STATE 1984 BLR 14 (CA) @ 37**; Section 24 and 26 of the Interpretation Act. Section 24(1) reads:

> "(1) For the purpose of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any textbook or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority

in reference to the enactment or to the Bill for the enactment, to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.

.....

26. Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit."

(Underlining for emphasis)

70. It is also well established that constitutional derogations from fundamental rights, like penal statutes are ordinarily to be given a strict and narrow rather than broad and generous construction. See, **PETRUS AND ANOTHER v. THE STATE 1984 BLR 14 (CA) @ 34-5**

71. It was also held in the **Dow** case that a derogation as contained in Section 15(4) does not permit unchecked discrimination which is not consistent with the core values of

the constitution. Where there is a derogation the Court must closely scrutinize it, give it a strict and narrow interpretation and test whether such discrimination is justifiable having regard to the exceptions contained in Section 3 of the Constitution. It is only when the Court is satisfied that a discrimination passes that test that the Court can find that the derogation is constitutionally permissible.

72. I therefore agree with the respondents that the derogations contained in Section 15 (4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest.

73. Before concluding his judgment, the learned judge made the following bold statement-

> "It seems to me that the time has now arisen for the justices of this court to assume the role of midwives and assist in the birth of a new world struggling to be born, a world of equality between men and women as envisioned by the framers of the Constitution"

74. That, in my view, is a loaded statement which may give a wrong signal to those who are not cognizant of the primary role of a judge, namely to resolve disputes before him/her and interpret the law to be applied in the dispute before him/her. It is not for the judge to traverse issues that do not directly arise from the case being dealt with however important they may be. The admonition of Francis Bacon a 17th century English philosopher, in his essay on the Judicature, is also apt –

> "Judges ought to be ... more advised, than confident."

That admonition holds true now as it did centuries ago. The judiciary of this country has a good track record of being alive to enforcement of the Constitutional values where the need arises, as demonstrated in a large number of cases, including at least two of the local cases the learned judge cited in his judgment namely, the **Dow** case and **STUDENTS' REPRESENTATIVE COUNCIL OF MOLEPOLOLE COLLEGE OF EDUCATION v. THE ATTORNEY-GENERAL 1995 BLR 178 (CA)**. No rebirth was called for in this case.

75. The Customary Court of Appeal in its judgment did not consider the merits of the decision made by Kgosi Lotlaamoreng II. On the contrary, it misunderstood that judgment. It is apparent at page 2 of the Customary Court of Appeal's judgment that it focused on the last part of Kgosi Lotlaamoreng II's judgment which dealt with the matter being referred back to the elders to convene a meeting with all the concerned parties and to identify the child who will take care of this home on behalf of others, as meaning that Kgosi Lotlaamoreng II did not resolve the inheritance issue. This lost sight of the first component of Lotlaamoreng II's judgment which reads:

> "This court orders that this home belongs to all children born to Silabo and Thwesane and further that they all have a right to use it as they wish whenever they have a common event."

76. It is not evident how the Customary Court of Appeal lost sight of this crisp determination contained in the two-page judgment of Kgosi Lotlaamoreng II. It failed to resolve, as Kgosi Lotlaamoreng II had done, the real issue of fact which

was paramount, this being the question of whether on the evidence, Banki did indeed inherit the property from his parents. That factual issue was independent of the customary law rule.

The organic nature of customary law

77. It is axiomatic to state that customary law is not static. It develops and modernizes with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times. See, INHERITANCE AND FAMILY LAW SUCCESSION published in **LAW IN RADICALLY DIFFERENT CULTURES**: *American Casebook Series* by John H. Barton et al pp. 255-6. For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion. No purpose is served by trying to categorise customary law into a

