IN THE COURT OF APPEAL FOR THE REPUBLIC OF BOTSWANA

HELD AT GABORONE

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

In the matter between:

MOLEFI SILABO RAMANTELE Appellant

And

EDITH MODIPAGE MMUSI First Respondent

BAKHANI MOIMA Second Respondent

JANE LEKOKO Third Respondent

MERCY KEDIDIMETSE NTSHEKISANG Fourth Respondent

HEADS OF ARGUMENT ON BEHALF OF THE RESPONDENTS

A. INTRODUCTION

1. The facts of this case are stark. The first respondent (Mrs Mmusi) is a widow, a retired teacher and a pensioner. She is 80 years old. She has since 1991, after the death of her husband, lived on the plot which belonged to her parents. She lives in a house which she built on that plot with her own resources. She has no other home. The appellant is her nephew. He has never lived on the family plot. He seeks to have her evicted from her home. He asserts that the Ngwaketse customary law of succession entitles him to have her evicted, and that this is consistent with the Constitution of Botswana.

2. The appellant appeals against the order[1] and judgment[2] of the High Court on 12 October 2012 in which Dingake J ordered:

    2.1. 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, in that it violates the applicants' rights to equal protection of the law.[3]

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1 Record p.10

2 Record p.12

3 Record p. 10, para 1

2.2. The judgement of the customary court of appeal to the extent that it applied such rule, was reviewed and set aside.[4]

3. The appellant appealed against the High Court judgment. Stripped of repetition, his grounds of appeal are threefold:[5]

3.1. He contends that the High Court erred in finding that the Ngwaketse customary law of inheritance provides that only the last born male is qualified as an intestate heir to the exclusion of his female siblings, therefore infringing the equality provisions of the Constitution. He contends that the Ngwaketse customary law allows all siblings to inherit intestate, and that the only distinction made by Ngwaketse customary law is that certain properties within the deceased's estate can only be inherited by a specific individual taking into consideration the gender of that individual and their position in relation to birth.

3.2. He contends that the High Court erred in finding that the Ngwaketse customary rule of inheritance has the same effect as the common law principle of male primogeniture, in that both exclude women from inheriting.[6]

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4 Record p. 10, para 2.

5 Notice of appeal, record p. 237

6 The special case in terms of Order 35 required the High Court to decide the constitutionality of "the Customary law rule of primogeniture which is that only a male who is related to the deceased through a male line qualifies as intestate heir": record p. 176 para 1.1. The learned judge in the High Court can hardly be criticized for deciding the case on that basis.

3.3. He asserted that in determining whether the Ngwaketse customary rule of inheritance is *ultra vires* section 3 of the Constitution, the High Court misdirected itself by placing too much emphasis on foreign judgments which dealt mainly with the principle of male primogeniture. He contends that these cases are distinguishable and should not have been relied upon.

4. In his heads of argument in this Court, the appellant contends that the High Court misconstrued sections 3 and 15 of the Constitution. He contends that the section 3 right to equality is to be interpreted in the light of section 15.[7]

5. The appellant's position is paradoxical and internally inconsistent. On the one hand, he devotes considerable effort to demonstrating there is no longer a general rule of succession by male primogeniture in Ngwaketse customary law. He apparently accepts that this would not be tolerable under the Constitution. On the other hand, he asserts and relies on a rule of male ultimogeniture in order to contend that he is entitled to succeed to a particularly valued asset in the estate, namely the family homestead. The sole basis for his claim to the property is that his alleged predecessor was the youngest son of the deceased, who is alleged to have inherited the property for no reason other than being the youngest male child. (He was estranged from the family, did not live at the property, and played no role in caring for his widowed mother or for other members of the family.) He asserts that the respondents are disqualified from inheriting because none of them was the youngest male child of the deceased. On the

[7] Appellant's heads of argument para 13.4.3

appellant's own version, the Ngwaketse customary law of succession is discriminatory in this regard.

6. The respondents oppose the appeal. They contend that

6.1. Ngwaketse customary law, properly understood, is flexible: it does not prescribe an invariable rule that only the last born son may succeed to the family homestead as intestate heir, to the exclusion of his female siblings, and it would not so prescribe in this case.

6.2. If the customary law does so prescribe, this violates the fundamental right to equality in section 3 and also section 15 of the Constitution of Botswana.

7. In these heads of argument, we address the following issues:

7.1. The factual background relevant to this appeal (page 6).

7.2. The relationship between the Constitution and customary law (page 13).

7.3. The nature of customary law, and the content of the Ngwaketse customary law of inheritance insofar as it relates to the property which forms the subject matter of this appeal (page 15).

7.4. The Constitutional issues (page 27).

7.5. The order which should be made on appeal (page 40).

B. THE FACTS

8. The salient facts relevant to this appeal are not in dispute.

9. The first to fourth respondents are sisters.[8] Their father was Silabo Ramantele, who died in 1952. Their mother was Thwesane Ramantele, who died in 1988.[9] The Ramanteles' matrimonial home was situated in Mafhikana ward, Kanye.[10] The dispute in this matter is in respect of that home.

