

BEFORE DR. DINGAKE J

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

CASE NO: MAHLB-000836-10

In the matter between:-

EDITH MOSADIGAPE MMUSI 1<sup>st</sup> Applicant

BAKHANI MOIMA 2<sup>nd</sup> Applicant

JANE LEKOKO 3<sup>rd</sup> Applicant

MERCY KEDIDIMETSE NTSHEKISANG 4<sup>th</sup> Applicant

And

MOLEFI SILABO RAMANTELE 1<sup>st</sup> Respondent

THE PRESIDING OFFICER, CUSTOMARY COURT OF APPEAL 2<sup>nd</sup> Respondent

(Herein represented by the Attorney –General of Botswana)

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THE 1<sup>st</sup> RESPONDENT'S HEADS OF ARGUMENT

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## Introduction

1. The factual background on which the applicant based its case has already been outlined in the Applicants' Head's of arguments and the same shall not be repeated hereunder. [see pages 4-6 of the applicant's bundle]
2. The applicant's avers that the rule of male primogeniture in the context of customary law of inheritance, which permits only male offspring from interstate succession violating section 3(a) of the constitution, this being the equality section. [pages 3,12 and 13 of the applicant's bundle]
3. Customary Laws of inheritance [especially the principle of male primogeniture in the context of inheritance] has been a contentious issue in many jurisdictions since the advent of human rights.
4. The right to equality has often been described as the most difficult right-a right that often promises more than it can deliver and tends to trouble the boundary between the judiciary, the legislature and the executive<sup>1</sup>.
5. Even though constitutions of different jurisdictions provide for the right to equality laid out in almost similar wording, importing the interpretation of this right as applied in those jurisdictions without any adaptations would result in according such a right a distorted meaning, totally removed from the circumstances of our jurisdiction.
6. The meaning of equality in any jurisdiction is influenced by the historical, socio-political and the legal conditions of the society concerned<sup>2</sup>. In defining equality due regard should be given to what is actually practised in the community rather than what is written as being practised.

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<sup>1</sup> S Woolman et al, Constitutional Law of South Africa at page 35-2. See also B McLachlin 'Equality: the most difficult right' (2000) 14 The Supreme Court Review 17.

<sup>2</sup> S Woolman supra at page 35-2.

7. Unlike many societies in different jurisdiction, our society is not marked by race and class inequalities; however gender inequalities are still visible albeit only in specific areas. The right to equality in Botswana should be viewed in light of this background.
  
8. We submit that in the area of inheritance in Botswana the legislator has introduced legal reforms in the form of statues<sup>3</sup> which put women's right to inheritance in respect to the distributable part of the deceased's estate almost on par with that of man and where there are inequalities these are justifiable.
  
9. Like all other rights, the right to equality is not an absolute right but limited where justifiable. The limitation of the right to equality under the Botswana Constitution is provided for under the equality clause. A differentiation between individuals does not automatically mean that section 3(a) has been violated because that differentiation might be justifiable as provided for under the constitution.
  
10. We submit that before an analysis as to whether the rule of male primogeniture violates section 3(a) of the constitution is conducted a detailed analysis and clear understanding as to what this rule encompass, how is applied in practise and whether it forms part of our customary law of inheritance.

The Principle of Male Primogeniture: What is and how is it applied in Practise?

11. Male primogeniture is defined as

*"The common-law right of the first born son to inherit his ancestor's estate to the exclusion of younger siblings".<sup>4</sup>*

<sup>3</sup> Abolition of Marital Power Act

<sup>4</sup> Bryan A. Garner (ed), Black's Law Dictionary, 8<sup>th</sup> Edition at page 1230.

12. In the context of customary law of inheritance male primogeniture can be defined as the right of the first born son to inherit his ancestor's estate to the exclusion of younger siblings. In general it is a gender based principle which gives woman less access to economic opportunities that arise from inheritance than men.
  
13. The general rule is that only a male who is related to the deceased qualifies as an interstate heir. Women do not participate in the interstate succession of the deceased's estates. In a monogamous family, the eldest son of the family head is his heir. If the deceased is not survived by any male descendants, his father succeeds him. If his father also does not survive him, an heir is sought amongst the father's male descendants related to him through the male line.
  