written or unwritten law as the appellant attempted to do, more especially in our jurisdiction where customary law has not been codified or reduced into statutory form. Cf. **BHE v MAGISTRATE, KHAYELITSHA, AND OTHERS 2005 (1) SA 580 (CC)**. As for texts and articles they merely record the position of a given custom as it prevailed at a particular point in the life or history of a tribal community but not subsequently. Such material may be useful merely as reference points to ascertain what stage of development the custom had reached at that point. To determine the content of a customary law, the prevailing societal ambience of the concerned community must loom large in the enquiry. Contemporary records, recent case studies and oral evidence may provide a better source for ascertaining the current state of the customary law. See, **PRINCIPLES OF TSWANA CUSTOMARY LAW: A SOCIOLOGY PERSPECTIVE**: J. Comaroff and S. Roberts's *Rules and Process: The Cultural Logic of Dispute Settlement in An African Context.* University of Chicago Press 1981. The above researchers demonstrate, through customary case studies, a number of principles of

customary law, two of which are necessary to restate here. Customary law is expected to conform to morality as understood by the ordinary folk, that is, the prevailing morality. Circumstances, the writers point out, significantly alter cases. The second principle is that although norms based on customary law are often contradictory, traditional norms which are contradictory in one set of circumstances do not necessarily lose their force in another set of circumstances.

78. Is there any Ngwaketse customary rule of intestate inheritance existent at the material time of this dispute that gave the last born son the sole right to inherit the deceased parents' home to the exclusion of all the other siblings (whether male or female)?

79. The respondents' counsel has drawn the Court's attention to an account of a socio-economic study of the Ngwaketse carried out in 1980 by Ørnulf Gulbrandsen from the University of Bergen, Norway, in association with the Rural Sociology Unit of the Ministry of Agriculture, Botswana. The article is titled,

"**AGRO-PASTORAL PRODUCTION AND COMMUNAL LAND USE**. At section 3.2.1 relating to land, they state-

> "Although soil fertility is reduced considerably after a few years cultivation and although everyone – including women – who wants it can be allocated vacant land, land usually represents no significant scarcity value, and is not, therefore, an important inheritance issue. It is the youngest son or an unmarried daughter who receives the parents' plot(s)."

80. The article also observes that customarily the last born received the parents' plot but that as more and more women remain unmarried, it has become increasingly common that this land is transferred to them. This article, prepared in association with a Government department, was written well before the passing away of the respondents' mother and 30 years before the Customary Court of Appeal made its decision in this case. Even on the account of the customary rules prevailing three decades earlier, the Customary Court of Appeal could not have been stating a universal customary law. But during that thirty years a lot of changes must have happened if the changes on the national scene are a pointer:- the Constitutional values of equality before the law, and the

increased levelling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere, demonstrate that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems.

81. I now turn to a number of errors both factual, issue-related and procedural which occurred during the course of the dispute which it is necessary to highlight.

82. The first error was committed by the Customary Court when it found that two witnesses who gave evidence before it, namely, Kegapetse Kgasa and Rankabang Itumeleng, had stated before the court that the home was given to Segomotso Silabo and concluded that as a result of such evidence the appellant is entitled to the property by virtue of Ngwaketse culture which says that the last born son is the one entitled to inherit the parents' home. Firstly, the two witnesses referred to above were clear in their evidence that the property was never

distributed. Secondly, the witnesses never stated that Banki had lawfully inherited such property. This was a case in which the presiding officer, although he had earlier stated the basis of that custom as he saw it, failed to establish any factual foundation upon which to apply it.

83. Had the presiding officer taken time to consider the evidence which was led before him and to consider the absence of evidence on the primary issue regarding the inheritance of Banki through a distribution process, after his mother's death, there is no way in which he would have rationally reached the decision he reached.

84. The Customary Court of Appeal also committed a number of errors both on procedure, and issue-related. The respondents in their answer to the appellant's appeal to the Customary Court of Appeal raised the point that the appellant was not properly before the Customary Court of Appeal in that he had filed his notice of appeal 63 days after the date of Lotlaamoreng II's judgment when he should have filed such notice within 30 days (Section 42(2) of the Customary Court of

Appeal Act). Notwithstanding the precept of the Statute and that the Customary Court of Appeal was bound to consider the point, it never addressed it in its decision. This was a procedural misdirection in that the Customary Court of Appeal could not automatically disregard the requirements of the enabling statute let alone without the appellant having explained his delay by way of a petition as contemplated under Rule 7 of the Customary Court of Appeal Rules (Statutory Instrument No. 3 of 1986).

