

# SOUTHERN AFRICA LITIGATION CENTRE

## MMUSI & OTHERS v RAMANTELE & ANOTHER: SUMMARY OF JUDGMENT

On 12 October 2012, the High Court of Botswana struck down a customary law rule denying women the right to inherit the family home. The case was brought by four daughters who alleged that the customary law rule violated their right to equality under section 3(a) of the Botswana Constitution. The case against the nephew was initially heard by the Customary Court, whose decision was appealed to the Customary Court of Appeal. The Customary Court of Appeal had ordered the women to vacate the family home as under the customary law rule it belonged now to the nephew. This decision was appealed to the High Court.

The decision by Justice Oagile Dingake addressed whether the blanket ban on women violated the right to equality under the Botswana Constitution; the test courts should employ when trying to ascertain whether there was a violation of the right to equality; whether there is any legitimate justification for the inequality of the customary law; and the role of international, regional and comparative law in a court's decision.

Section 3(a) of the Botswana Constitution states that “every person in Botswana is entitled to the fundamental rights and freedoms of the individual that is to say, the right, whatever his 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 ... the protection of the law (emphasis added).”

Botswana also prohibits discrimination under section 15 of its Constitution, but this was not relied on by the applicants as it permits exceptions in the case of customary law. The Court held that section 3(a) provides for a separate basis of rights from section 15.

The Court held that the customary law rule denying women the right to inherit the family home infringed the right to equality, noting the supremacy of the Constitution over all other law including customary law. In reaching its decision, the Court applied the test the South African Constitutional Court laid out in *Harksen v Lane*.<sup>1</sup> In *Harksen*, the South African Court outlined the test for determining whether a certain law or practice infringed the right to equality under section 9 of the South African Constitution. Applying *Harksen*, the Court held that a court should first look to whether the law at issue differentiated between people or categories of people and if so, whether the differentiation has a rational connection to a legitimate governmental purpose. The court should then look to whether the differentiation is on a prohibited ground and if so, then the differentiation on its face is unfair.

In determining whether there was a legitimate government purpose, the Court outlined three considerations that should be taken into account: the first is whether the complainant is a member of a group that has been historically disadvantaged; the second whether the differentiation occurs to achieve an important societal goal; and third, the extent the complaint's fundamental rights have been infringed.

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<sup>1</sup> 1998 (1) SA 300 (CC).

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In applying this test, the Court held that in this case the customary law rule differentiated on the basis of sex and as it was one of the prohibited grounds under section 3(a) such differentiation was unfair. The Court further noted that this customary law rule had the insidious effect of implying that women are inferior to men – a position it found had no place in a democratic society with a Constitution. The Court also noted the impact the denial of inheritance to women had on their right to dignity finding that the law treated women as “inferior and less deserving of respect” than men.<sup>2</sup>

The Court then turned to whether such differentiation is justifiable as permitted under section 3(a), namely that the right to equality cannot prejudice the rights and freedoms of others or that the inequality is in the public interest. The respondents had argued that the differentiation was justifiable on three basis: the courts should be slow to overturn custom; the majority of people in Botswana were not ready for equality; and that though the youngest son would inherit the family home he would be required to make the home available to all the other siblings for use for family gatherings such as weddings and funerals and as such his inheritance was encumbered by this obligation and placed him at a disadvantage.

The Court held that though courts should be slow to overturn custom, they must do so when such custom violates the Constitution. In particular, after a thorough analysis of Botswana and foreign jurisprudence, the Court held that customary rules are not static, and can and must change with the times. The Court relied heavily on the South African Constitutional Court’s decision in *Bhe v Magistrate, Khayelitsha*,<sup>3</sup> and in particular on the South African Constitutional Court’s view that customary law must change to respond to changes in family structure and revised family structures. The Court also referred to the seminal case in Botswana of *Dow v Attorney General*,<sup>4</sup> where the Appeal Court held that “custom and tradition are never static; they have always yielded to express legislation and the pre-eminence of the Constitution.”<sup>5</sup>

The Court found that the consequence of the customary rule was that women had limited inheritance rights in comparison to their male siblings and that this meant that daughters could be evicted from their family home. The Court held that “[t]he law [at issue] is biased against women... This gross and unjustifiable discrimination cannot be justified on the basis of culture... It cannot be an acceptable justification to say it is cultural to discriminate against women... Such an approach would... amount to the most glaring betrayal of the express provisions of the Constitution and the values it represents... [the law at issue] has no place in a democratic society that subscribes to the supremacy of the Constitution---a Constitution that entrenches the right to equality.”

The Court also unequivocally rejected the view that a declaration of unconstitutionality would be against the public interest as public opinion was not in support of equal rights for women, stating that “[t]his court also rejects outright any suggestion... that this court must take into

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<sup>2</sup> Mmusi, para 71.

<sup>3</sup> 2005 (1) SA 580 (CC).

<sup>4</sup> 1992 BLR 119.

<sup>5</sup> Mmusi, para 98.

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account the mood of society in determining whether there is violation of constitutional rights as this undermines the very purpose for which the courts were established.”<sup>6</sup>

Finally, with respect to the role of international, regional and comparative law, the Court noted that though not binding international, regional and comparative law can offer useful guidance to courts when assessing the nature and scope of constitutional rights. Indeed, the Court relied on Botswana’s international and regional law obligations as well as statements made by Botswana to international bodies. In addition, the Court highlighted numerous cases from Ghana, Kenya, Tanzania, India, Nigeria, and South Africa all which rejected customary laws discriminating against women.

The Court concluded stating that “[a] large number of the people of this country may not be conscious of their rights. Those who are conscious may lack resources to litigate. If it so happens that they have the fortune to approach the court; and their complaint has merit, then it is the sacred duty of this court to protect their rights at all costs”.<sup>7</sup>

The full decision of the High Court of Botswana can be found at [www.southernafricalitigationcentre.org](http://www.southernafricalitigationcentre.org)

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<sup>6</sup> Mmusi, para 197.

<sup>7</sup> Mmusi, para 216.