14. Jourbert *et al*<sup>5</sup> outline the principal laws for single family succession based on the principle of male primogeniture i.e. the case of a deceased family head leaving one wife and only legitimate children, as follows:
  - a) *The successor of the family head is the eldest son, if he predeceases the family head, the eldest son's senior male descendant (through the male lineage),*
  
  - b) *If the eldest son has no such male descendants, then the second eldest son of the family head or his senior male descendant.*
  
  - c) *If the second eldest son also has no male descendant, then the third eldest son of the family head or, if he predeceases the family head, his senior male descendant; and so forth through the other sons of the family head according to age and their senior male descendants. The principle of primogeniture is applied throughout.*

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<sup>5</sup> The law of South Africa, Volume 32 at page 148.

- d) *If a kraal head dies without leaving any male descendants alive, his father will be the heir.*
- e) *If his father also predeceases him, then the family head is succeeded by his father's eldest brother from the same mother or, if he fails, the senior male descendants of that brother according to the principle of primogeniture.*
- f) *If the family head's eldest brother predeceases him and also fails to leave male descendant, the family head's second eldest brother of the same mother succeeds, or if he predeceases the kraal head, his male descendants, and so on, through all the brothers of the family head and their male descendants in order of seniority.*
- g) *Falling the above, the eldest half brother of the family or his senior male descendants succeed according to the principles above.*
- h) *In default of any of the above, the grandfather on his father's side is the heir.*
- i) *If the grandfather predeceases the family head, then the eldest brother of the family head's father, or his senior male descendants, and so on through all the brothers and half brothers and the applicable male descendants as stated above, will succeed.*
- j) *If the grandfather and his brothers predecease the family head and leave no male descendants in the same order of primogeniture will succeed.*
- k) *If all the known male relatives of the family heads have so been exhausted, the inheritance devolves upon the paramount chief of the family head's tribe, who then also acts as guardian of the females in respect of whom the family head was the guardian.*

*If the tribe to which the deceased belonged has no paramount chief, then the*

*property devolves upon the state president as supreme chief of blacks of South Africa.*

15. In terms of the principle of Male primogeniture

7.1 The eldest male descendent inherits all the assets of the deceased to the exclusion of all his siblings irrespective of gender or sex.

7.2 as seen from the above analysis by Joubert<sup>6</sup>, females are totally excluded from inheriting from the deceased in terms of the principle of male primogeniture

7.3 if there are no male descendants or male relatives of the deceased his estate is inherited by the Paramount chief of the Family head's tribe.

7.4 In cases of married persons the wife is prohibited from inheriting from the husband under customary law in terms of this principle.

7.5 Extra-marital children are excluded from inheriting as interstate heirs from their fathers.

16. The principle of male primogeniture has been applied in many African countries as a principle for determining succession under customary law.<sup>7</sup> In countries such as South Africa this principle has been declared unconstitutional.<sup>8</sup>

Does the principle of male primogeniture form part of Nqwaketse customary law in the context of inheritance?

<sup>6</sup> *Supra*.

<sup>7</sup> Some of the countries where this principle was applied include but are not limited to South Africa, Kenya and Nigeria.

<sup>8</sup> *Bhe and other v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC).

17. Customary law differs from one tribe to another. In *Letsholo v Sete*<sup>9</sup> the court held that the customary law to be applied in a case is the customary law as it was understood and practised in the area in which the parties lived.
18. According to Tswana customary law, the family home is either inherited by the first born or the lastborn male child depending on the tribe from which they belong.
19. In the case which is the subject matter of this application, the Customary Court of Appeal held that in Sengwaketse culture and traditions , 'if the inheritance is distributed, the *family home* [my emphasis] is given to the last born child'.
20. We submit that according to Ngwaketse culture and traditions the family home is inherited by the last born male child of the deceased. The rest of the inheritance is distributed among his siblings.
21. We submit that under Ngwaketse customary law there is no blanket ban on women inheriting interstate nor are the submissions of the applicants that only the male offspring can inherit interstate under the customary law supported as such is not the position under Ngwaketse customary law.[see paragraph 29 on page 13 of the Plaintiff's bundle]
22. We submit that the Customary Court of Appeal did not apply the principle of male primogeniture in awarding the family home to the last born male descendant of the deceased but applied Ngwaketse customary law, which applies different principles from those applied under the Principle of Male Primogeniture in the context of customary law inheritance.[see paragraph 28 on page 13 of the bundle]

Does the principle of male primogeniture form part of Botswana customary law?