85. The Customary Court of Appeal delivered a judgment which was presented before the High court and subsequently to this Court in two different versions. The first version marked "E1" is contained in pages 110 to 112 of the record and it is in the form of a translation by a sworn court interpreter, and that copy was availed to the respondents by the Customary Court of Appeal on the 16th December 2010. The other version of the same judgment, bearing the signature of the presiding officer and other members of the Customary Court of Appeal panel, was forwarded as part of the Customary Court proceedings

transcript and it bears the date of 22nd September 2010. It was translated on the 26th October 2011.

86. At page 111 of "E1" the Customary Court of Appeal made the following remark:

> "This is how the judgment of the Paramount Chief [Lotlaamoreng II] was. His judgment did [not] help in any way because people had come to him because they had long failed to reach an agreement with the help of the Headman and that of the Village Chief. I was surprised by the judgment made by the Paramount Chief. May be it is because they are cousins he forgot that this was a legal case and not just a meeting. This is just my comment." (underlining for emphasis)

87. This whole paragraph is absent from the signed copy. A subsequent paragraph to the one quoted earlier and which contained a number of Setswana proverbs was also not contained in the signed copy except for the last two sentences which were also altered. I will in due course revert to this anomaly.

88. It must be observed that the underlined statement casts aspersions not only on the judicial integrity of Kgosi

Lotlaamoreng II but also on his impartiality in the way he presided over the case. Nothing was pointed out on the record to support this serious indictment on both the integrity and impartiality of Kgosi Lotlaamoreng II. Nor have we found anything in the record to lend credence to the Customary Court of Appeal's remark. On the other hand, it appears that Kgosi Lotlaamoreng II did fully appreciate the issues to be determined and did make a decision which was sound. It must only be in the rarest cases and for demonstrable reasons that a higher court should make such an indictment of the integrity and impartiality of the presiding officer of a lower court.

89. The statement that Kgosi Lotlaamoreng II's judgment did not help in any way, read together with another statement in the signed copy of the judgment merely quoting the second part of Kgosi Lotlaamoreng II's order but not the first part points to another error by the Customary Court of Appeal. The Customary Court of Appeal overlooked, as I have said, the first part of Kgosi Lotlaamoreng II's court order that the property in

dispute belonged to all the children of Silabo and Thwesane. The last part of Kgosi Lotlaamoreng II's order had nothing to do with the parties' rights of inheritance over the property but it was merely concerned with the appointment of a caretaker to look after the property "on behalf of others."

90. The next error that was committed by the Customary Court of Appeal was in including the following paragraph in "E1 but not in the signed copy:

> "Molefi Silabo Ramantele was not satisfied with the decision by the Kgosi hence the appeal. We heard Molefi Silabo Ramantele on the 22/09/10 at the main Kgotla at Kanye. "Kgopa di ne di kgopane, di intaana ka makwapa" or I might say "setlhatlhe a re o batla go kgaogana le setlhatlhe" meaning that the people had offended each other and this sparked a serious fight. These are Setswana proverbs used in trying to explain the bad blood or hatred between the parties. It clearly shows that there was a huge disagreement. There is [a] saying that says, "Nkotla ke tsamae kana ka otla ga se ka tsala" meaning that to upbring someone does make you to be the parent – it really tries to show someone who does not appreciate the people who have cared for them in their upbringing. The issue of the inheritance as to who gets to keep the household is to be decided basing on the Sengwaketse customs/culture. When property is being shared out among people, the person who gets to keep the household is the youngest son."