10. The first respondent is a retired teacher and a widow. She has lived at the family home since 1991, after the death of her husband in 1988. Although she does not say so in terms, it is clear from the context that she has no other home.[11]

11. Silabo and Thwesane Ramantele had five daughters and two sons, in the following sequence:[12]

    11.1. Mr Basele Ramantele. He died in the early 1990s.

    11.2. The second respondent, Mrs Bakhame Moima.

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8 Edith Mmusi affidavit record, p. 104, para 12

9 Edith Mmusi affidavit record, p. 104, para 11

10 Edith Mmusi affidavit record, p. 104, para 11

11 Edith Mmusi affidavit record, p. 104, para 14, p.105, para 16.

12 Edith Mmusi affidavit record, p. 104, para 12

11.3. The first respondent, Mrs Edith Mmusi.

11.4. The third respondent, Mrs Jane Lekoko.

11.5. Mrs Flora Keikitse. She is not a party to this litigation.

11.6. Mr Banki Modiegi Ramantele. He died in or about 1995.

11.7. The fourth respondent, Mrs Mercy Kedidimetse Ntshekisang.

12. In or around 1980, the respondents' brother Banki Ramantele was banished from the Ramantele family *kgotla* (ward) by his uncles, on the basis that he was bewitching them. The Mafhikana ward headman ordered him to go and live on unoccupied land in Mafhikana ward, which is about one kilometre from the family home. Thereafter he never came back to the family homestead. He died in or around 1997.[13]

13. The respondents' father Silabo Ramantele had also had a son with another woman before the respondents were born. This son (the respondents' half-brother) was Segomotso Ramantele. He was the father of the appellant.[14]

14. After the death of their father Silabo Ramantele in 1952, the respondents alone took care of their mother. She was unemployed and she relied entirely on the respondents.

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13 Edith Mmusi affidavit, record p. 105, para 20

14 Edith Mmusi affidavit , record p. 105, para 21

Their brothers refused to assist them. The respondents jointly built a three-bedroomed house on the property for their widowed mother.[15]

15. Segomotso Ramantele participated in the distribution of the estate of his deceased father Silabo Ramantele. He was given a ploughing field, herds of cattle and an ox wagon, these being his share of his father's estate.[16]

16. Segomotso Ramantele never resided at the family homestead in Mafhikana ward. He went to live in South Africa and married there. He seldom visited the family homestead.[17] He died in South Africa in 2006. His funeral was held at the home of the appellant (his son) in Mafhikana ward.[18]

17. The first respondent married Japhet George Mmusi. He died in 1988. After his death, there was a bitter dispute over of the matrimonial livestock between his children from another woman and the first respondent, his widow. After the dispute had been determined by Kgosi Kgosikwena Sebele in 1991, and in that same year, the first respondent returned to her parents' matrimonial home in Mafhikana ward, Kanye.[19]

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15 Edith Mmusi affidavit, record p. 105, para 18

16 Edith Mmusi affidavit, record p. 105, para 22

17 Edith Mmusi affidavit, record p. 106, para 23

18 Edith Mmusi affidavit, record p. 106, para 24

19 Edith Mmusi affidavit, record p. 104 para 14

18. When the first respondent returned to the family home, her younger sisters the third and fourth respondents were still living at home.[20] Although they had been married under civil law, they were not yet married at customary law because their *bogadi* had not yet been paid. They subsequently left the family homestead after payment of *bogadi*.[21]

19. When she returned to the family homestead in 1991, the first respondent was 58 years old. She has not remarried since her husband's death. Before her marriage, she had built two houses at the homestead: one with two rooms, and one with one room. One of them has since collapsed. Around 2000, after the death of her husband and her return to the family homestead, she built a home with four rooms. She also fenced the home, and built a toilet and installed a tap.[22]

20. The first respondent was able to build these structures from resources which she earned whilst she was a teacher, and as a pensioner. She also used proceeds from the sale of the livestock she had received from the distribution of property she had owned with her late husband.[23]

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[20] Edith Mmusi affidavit, record p. 104, para 14

[21] Edith Mmusi affidavit, record p. 104, para 15

[22] Edith Mmusi affidavit, record p. 105, para 16

[23] Edith Mmusi affidavit, record p. 105, para 17

21. It appears that the first respondent lived peacefully on the family homestead for more than twenty years. In 2006 her half-brother Segomotso Ramantele (the appellant's father) passed away. The following year, a dispute erupted: the appellant instituted proceedings in the lower customary court in Kanye. He claimed that he was entitled to the family homestead because, he asserted, the late Banki Ramantele had bequeathed the property to his father, Segomotso Ramantele.[24] There is no suggestion that this was done in in terms of a will.

22. The lower customary court ordered that the appellant was entitled to the property. Presiding in that customary court, Kgosi Ketsitlile took into consideration Ngwaketse culture in which, he said, *"a male child never leaves his parents' home except when he marries or due to bad behaviour which the 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."*[25]

23. The lower customary court awarded the home to the appellant, and gave the first respondent six months to decide what to do with the house which she had built on the plot.[26] What she was to do with her house if she could neither live in it nor sell it, was not explained.

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[24] Edith Mmusi affidavit, record p. 106, para 25

[25] Judgment of lower Customary Court, record p. 156

[26] Record p. 157

24. The respondents appealed to the main customary court. Kgosi Lotlaamoreng upheld the respondents' appeal on 4 November 2008.[27] He ordered that *"this home belongs to all children born to Silalo 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."*[28]

25. In January 2009 the appellant appealed to the customary court of appeal in Gaborone. The customary court of appeal dismissed the judgment of Kgosi Lotlaamoreng and upheld the judgment of the lower customary court. Kgosi Mosielele held that the household belongs to the appellant, and ordered Mrs Mmusi to vacate the plot with all her belongings within three months.[29] He reasoned as follows:

"The household in issue here was given to Banki, being the heir. Banki then gave it to Segomotso as per their agreement/arrangement. Edith now wants to undo the agreement made by the deceased persons, and she has without any hiccup said she wants to change the Sengwaketse custom. It is really surprising for women who have been given away on marriage to fight over/claim assets of her forebears/natural parents. This is not according to Ngwaketse culture."[30]

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[27] Edith Mmusi affidavit, record p. 106, para 26

[28] Record p. 159

[29] Record p. 112

[30] Record p. 112

26. The respondents appealed to the High Court at Lobatse, which upheld their appeal. This is a further appeal against that decision.