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<sup>9</sup> [1998] BLR 676.

23. Schapera provides that:
- “The manner in which property is inherited after the death of the owner depends both upon his marital condition and sex, and upon the nature of the property. The general rule regarding the latter is that sons inherit cattle and other property specifically used by males; while daughters inherit domestic utensils and other goods specifically used by females. Traditional variations occur, however, from tribe to tribe brought in some respects by recent modifications to customary law. **Fields and dwellings occupy a somewhat special position, as they may be inherited by either sons or daughters, according to their allocation [my emphasis]”**<sup>10</sup>*
24. The above quoted passage from a book written as far back as 1938 clearly indicates that the underlying principles of customary law of inheritance in Botswana woman always had a right to inherit interstate from their ceased ancestor.
25. Cases of inheritance under customary law of different tribes have been before our courts and a few of those cases will be dealt with to determine whether the principle of male primogeniture forms part of Setswana customary law as applied in those tribes.
26. In *Kgatwane v Ramohube*<sup>11</sup> the court of Appeal held that
- ‘In Setswana Culture, the deceased’s properties belong to his *children*’ [my emphasis]
27. The court<sup>12</sup> went further and held that the deceased’s brother has no *locus standi* to challenge the high court’s decision in favour of the individuals who inherited the property.
28. The Court of Appeal has also held, applying Kisa Custom, that a woman who lived

<sup>10</sup> A Handbook of Tswana Law and Custom 1994 at page 230.

<sup>11</sup> [2010] 1 BJR 254



with a man as husband and wife but not married is entitled to inherit interstate from the estate of that man.<sup>13</sup>

29. In *Hendrick v Tsawa*<sup>14</sup> the court in dealing with the custom existing in Tshootsha stated that

*"...by and large the children born out of that union are regarded as entitled to the protection and support of their parents until they can fend for themselves. And on the death of their parents, those children are entitled to a share of the estate of the couple; or such part of it as then distributable as an inheritance"*

30. The court has also held that according to Kalanga culture and traditions the estate of the deceased devolved upon his children and the surviving spouse provided that an appropriate share is passed to the mother of the deceased if she is still alive.<sup>15</sup>
31. The above cases clearly indicate that woman are not banned from inheriting interstate under Tswana customary Law and therefore the principle of male primogeniture as applied in the context of customary law of inheritance does not form part of Botswana customary law.

Does the application of the customary law of inheritance violate section 3 (a) of the Botswana constitution?

32. The main question that the court has to deal with is whether the content and the application of the customary law of inheritance violates or goes contrary to the provisions of section 3 (a) of the Botswana constitution, the equality clause.

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<sup>12</sup> *Supra*.

<sup>13</sup> *Tokoyame v Bok* [2008] 1 BLR 384.

<sup>14</sup> [2008] 3 BLR 447.

<sup>15</sup> *Batshabi v Phegelo* [2008] 2 BLR at page 332.

33. Section 3(a) provides:
- 'Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:*
- (a) Life, liberty, security of the person and the protection of the law;*
- (b) Freedom of conscience, of expression and of assembly and association;*
- and*
- (c) Protection for the privacy of his or her home and other property and from deprivation of property without compensation;*
- the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".*
34. Section 3(a) provides for the right to equal protection and equal treatment of the law.<sup>16</sup>
35. The applicants having abandoned their arguments under paragraph 1.3 and 1.4 of the stated case the main issue to be dealt with is whether the content and the application of the customary law of inheritance as currently applied under Ngwaketsi customary law violates section 3 (a)? However for a proper analysis of section 3(a) it is still important to deal with the nexus between section 3 and 15 of the constitution.
36. Any differentiation between the 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. Any other differentiation on the grounds specified under section 3

should be dealt with under section 3. The limitations specified under section 3 apply only to that section and the same applies to those stated in section 15.