91. Later, after quoting a few statutory provisions, the said court stated:

> "I have just read out the above law, to [wit Section 5 and 6(4)(a) of the Common Law and Customary Law Act Cap. 16:01] in English and will not translate it to Setswana. In this case before us it is clear of what caused it. "Letlhoo le tuka malakabe" a Setswana proverb used in trying to explain the flamed hatred between the parties. It is clear that Segomotso, Molefi Silabo Ramantele's father and Edith Mmusi were not born of the same parents. Edith Mmusi went on to state that Molefi's inheritance is at South Africa where Segomotso had married. This was not related in any way to the case. The main issue is the household."

92. The above paragraphs do not appear in the signed version. What appears is a variant statement –

> "In this case it is evident where the root cause of the conflict comes from. There is too much hatred between the parties and it seems Segomotso, Molefi's father was not Edith Mmusi's sibling. Edith even went further suggesting that Molefi's inheritance was at South Africa where Segomotso had married. These issues were irrelevant because the main subject in this matter is the plot (home)."

93. The above cited paragraphs are merely to demonstrate instances of substantive alteration of the judgment not mere correction of clerical errors. This is not permissible.

A court must, subject to correcting clerical errors, ensure that the delivered judgment is fully reflected in the final version.

94. There was another error. The fact that no distribution had been effected with regard to the property and that the appellant's father had no right to inherit from the estate of Silabo and Thwesane were critical to the judgment on the dispute before the Customary Court of Appeal. They could not be ignored, and yet they were.

95. That error led to yet another error by the Customary Court of Appeal; - in finding that simply because according to the Sengwaketse custom/culture that the person who keeps the homestead is the youngest son, it must *ipso facto* follow that indeed there was as a fact an inheritance by the late Banki of the property, that the late Banki was entitled to dispose of this, and that he did indeed give the property to his half-brother Segomotso. The Customary Court of Appeal seems not to have taken

the time to make an evaluation of the evidence that had been led in the Customary Court of first instance in order to resolve these issues.

96. To the extent that it was assumed that the alleged rule of customary law of inheritance was self-executing, that cannot be so. The uncles, aunts and elders would be expected to call a gathering of the relevant family members where the distribution of the estate is made in accordance with such a rule. There may well be circumstances under which at such a gathering, it may require that certain considerations be taken into account. In sizeable estates for instance, the involvement of the head of the Ward or a senior tribal leader may be required either to confirm the distribution or to assist in carrying it out.

97. The cumulative errors by the Customary Court of Appeal and the citation of irrelevant statutory provisions ineluctably led to a grave misdirection.

98. That was not to be the end of misdirections. When the matter was taken to the High Court, it went in the form of a review/Section 18 of the Constitution application instead of an appeal as is envisioned under Section 42(3) of the Customary Courts Act which reads:

> "Any person aggrieved by any order or decision of a Customary Court of Appeal may within 30 days of that Order or decision appeal therefrom to the High Court."

99. It was not explained before us why that provision of the law was not followed. The proper procedure in the circumstances of this case would have been an appeal even if the constitutionality of the rule contended for by the Customary Court of Appeal was one of the issues raised in the appeal to it. If the record was availed late, then the proper course was to apply for leave to appeal out of time. The High Court in hearing an appeal from the Customary Court has a wide discretion to sit with assessors who would have been people with knowledge of the current customary law of the parties (See Section 44 of the Customary Courts Act). The presiding High Court

Judge did not raise this procedural point nor did the appellant. The principle of finality to litigation requires that a party challenging a court's decision must raise his points at the same time and where there may be various channels of challenging the decision, the party must choose the one that will effectively deal with the decision challenged. In this case that channel or procedure was the appeal. The principle of finality to litigation is one of the cornerstones of our legal system. "It is to be preserved and cherished and not eroded." See, **KOBEDI v THE STATE (2) 2005 (2) BLR 76 (CA) @ 90H**.

100. Another procedural error committed in the High Court is that although an application to bring the review/Section 18 motion proceedings out of time was made, the Court did not consider it as is required nor grant the condonation before allowing the proceedings to continue. The appellant did not raise that complaint with this court either.