27. The appellant's case is the following: he contends that

27.1. under Ngwaketse customary law, the youngest male child inherits the family home;

27.2. Banki Ramantele, as the youngest son, therefore inherited the home;

27.3. Banki Ramantele 'bequeathed' it to Segomotso Ramantele; and

27.4. he (the appellant) inherited it from his father Segomotso.

28. It follows that the foundation of the appellant's case is that under Ngwaketse customary law, the youngest male son inherits the family home. This appeal therefore raises two questions:

28.1. Does Ngwaketse customary law prescribe that the family home must invariably be inherited by the youngest son, to the exclusion of all daughters? If so,

28.2. Is the Ngwaketse customary law in that regard consistent with the Constitution of Botswana?

29. For the appeal to succeed, both questions must be answered in the affirmative.

C. CUSTOMARY LAW AND THE CONSTITUTION

30. The Constitution is the pre-eminent and supreme law of Botswana, and the primary source of law.[31] The secondary sources of law are legislation, the common law and customary law. No law is valid if it is inconsistent with the Constitution.

31. All laws must be interpreted in the light of the Constitution, and must as far as possible be interpreted so as to be consistent with the Constitution. If that is not possible, they are invalid. This Court has in terms applied these foundational principles to customary law:

> **Custom and tradition must *a fortiori*, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform with the Constitution. But where this is impossible, it is custom not the Constitution which must go".**[32]

32. We make these perhaps trite submissions because the appellant appears to contend that because the customary law in issue in this matter has its source in custom and not in legislation, this inhibits the force of the Constitution when applied to that law, or limits the powers of this Court.[33] He thus seeks, for example, to distinguish, the Bhe decision

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31 Section 86 of the Constitution; **Attorney-General v Dow** [1992] BLR 119 (CA) p 137B-D.

32 **Dow** p 137E-F.

33 Appellant's heads of argument para 11, 12.1, 14.1.3.3.

of the South African Constitutional Court[34] on the grounds that it dealt with a statutory rule of customary law.[35] That is however a distinction without a difference. All law, whatever its source, is subject to the Constitution. If a rule of law is inconsistent with the Constitution, it is invalid, whether its source is in non-statutory customary law or in a statute.

33. It may be that we have misunderstood the appellant's contention, and that what he actually contends is that where the Court is dealing with a provision of non-statutory customary law which is inconsistent with the Constitution, it may remedy the defect by developing the customary law instead of striking it down (which would be the appropriate remedy in the case of a statute). If this is the appellant's contention, it is not disputed. That however is a matter of remedy: the first question is whether the rule for which the appellant contends, whatever its source, is consistent with the Constitution. That question cannot be avoided on the basis that the alleged rule is one of non-statutory customary law.

34. The appellant, with respect, over-states the relevance of the source of any particular customary law. That is the matter to which we now turn.

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34 **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC)

35 See for example appellant's heads of argument para 11.7.3

D: THE NATURE OF CUSTOMARY LAW, AND THE CONTENT OF NGWAKETSE CUSTOMARY LAW

Customary law is not static

35. In determining the content of Ngwaketse customary law (the first question), it is important to recognise at the outset that as this Court has pointed out *"Custom and tradition have never been static"*.[36] Custom has its origin in practice: as practice changes, so custom changes, and so customary law changes.

36. The South African Constitutional Court has referred to customary law as *"living law"* which evolves and develops over time:

> **In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. 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 consistently with the Constitution.**[37]

and

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[36] **Dow** at 137E-F.

[37] **Alexkor Ltd and Another v The Richtersveld Community and Others** 2004 (5) SA 460 (CC) at para [53].

> **…customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.**[38]

37. The final phrase in that passage is consistent with what has been held by this Court, as noted above (para 32). Custom evolves through changing practice. In assessing its evolution, the customary law must as far as possible be read so as to conform with the Constitution.

38. The question then becomes how to determine the content of customary law at a particular time.

39. This has given rise to the distinction which is sometimes drawn between the living customary law and official accounts of customary law. The true customary law is the living law: it is the law of the community. Accounts of that law which have been recorded in (for example) judgments of the past, or in textbooks, have to be treated with caution. They are at best a reflection of what the law was at that particular time – and sometimes of what it was in the past. They do not necessarily reflect the living law as it is in the present.

40. Ngcobo J (as he then was) has drawn attention to the need for this caution:

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[38] **Shilubana and Others v Nwamitwa** 2009 (2) SA 66 (CC) para [81].