37. An analysis under section 3 (a) should proceed as follows:

35.1. Is there differentiation between individuals based on the grounds stated in section 3?

If there is differentiation

35.2. Is the differentiation justifiable because it is designed to ensure that the enjoyment of rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest?

Differentiation under customary law of inheritance:

38. Tswana Customary law of inheritance generally makes a distinction between the distributable part of the deceased's estate and the part of the estate which is reserved for certain individuals.

39. In terms of Ngwaketse culture and traditions, the family home does not form part of the distributable estate but is specifically reserved for inheritance by the last born male unless where otherwise the deceased did not leave any male issue in which case the family home shall form part of the distributable estate.

40. In respect to the family home inheritance is based on gender and position of birth and therefore on the face of it affords a differentiation on the prohibited ground under section 3 triggering a section 3(a) analysis.

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<sup>36</sup> Kamanakao I v Attorney General [2001] 2 BLR at page 54.

Justification: Protection of rights or public interest

41. In *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs*<sup>17</sup> the court defined equality as follows
- "Equality means equal concern and respect across differences. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour"*
42. *Schoeman Malan*<sup>18</sup> when analysing the *Bhe* case<sup>19</sup> states that:
- "The court decided that African females, irrespective of age or status, were entitled to inherit from their parent's estate like any other male person. This did not mean that there might not be instances where differentiation on gender lines may not be justified for purposes of certain rituals as long as it did not amount to any prejudice to any female descendent."*
43. Ngwaketse customary law reserves the family home among all other properties for the last born male child and the rest of the property to devolve among his siblings. The distributable part of the estate is divided among the children of the deceased.
44. What the applicants aver for is not for equal protection of the law but for change of the customary law so as to no longer make a distinction for property reserved for certain individuals and property distributable.

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<sup>17</sup> 2006 (1) SA 524 (CC) at page 60.

<sup>18</sup> Recent developments regarding South African common and Customery law of succession [2007] PER at page 18.

<sup>19</sup> *Supra* fn 8.

45. The family home is inherited by the last born male but in terms of custom it is still available for the use of the other siblings for hosting certain function such as family gathering, weddings and funerals. It is in the public interest that members of the family should at all times irrespective of their gender to always have a place where they can host public events of importance such as funeral and weddings.
46. The other property forming part of the deceased's estate are inherited by the other siblings including the females and these then fall within their separate estates and are not for use by any one of their siblings.
47. We submit that the rights of inheritance of the last born male are less favourable than those of the other siblings since the property that he is entitled to inherit comes attached with a condition that such property should be used in certain circumstances by any one of his siblings.
48. We submit that the inheritance by the last born male of the family home does not specifically amount to any prejudice to any female descendant.

Conclusion:

49. We submit that the principle of male primogeniture in the context of customary law of inheritance does not form part of Tswana customary law in general nor does it form part of Ngwaketse customary law.
50. We submit that the cases advanced and international treaties advanced by the applicant serve little purpose under section 3(a) as they deal mostly with discrimination which has been abandoned by the applicant alternatively they deal exclusively with the principle of male primogeniture in the context of customary inheritance in other jurisdictions, a position which is different from our customary law

of inheritance.

51. We further submit that the distinction made under customary law of inheritance as to the property that forms part of the deceased's distributable estate and individuals who are supposed to inherit certain properties in the deceased's estate does not violate section 3(a) as such division is in the public interest and does not amount to any prejudice specifically to any female descendant.
52. We submit that woman in Botswana have same rights of inheritance under customary law of inheritance as indicated in paragraphs above and the notion that woman are banned from inheriting under customary law is foreign to Tswana customary law. [see paragraph 3 on page 3 of the applicant's bundle]
53. We submit further that the Honourable Court should confirm the decision of the customary court of Appeal as the correct application of the customary law of inheritance and declare also that the current application of the customary law of inheritance is in line with the provisions of the constitution.

DATED AT GABORONE this 24<sup>th</sup> day April 2012

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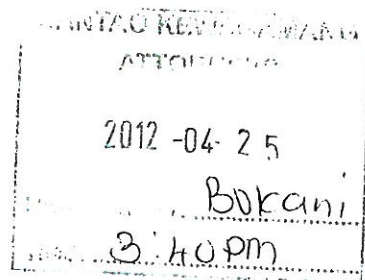
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