101. After the filing of a notice of opposition by the respondent, the parties set out what they considered to be a constitutional issue in the case. This was purportedly being done in terms of Order 35 of the High Court Rules. This was quite permissible under Order 35(1)(1) of the High Court Rules. By consenting to this approach without first filing his answering papers, the appellant closed the doors on himself, in that the factual averments in the respondents' founding and supplementary affidavits stood undisputed and are to be taken as such. See **BOXER SUPERSTORES MTHATHA AND ANOTHER v. MBENYA 2007 (5) S.A. 450 (SCA) @ 452**. This approach incidentally also denied the High Court the opportunity to properly ascertain the current content and character of the Ngwaketse custom which was being challenged. Without the factual matrix of such customary rule, neither the court nor the appellant could be able to say, having regard to what was on the record of the Customary Court proceedings, what the real content and character of the Ngwaketse custom which was being

contended for was. This is more so having regard to the varied and contradictory views of the first, second and third tiers of the Customary Courts, not to mention the evidence led at the Customary Court of the first instance. This was an important case which could have been handled with more discretion. At the very least the rationale behind that historic customary law needed to be explained.

The conclusion

102. If as was apparent on a balance of probabilities from the record the homestead portion of the estate of the late Thwesane and her husband was not distributed, then the late Banki could not have claimed for himself that homestead, could not have exchanged it and could not have given it to his elder half-brother, even if customary law allows this. The latter question was not canvassed.

103. It is accordingly clear that there was neither a real and informed constitutional question before the Judge a quo, nor a

proper analysis of the issue before him and/or the constitutional provisions. But a decision to that effect alone will not dispose of the dispute between the parties. I note from the record that this dispute has been dragging on for 14 years, for six of which it was before the Courts, and that the first respondent is now over 80 years of age. This Court is entitled under Rule 29 (2) of the Court of Appeal rules "to draw inferences of fact and to give judgment and to make any order which ought to have been made by the court below and to make any such order as the Court may deem fit". Although the Judge a quo's order must be set aside and replaced, its outcome, namely that the respondents retain the family homestead will remain the same. This means that in substance, the appellant has lost the appeal and it is he who should bear the costs.

The appropriate relief

104. In all the circumstances, the appropriate Orders for this Court to make will be firstly, on the interpretation of the Ngwaketse

customary law; and secondly, on the merits of the dispute. The decision on the merits will involve overturning the judgment of the Customary Court of Appeal. It will not help to have this matter referred back for rehearing owing to the advanced age of the first Respondent, and because there is, in any event, a decision of the Higher Customary Court which will be restored if the decision of the Customary Court of Appeal is set aside, as the Respondents did not appeal against it. This was the decision of Kgosi Lotlaamoreng II. That decision is consistent both with the values promoted by the Constitution and the notion of fairness promoted under Sections 2 and 10(2) of the Customary Law Act, and we endorse it.

The order

105. In my view, the appropriate Order, which we now make, is as follows:

1. The decision of the High Court is set aside and for it is substituted the following order:

a. The application succeeds to the extent that the decision of the Customary Court of Appeal is set aside.

b. It is declared that the Ngwaketse Customary Law of inheritance does not prohibit the female or elder children from inheriting as intestate heirs to their deceased parents' family homestead.

c. The decision of Kgosi Lotlaamoreng II is confirmed save that the latter part thereof is varied to read: "If the surviving children of the late Silabo and Thwesane Ramantele are unable to agree who amongst them is to take care of the property on behalf of the others, the matter is to be referred to the elders and uncles for resolution, and this failing, the respondents are to be assisted by a person appointed by Kgosi Malope II

of the Bangwaketse tribe, in deciding upon such person."

2. The appellant is to bear the costs of this appeal and those of the High Court.

3. A copy of this judgment is to be transmitted to Kgosi Malope II of BaNgwaketse.

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

I.B.K. LESETEDI
Judge of Appeal

I agree

I.S. KIRBY
Judge President

I agree

DR. S. TWUM
Judge of Appeal

I agree

J. G. FOXCROFT
Justice of Appeal

E. M. W. J. LEGWAILA
Judge of Appeal

I agree