> **The evolving nature of indigenous law and the fact that it is unwritten have resulted in the difficulty of ascertaining the true indigenous law as practised in the community. This law is sometimes referred to as living indigenous law. Statutes, textbooks and case law, as a result, may no longer reflect the living law. What is more, abuses of indigenous law are at times construed as a true reflection of indigenous law, and these abuses tend to distort the law and undermine its value. The difficulty is one of identifying the living indigenous law and separating it from its distorted version.**[39]

41. It is important to recognise that there are not two different, competing systems of customary law – the "official" customary law and living customary law. There is only one system of customary law in a particular community. Sometimes, however, there are different accounts of it. The correct approach, we submit, is to treat practice as the primary source of custom.[40] We understand that this is not in dispute.

Customary law is flexible

42. It is also important to recognise that customary law is not a body of fixed rules which allow no flexibility in particular situations. It is the flexibility inherent in customary law which is one of its great strengths, and which has given it its durability. The leading study of dispute resolution in Tswana chiefdoms demonstrated that the "rules"

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39 **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC) para [154]

40 Of course legislation may override customary practice, and prescribe what the content of law shall be: see for example section 6 of the Customary Law Act Chap 16:01. That issue does not arise here.

on which customary law is based are often mutually contradictory: the "rules" consist of *"a loosely constructed repertoire rather than an internally consistent code"*, and *"almost any conduct or relationship was potentially susceptible to competing normative constructions"*. It is extremely difficult to predict the outcome of disputes by applying the "rules" deductively to the facts of a particular case.[41] Substantive rules rarely determine outcomes in a simple, mechanistic fashion.[42]

The content of the Ngwaketse customary law of succession

43. Customary law is determined by reference to evolving practice. The content of that practice is reflected in the expressions of practice by elders, in determinations by the courts, and in studies conducted by independent experts.

44. In this instance, the elders of the community were divided as to the correct solution to the dispute.[43]

45. The Ngwaketse customary courts, too, differed as to the content of Ngwaketse customary law. The lower court held for the appellant: it found that the last born boy

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41 John L Comaroff and Simon Roberts Rules and Processes: The Cultural Logic of Dispute in an African Context (University of Chicago, 1981) page 18. The study was of the Kgatla and the Tshidi-Rolong communities. Professor Comaroff is currently Professor of African and African American Studies and of Anthropology at Harvard University. Professor Roberts is Professor of Law at the University of London. He was Adviser on Customary Law to the Botswana Government (1968-1971). He is a member of the Advisory Editorial Board of the University of Botswana Law Journal

42 Ibid page 84.

43 Evidence of Headman Masiele Record p 131

child is entitled to inherit,[44] and a girl child never inherits a family ward or the family homestead.[45] The higher (main) customary court held for the respondents: Kgosi Lotlaamoreng found that *'this home belongs to all children born to Silalo and Thwesane and further that they all have a right to use it as they wish whenever they have a common event.'*[46]

46. The customary court of appeal held: *"Inheritance matters, particularly as to who inherits the family home, is determined by our Setswana (Sengwaketse) culture and tradition. Accordingly if the inheritance is distributed, the family home is given to the last born boy child."*[47]

47. We respectfully submit that the approach of the customary court of appeal ignored the flexibility which is inherent in customary law, and which is one of its great strengths. The result was a patently unjust outcome which could not conceivably be justified in accordance with the constitutional norm of equality. The result failed to accord with this Court's statement that custom will as far as possible be read so as to conform with the Constitution.

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[44] Record p. 154

[45] Record p. 154

[46] Record p. 159

[47] Record p. 171

48. The outcome was also inconsistent with the underlying purpose of succession under customary law, which has been explained as follows:

> **The underlying purpose of indigenous law of succession is therefore to protect the family and ensure that the dependants of the deceased are looked after. This is achieved by entrusting the responsibility of seeing to the welfare of the deceased's dependants to one person in return for the right to control the family property. This system ensures that the dependants of the deceased as well as the members of the family always have a home and resources for their maintenance. This prevents homelessness.**[48]

49. Succession by the appellant would be fundamentally inconsistent with this purpose. The line of succession which he asserts, leading to inheritance by him, failed at every step:

49.1. Banki did not support his mother. That was done by his sisters, the respondents.

49.2. Banki's alleged successor by 'bequest', Segomotoso, had no connection with the homestead, never having lived there. Segmotoso did not maintain his father's widow. That is perhaps not surprising, given that she was not his mother.

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[48] Ngcobo J in **Bhe v Magistrate, Khayelitsha** 2005 (1) SA 580 (CC) para [174]. See also, on the distinction between succession and inheritance, the judgment of Langa DCJ (as he then was) at [75] and [76].

49.3. The appellant has demonstrated by word and deed that he considers that the succession which he asserts, entitles him to evict his 80-year-old aunt from the from the house that she has built on the family homestead, and from the family homestead which is the only home which she knows.

50. It is difficult to conceive of a more sustained negation of the underlying purposes and nature of the customary law of succession, which is premised on linked rights and responsibilities.

51. In his heads of argument, the appellant effectively concedes that the eviction of Mrs Mmusi would be inconsistent with customary law: *"it is possible to come to the conclusion that the Customary Court of Appeal decision ordering the applicant [Mrs Mmusi] to leave the family home was wrong".*[49] That is precisely the relief which the appellant seeks in bringing this case. His complaint against Mrs Mmusi in the lower customary court was *"The complainant wants his father's plot that you have developed."*[50] Consistently with that, he has defended the eviction orders which he obtained.

52. A result that conforms with the underlying customary law norm of succession was possible. The elders were in dispute as to the outcome. The Ngwaketse customary

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[49] Appellant's heads of argument para 12.4. The appellant's position in this regard has been inconsistent. In his argument in the High Court, he contended that the respondents could use the property only "in certain circumstances", eg for family gatherings, funerals and weddings (High Court judgment para 39-41, record page 22).

