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RAMANTELE V MMUSI & OTHERS: SUMMARY OF JUDGMENT

On 3 September 2013, the Botswana Court of Appeal held that four sisters were entitled to inherit the family home under customary law. The case was an appeal from an October 2012 High Court judgment which struck down a customary rule denying women the right to inherit the family home as violating the right to equality under section 3(a) of the Constitution.

The case involved four sisters—Edith Mmusi, Bakhani Moima, Jane Lekoko, and Mercy Ntsehkisang—who argued that they were entitled to the family home as they had used their own finances to renovate the property and had taken care of their mother prior to her death. Their claim was challenged by their half-brother's son, Molefi Ramantele, who argued that under customary law the family home was inherited by the youngest son and thus he was entitled to inherit as his father received the property from the youngest son. The case was initially heard by the Lower Customary Court which found in favour of Ramantele. This was appealed to the Higher Customary Court, which found that the homestead belonged to the sisters in effect. This was appealed to the Customary Court of Appeal which ordered Mmusi to vacate the family home as under the customary law rule it belonged now to Ramantele.

The Court of Appeal with five justices—Judge President Ian Kirby, Judge John Foxcroft, Judge Elijah Legwaila, Judge Isaac Lesetedi, and Judge Seth Twum—issued a unanimous decision on 3 September 2013 authored by Lesetedi J. Kirby JP wrote a concurrence onto which all the others judges signed.

In his decision, Lesetedi J held that the homestead belonged to all of Silabo's and Thwesane's children, which effectively meant Edith and her sisters inherited the homestead. Lesetedi J further ordered them to determine who among them would take care of the home on behalf of the others. This order had the effect of setting aside the order of the High Court and reinstating the order, with a small variation of the Higher Customary Court.

First, Lesetedi J noted that for Molefi to succeed he had to satisfy all of the following six requirements:

1. He had to show that Banki, the youngest-born son of Silabo and Thwesane did inherit the property from his parents.
2. That such an inheritance "to the extent that it unfairly excluded" Edith and her sisters was in line with Ngwaketse customary law.[1]
3. That if the custom was that the youngest-born son inherits the family home, that he was then entitled to do with the home as he pleases without regard to his siblings.
4. This customary rule was not "incompatible with the provisions of any written law or contrary to morality, humanity or natural justice" as required under the CLA.[2]
5. That the customary rule was also constitutional.
6. Finally, if he was able to show all the above requirements, Molefi would then have to show that there was an agreement between Banki and his father giving his father ownership over the property.

[1] *Ramantele v Mmusi and Others*, CACGB-104-12, para 43.
[2] Section 2, Customary Law Act Chap 16:01.

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Lesetedi J held that even on the first requirement—that Banki inherited the property from his parents—there was no evidence that distribution of Silabo's and Thwesane's homestead to Banki occurred. Based on that finding alone, he held that Molefi's appeal failed.

However, Lesetedi J continued interrogating the issue and provided a number of clear far-reaching principles with respect to customary law. First, he noted that customary law is rarely inflexible, stating that customary law "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".[3] Indeed, in this case he pointed out that there was significant disagreement among the customary courts in this case as to who should inherit the homestead. Lesetedi J argued that the customary rule calling for the inheritance of the family home to the youngest-born son was based on the view that the youngest son never leaves the parents' home except when he marries or is banished. In this case, Lesetedi noted that Banki had long left his parents' home and that there was undisputed evidence before the High Court that he was indeed banished.

He further outlined how to ascertain the content of customary law stating that one must look to the prevailing societal ambience of the concerned community, including looking at contemporary records, recent case studies and oral evidence. In applying this to determining whether it was the Ngwaketse customary rule to have the youngest born son inherit the homestead, Lesetedi J found that there was maneuverability in its application. He noted that in an account of the Ngwaketse customary law thirty years ago cited by Edith and her sisters, more and more of the homesteads were going to unmarried women. Lesetedi J further noted that in the intervening thirty years a lot had changed, including "the Constitutional values of equality before the law, and the increased leveling 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".[4] Based on that he concluded 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."[5]

Second, Lesetedi J held that for a customary rule to actually be a customary law, it would have to meet the definition of customary law as provided under the CLA. This would require the customary rule not to be "inconsistent with the values of or principles of natural justice…unconscionable either of itself or in its effect…inhuman…[and] applied in accordance with the set our principles of morality, humanity or natural justice with the object of achieving justice and equity between the disputants".[6]

In applying this test to the situation at hand, Lesetedi J held applying the rule in this case would result in denying inheritance to those children who developed part of the homestead in order to take care of their mother and grant inheritance to a child who provided no assistance. Lesetedi J

[3] *Ramantele*, para 77.
[4] *Id*. at para 80.
[5] *Id.*
[6] *Id.*at para 49.

found that this would go "against any notion of fairness, equity and good conscience" and thus did not meet the definition of customary law under the CLA.[7]

Finally, Lesetedi J discussed how courts should go about determining whether a customary law is constitutional. He outlined three key principles of constitutional interpretation. First, laws should only be declared unconstitutional if there is no way of reading them to be in line with the Constitution. Second, rights must be given broad and generous interpretation. Third, limitations on rights should be interpreted narrowly.

With specific reference to the relationship between sections 3 and 15 of the Constitution, Lesetedi J rejected the High Court's finding that section 3 provided rights separate from section 15 and thus was not limited by the exemptions outlined under section 15(4). Instead, Lesetedi J held that section 3 was an umbrella provision under which section 15 was subordinate. Furthermore, Lesetedi J noted that any limitations outlined in section 15, among others, would themselves be limited by those outlined in section 3. Thus, he reasoned a court must assess whether the particular limitation on a specific right under the Constitution is justifiable in that it either prejudices the freedoms of others or is in the public interest. In particular he stated: "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."[8]

Kirby JP wrote a concurrence to which all the judges signed on. In his concurrence, Kirby JP reaffirmed many aspects of Lesetedi J's judgment, including the view that customary law is flexible and evolutionary and that if a case can be resolved without reaching the constitutional issue then it should be done. Kirby JP also noted that it would be rare for courts to be faced with determining whether a customary law is constitutional as courts will first have to determine whether the customary law is in line with the CLA which provides that customary law must be compatible with morality, humanity and natural justice. He further held that a court would have to apply the customary law to the particular facts of the case "against the benchmarks of justice, equity and good conscience."[9]

In this case, Kirby JP argued that the court would need to look at the situation of the last-born son, including whether he lives in the house and whether he cared for his parents; the size of the estate; the lifestyle of the heirs; the situation of the last-born son's siblings; and the wishes of the deceased. Based on that, he found denying Mmusi and her sisters the homestead would be manifestly unjust.

With respect to other customary rules which categorically discriminate against women, Kirby JP held that "any customary law or rule which discriminates in any case against a woman unfairly solely on the basis of her gender would not be in accordance with humanity, morality or natural

[7] *Ramantele*, para 50.
[8] *Id*. at para. 72 (emphasis in original).
[9] *Ramantele v Mmusi and Others* (judgment of Kirby JP), para 33.

justice. Nor would it be in accordance with the principles of justice, equity and good conscience."[10]

The full decision of the Court of Appeal can be found at www.southernafricalitigationcentre.org.

[10] *Ramantele* (judgment of Kirby JP), para 36.