[50] Record page 130.

courts similarly differed as to the correct approach. There was no obvious and pre-ordained outcome. The case required the selection of the appropriate rule to achieve the underlying norm and purpose. The customary court took the position that only one outcome was possible, namely the eviction of Mrs Mmusi.

53. We submit that the approach of the customary court of appeal undermined the very purpose of the system of succession in customary law. It would be inconsistent with the norm-driven approach of customary law to apply a "rule" which undermines the most fundamental norm which guides succession. The "rule" cannot apply in circumstances in which its application would defeat its purpose. In the common law, this principle was expressed as follows by Gane J:[51]

> **If public policy is the foundation of the rule, public policy should govern its application. Cessante ratione regulae, cessat et regula ipsa.**

Changes in Tswana and Ngwaketse succession

54. The customary law and practice of succession has changed and continues to change in response to changing circumstances.

55. A prominent example arises from the action of Kgosi Linchwe II of the Bakgatla after he took office in 1963. He handed down judgments that the *boswa* (unallocated

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[51] **Duvenage v Duvenage** 1936 EDL 147 at 171. See also **Ex parte Vermaak** 1977 (2) SA 129 (N) at 133.

inheritance of cattle) would be divided equally among all the children of the deceased, instead of going to the eldest son. He described his decision as developing customary law in order to recognise *"a new trend in Kgatla life"*, for *"in recent times eldest sons had shown a tendency to 'eat up' the heritable cattle themselves and had not taken any interest in their segments."* His approach was that law must "catch up" with changes in society.[52]

56. Ngwaketse society and its practice of customary law have indeed changed. Gulbrandsen conducted fifteen months of anthropological fieldwork in the Ngwaketse district. He reported in 1980 that *"It is the youngest son or an unmarried daughter who receives the parents' plot(s)".* In a footnote to that statement, he noted that *"Customarily, the last born son received the parents' plot. However, as more and more women remain unmarried, it has become increasingly common that this land is transferred to them."*[53]

57. What this demonstrates is the flexibility of Ngwaketse customary law, in which decisions are made which are appropriate to the factual situation pertaining in a particular case. Professor Gulbrandsen's findings on the operation of customary law in practice contradict the assertion that that there is an invariable rule that the youngest

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52 Comaroff & Roberts op cit p 80.

53 Gulbrandsen Agro-pastoral production and communal land use: A socio-economic study of the Bangwaketse (1980, University of Bergen) p 50: published jointly with the Rural Sociology Unit of the Ministry of Agriculture, Botswana. Ornulf Gulbrandsen is a Professor at the University of Bergen.

son inherits the family plot. Thirty years ago, the practice and custom had already changed.

58. Professor Gulbrandsen also found that of the 148 households he surveyed, 43 (28%) centred around a widow, a divorcee or an unmarried mother with her own *lolwapa* (homestead). The largest group amongst these was widows (26%).[54] This too is inconsistent with the proposition that the homestead is invariably inherited by the youngest son of the family.

59. What this goes to show is that, as Professors Comaroff and Roberts state, there are a number of "rules" involved in the determination of succession, leading to a variety of possible outcomes. We submit that the outcome posited by the customary court of appeal is simply not tenable, given the purpose of the system of succession, in a case in which it would result in:

59.1. the eviction of an 80-year-old widow who has lived on the property for more than 20 years in a house which she built with her own resources; and

59.2. the exclusion of her and her sisters, who had looked after their mother; in favour of

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[54] Ibid p 112.

59.3. a nephew who has never had any connection at all with the property, who has never cared for the widow, and whose father never cared for the widow and never lived on the property.

60. We submit that this is simply inconsistent with a system of succession based on rights linked with responsibilities.

Conclusion on the Ngwaketse customary law

61. For all of these reasons, we submit that the customary court of appeal erred in finding that there is an invariable customary law rule that the family homestead is inherited by the youngest son. The customary law is flexible, and the outcome depends on the facts of the case.[55]

62. We submit that in this case, the conclusion is ineluctable that the appellant has not succeeded to the property. For him to do so –

62.1. would fly in the face of the nature and purpose of the Ngwaketse customary law of succession;

62.2. would be inconsistent with actual practice among the Bangwaketse as demonstrated by the findings of Professor Gulbrandsen; and

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[55] We deal below with the question of the appropriate order to be made.

62.3. would be inconsistent with this Court's finding that custom will as far as possible be read so as to conform with the Constitution.

63. We submit further that if however we are incorrect in this regard, and Ngwaketse customary law does prescribe an invariable rule that the family homestead is inherited by the youngest son, the customary law is to that extent inconsistent with the Constitution. We next address that issue.

E. THE CONSTITUTION

Section 3 of the Constitution

64. Section 3 of the Constitution confers on the individual the right to equal treatment of the law, irrespective of the individual's sex. That follows from the wording of section 3(a).

65. A law which provides that women shall have lesser rights than men, denies women the equal protection of the law, or to put it differently, deprives women of the equal protection of the law. It is on its face inconsistent with the constitutional guarantee in section 3.

66. The question then becomes whether that inconsistency is nevertheless saved by section 15(4) of the Constitution.

67. This Court has explained the relationship between section 3 and the other sections in Chapter II of the Constitution as follows:

> **…section 3 … is the key or umbrella provision in Chapter II under which all rights and freedoms protected under that Chapter must be subsumed. Under the section, every person is entitled to the stated fundamental rights and freedoms. Those rights and freedoms are subject to limitations only on two grounds, that is to say, in the first place "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", and secondly on the grounds of "public interest". Those limitations are provided in the provisions of Chapter II itself, which is constituted by sections 3 (but effectively, section 4) to 19, of the Constitution.**[56]
>
> **… the rest of the provisions of Chapter II … have to be read in conjunction with section 3. They must be construed as expanding on or placing limitations on section 3, and be construed within the context of that section. As pointed out before, the wording of section 3 itself shows clearly that whatever exposition, elaboration or limitation is found in sections 4 to 19, must be exposition, elaboration or limitation of the basic fundamental rights and freedoms conferred by section 3. Section 3 encapsulates the sum total of the individual's rights and freedoms under the Constitution in general terms, which may be expanded upon in the expository, elaborating and limiting sections ensuing in the Chapter**.[57] [emphasis added]

68. From this it follows that section 15 is to be regarded as expounding, elaborating and limiting the rights conferred in section 3. Section 15 is to be interpreted in the context of section 3, and not the other way around, as the appellant contends. The question in this case is whether section 15 limits the equal protection of the law in such a manner as to deprive the respondents of the equal protection which is guaranteed by section 3.

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56 **Dow** p 133F-G.

57 **Dow** p 134B-C. See also **Zachariah and Another v Botswana Power Corporation** 1996 BLR 710 (CA)

The interpretation of section 15 of the Constitution

69. The limitations contained in section 15 are to be read and interpreted in the light of four principles:

70. First, it is well established that in the words of Lord Diplock in **Attorney-General of the Gambia v Jobe**:[58]

> **A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.**

71. This dictum was cited with approval in the concurring judgment of Aguda J in **Dow**. He held that a generous construction means that the provisions of the Constitution must be interpreted in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling. The construction can only be purposive, he said, when it reflects the deeper inspiration and aspiration of the basic concepts which the Constitution must forever ensure, namely the fundamental rights and freedoms entrenched in section 3.[59] The Constitution thus requires a generous construction of section 3.

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58 [1985] LRC (Const) 556 P.C. at p. 565.

59 At 165H

72. Second, the opposite approach is to be applied in the interpretation of limitations: it is a *"well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions"*.[60] Where rights and freedoms are conferred on persons by the Constitution *"derogations from such rights and freedoms should be narrowly or strictly construed"*.[61] The section 15 limitation must therefore be narrowly or strictly construed.

73. Third, the domestic law is to be interpreted in a manner that does not conflict with the international obligations which Botswana has undertaken. Amissah P analysed the relevant legal principles fully in **Dow**.[62] We do not repeat that analysis here. He concluded as follows:

> **I am in agreement** [with the judgment of Aguda JA in Petrus] **that Botswana is a member of the community of Civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the**

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60 **Petrus v The State** [1984] BLR 14 (CA) p 35E.

61 **Dow** p 132A-B.

62 At pp 151F – 154F.

framers of the Constitution could not have been to permit discrimination purely on the basis of sex.

74. The principle of non-discrimination lies at the very heart of international law. It is a core principle of the African Charter on Human and Peoples' Rights. It underpins the Universal Declaration of Human Rights which was proclaimed by the international community of nations in 1948 in the aftermath of World War II.

75. Fourth, the Constitution provides in section 3 the primary means for determining the appropriate strict construction of a limitation. It states that the rights in section 3 (the key or umbrella provision) are subject to limitations stated elsewhere in the Chapter, *"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"*. The purpose of that phrase can only be to guide the interpretation of the limitations which are to follow in the Chapter. If the limitations in sections 4 to 19 were to be read in an unrestricted and unlimited manner, this explanation of the purpose of the limitations would be superfluous and indeed contradictory.

76. Section 3 thus identifies the primary means of giving effect to the required narrow or strict construction of the limitations or derogations: they are to be interpreted in the light of the prescription in section 3 that they are limitations designed to ensure that the enjoyment of the rights and freedoms by an individual does not prejudice the rights and freedoms of others, or the public interest.

77. The approach to be taken has been explained by this Court as follows

> **Whether it [the limitation] is a permissible limitation will turn on considerations of whether it is reasonably necessary to protect the rights and freedoms of others and the public interest, and that in turn involves considering proportionality.**[63]

78. Similarly, in **Moatshe**[64] the High Court held that section 7(2) of the Constitution, which limits the section 7(1) protection from inhuman treatment by saving the validity of punishments authorised by pre-Constitutional laws, is to be narrowly construed. As a result, it does not save a sentence under a pre-Constitutional law which is grossly disproportionate or excessive, or which is unacceptable due to the manner of its infliction or imposition.

The content of the section 15(4) limitations

79. Section 15(4) provides that the section 15(1) prohibition of discrimination (which is an elaboration upon or exposition of the umbrella right in section 3) shall not apply to certain laws,[65] in so far as that law makes provision

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63 **Nchindo and Others v The Attorney-General and Another** 2010 (1) BLR 205 (CA) p 219A.

64 **Moatshe and another v The State** 2003 (1) BLR 65 (HC).

65 The appellant contends that the section 15 prohibition of discrimination (and by necessary implication, the section 15 limitations on that prohibition) do not apply to customary law, because section 15(2) refers to "written law": appellant's heads of argument para 13.4.6. If that is correct, then section 15 is irrelevant to the determination of this case. That however does not appear to be correct: see in this regard section 15(6). And section 15(1) does not refer to "written" law.

> **(a) for the appropriation of public revenues or other public funds; …**
>
> **(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.**

80. Section 15(4)(d) authorises the inequality which is inherent in having a separate system of customary law which is applicable only to members of a particular race, community or tribe. It does not authorise unequal treatment or discrimination within the customary law: it addresses the inequality which is inherent in having different systems of law applicable to persons of different groups.

81. The subsection which requires consideration in this matter is section 15(4)(c). Customary law is a law which makes provision for devolution of property on death. The question then becomes the proper construction of section 15(4)(c), and in particular the extent of the limitation which it authorises. Section 15(4)(c) does not itself limit the right: it authorises the limitation of the right by another law.

82. Section 15(4)(c) (and indeed the whole of section 15(4)) must be read in the light of the principles which we have identified above, namely the need for a narrow or strict

construction of the extent to which limitation is authorised, and the application of the criteria set out in section 3 as the primary guide in that interpretive exercise.

83. An analysis of the subsections of section 15(4) shows that they cannot conceivably be given an unrestricted meaning, unrestrained by these principles of interpretation. If the subsections were given an unrestricted meaning, section 15(4) would authorise the following:

83.1. A law which provides that certain public funds (for example, funds for social welfare benefits or other appropriations to provide benefits for citizens) will not be made available to persons of a particular race, tribe, place of origin, political opinion, colour, creed or sex, would be permissible in terms of section 15(4)(a). This would be a law for the appropriation of public revenues or other public funds. Any discrimination of any kind, however egregious, would be permitted.

83.2. If a rule of personal law prohibits inter-racial marriage, that would be permissible under the Constitution, because it would be a law protected by section 15(4)(c).

83.3. If a rule of personal law prohibits inter-racial adoption of children, that too would be a law protected by section 15(4)(c).

83.4. If a rule of personal law provides that while men shall be free to choose their marriage partners, women shall be subject to forced marriages, that would be protected by section 15(4)(c).

84. We submit that discrimination of this kind could never be tolerated under the Constitution of Botswana. If section 15(4) were given the unrestricted interpretation which would permit this, the umbrella right in section 3 would be eviscerated. Any provision of personal law which discriminates in respect of the matters listed in section 15(4)(c), no matter how offensive, would be constitutionally permissible. For practical purposes, personal law would be a "no-go" area for the Constitution.

85. We submit that the Constitution does not allow this. Section 3 states that the umbrella right is subject only to 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"*, and which are contained in the other provisions of Chapter II. The other provisions of Chapter II have to be interpreted in the light of this stated purpose of the limitations. This was clearly stated by this Court in **Dow**, where it held that the limitations in Chapter II *"...have to be read in conjunction with section 3. They must be construed as expanding on or placing limitations on section 3, and be construed within the context of that section"*.[66]

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[66] Page 134A-B

86. The question thus becomes the following: if there is indeed a rule of Ngwaketse customary law that no woman may inherit the family plot or residence, is that limitation on the equal protection of the law, one which is *"designed to ensure that the enjoyment of the rights and freedoms in section 3 does not prejudice the rights and freedoms of others, or the public interest"*? That is the interpretive test. If the law in question does not meet that test, it is not a law which is protected by section 15(4)(c), interpreted in the light of section 3 as it must be.

87. To put it differently: the provisions of section 15(4) can only authorise the limitation of the section 3 right to equal protection of the law, if that limitation is designed to ensure that the enjoyment of the right does not prejudice the rights and freedoms of others, or on the grounds of public interest.

88. This approach has been endorsed by this Court in **Nchindo**.[67] There, Lord Abernethy JA (speaking on behalf of the Court) explained the judgment of Amissah P in **Dow** as follows:

> **What the learned Judge is saying is that it is necessary to look at each of sections 4 to 19 to discover whether the rights and freedoms provided in those sections are subject to one or other or both of the limitations mentioned in section 3.**[68]

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67 **Nchindo and Others v The Attorney-General and Another** 2010 (1) BLR 205 (CA).

68 Page 218B-C.

89. In other words, the limitations on the section 3 rights are those contained in section 3, to the extent that they are spelled out in sections 4 to 19. Sections 4 to 19 cannot extend the limitations beyond what is provided for in section 3, and they do not purport to do so. They put flesh on the bones of the two section 3 limitations.

90. We respectfully submit that this must necessarily be the case. If it were not so, then the Constitution would in effect say that *"anything goes"* as far as discrimination is concerned, and the section 3 right to equality before the law has no meaning at all, as long as the inconsistency is provided for by a law which (for example) provides for the appropriation of public revenues, or deals with matters of personal law, or deals with non-citizens. It would mean that the most egregious discrimination, which finds no justification in the limitations specifically provided for in section 3 of the Constitution, is authorised by the Constitution of Botswana.

91. We respectfully submit that there is no warrant for such a conclusion, which would be inconsistent with the now well-established jurisprudence of this Court.

<u>The limitation in this case does not meet the requirement for a valid limitation of the right to equal protection of the law</u>

92. It then becomes necessary to evaluate the limitation on equal protection of the law for which the appellant contends, to establish whether it meets the test for a valid limitation – namely, whether it is designed to ensure that the enjoyment of the right does not prejudice the rights and freedoms of others, or to promote the public interest.

93. As a matter of fact, inheritance of (or succession to) the family property by women is widespread in Ngwaketse society. It has been widespread for more than thirty years. There can be no valid basis for concluding that this prejudices the rights of others. There is no evidence to that effect. Similarly, there can be no basis for concluding that this development is contrary to the public interest. It is a practice which is a result of the organic development of Ngwaketse society, as a result of changing social circumstances. It cannot be suggested that this development is contrary to the approach and attitude of society in Botswana.

94. This Court has held that the judges must make the Constitution grow and develop in order to meet the just demands and aspirations of an ever-developing society which is part of the wider and larger human society governed by acceptable concepts of human dignity.[69] To find an invariable rule that no woman may inherit the family homestead would be to attempt to set the clock back, and to undo development which has taken place.

95. The facts of this case starkly demonstrate that the enforcement of such an invariable rule would lead to an outcome which flies in the face of the most basic principles of justice and human dignity. It would lead to the eviction of an 80-year-old pensioner from a home which she built with her own resources, and which she has occupied for more than twenty years. This would be done at the instance of a person who has no connection with the property, and whose alleged predecessors made no such claim.

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69 **Petrus and another v The State** (1984) BLR (CA) 14; **Kanane v The State** 2003 (2) BLR 67 (CA)

We submit that there can be no basis for suggesting that this is required in order not to prejudice the rights of others, or in the public interest.

96. Section 10(2) of the Customary Law Act Chap 16:01 provides that "*if the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity and good conscience"*. It is so that section 10 is headed "Conflict of customary laws". The words of section 10(2), however, plainly go beyond situations of conflict of laws.[70] To the extent that there is doubt as to the true content of the customary law – a matter on which neither the elders nor the Ngwaketse customary courts could agree – we submit that section 10(2) applies, and that the eviction of Mrs Mmusi would be contrary to the principles of justice, inequitable, and unconscionable. Section 10(2) also identifies the values which customary law is intended to serve. They are underlined by the definition in section 1 of "customary law", which provides that a customary law does not constitute customary law under the Act if it is *"contrary to morality, humanity or natural justice"*. An invariable rule leading to the eviction of Mrs Mmusi would be inconsistent with that definition.

97. It is, with respect, not surprising that even the appellant's counsel now concedes that this decision of the customary court of appeal evicting Mrs Mmusi may have been wrong.[71] But that is the relief which the appellant sought and seeks.

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70 The clear words used in the section cannot be overridden by the words of the heading; **Turffontein Estates Ltd v Mining Commissioner, Johannesburg** 1917 AD 419 at 431 (per Innes CJ).

71 Appellant's heads of argument para 12.4.

F. THE ORDER TO BE MADE

98. The appellant instituted action in the lower customary court as the complainant. His complaint was *"The complainant wants his father's plot that you have developed"*.[72] Both parties, and all of the customary courts, understood this to mean that he wished to have Mrs Mmusi evicted. The issue before the courts has been (and is) whether the appellant has proved that he has the right to evict Mrs Mmusi.

99. We submit that he has failed to do so, and that his claim must fail on the following grounds:

99.1. In terms of Ngwaketse customary law, he is not entitled to have Mrs Mmusi evicted.

99.2. If Ngwaketse customary law does provide that he is so entitled, it is inconsistent with the Constitution.

100. As to the order which should be made:

100.1. Because of the confusion as to which alleged rule of Ngwaketse customary law was in issue, we respectfully submit that paragraph 1 of the order of the High Court ought to be amended to provide as follows:

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[72] Record page 130.

The Ngwaketse customary law does not provide that only the last born son is qualified to inherit the family homestead as intestate heir; *alternatively*

To the extent that the Ngwaketse customary law provides that only the last born son is qualified to inherit the family homestead as intestate heir, it is inconsistent with the right under the Constitution to equal protection of the law, and is invalid.

100.2. Accordingly, the decision of the customary court of appeal ought to have been set aside. That is what the High Court did in paragraph 2 of its order, which should stand.

GEOFF BUDLENDER SC
NCUMISA MAYOSI
Chambers
Cape Town

10 July 2013

LIST OF AUTHORITIES

Botswana cases

Attorney-General v Dow [1992] BLR 119 (CA)

Zachariah and Another v Botswana Power Corporation 1996 BLR 710 (CA)

Petrus v The State [1984] BLR 14 (CA)

Nchindo and Others v The Attorney-General and Another 2010 (1) BLR 205 (CA)

Moatshe and another v The State 2003 (1) BLR 65 (HC)

Kanane v The State 2003 (2) BLR 67 (CA)

Cases in other jurisdictions

Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC)

Alexkor Ltd and another v The Richtersveld Community and others 2004 (5) SA 460 (CC)

Shilubana and Others v Nwamitwa 2009 (2) SA 66 (CC)

Duvenage v Duvenage 1936 EDL 147

Ex parte Vermaak 1977 (2) SA 129 (N)

Attorney-General of the Gambia v Jobe [1985] LRC (Const) 556 (PC)

Turffontein Estates Ltd v Mining Commissioner, Johannesburg 1917 AD 419

Other authorities

John L Comaroff and Simon Roberts Rules and Processes: The Cultural Logic of Dispute in an African Context (University of Chicago, 1981)

Gulbrandsen Agro-pastoral production and communal land use: A socio-economic study of the Bangwaketse (1980, University of Bergen) p 50: published jointly with the Rural Sociology Unit of the Ministry of Agriculture, Botswana.