

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Bhe and Others v The Magistrate, Khayelitsha and Others

Case CCT 49/03

Shibi v Sithole and Others

Case CCT 69/03

*South African Human Rights Commission and Another v
President of the Republic of South Africa and Another*

Case CCT 50/03

Date of hearing: 2-3 March 2004

Decided on: 15 October 2004

MEDIA SUMMARY

*The following media summary is provided to assist in reporting this case and is not binding on the
Constitutional Court or any member of the Court*

These three cases concern a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as constitutional challenges to section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and section 1(4)(b) of the Intestate Succession Act, 81 of 1987. The Constitutional Court today upholds the challenges, strikes down the impugned statutory provisions and regulations, and puts in place a new interim regime to govern intestate succession for black estates.

The first two cases (the *Bhe* and *Shibi* cases) are applications for confirmation of orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. Both Courts found section 23(10)(a),(c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be

unconstitutional insofar as it excludes from the application of section 1 of that Act any estate or part of any estate in respect of which section 23 of the Black Administration Act applies.

The application in the *Bhe* case was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. It was contended that the impugned provisions and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate of their late father. In the *Shibi* case for similar reasons, Ms Shibi was prevented from inheriting the estate of her deceased brother.

The South African Human Rights Commission and the Women's Legal Trust were permitted direct access to the Court in the third case which was brought in the public interest, and as a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture.

The Commission for Gender Equality was admitted as *amicus curiae* and, together with the Minister for Justice and Constitutional Development (who was a respondent in each of the cases), presented oral and written submissions.

Langa DCJ, writing for the majority of the Court, holds that, construed in the light of its history and context, section 23 of the Black Administration Act is an anachronistic piece of legislation which ossified "official" customary law and caused egregious violations of the rights of black African persons. The section created a parallel system of succession for black Africans, without sensitivity to their wishes and circumstances. Section 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in section 9(3) and dignity in section 10 of our Constitution, and therefore must be struck down. The effect of this order is that not only are the substantive rules governing inheritance provided in the section held to be inconsistent with the Constitution, but also

the procedures whereby the estates of black people are treated differently from the estates of white people are held to be inconsistent with the Constitution.

Langa DCJ then considers the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property. He holds that it discriminates unfairly against women and illegitimate children. He accordingly declares it to be unconstitutional and invalid.

He holds that while it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, that remedy is not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replacable on a case-by-case basis. However, he holds that an interim regime to regulate intestate succession of black persons is necessary until the legislature is able to provide a lasting solution. As such, the Court orders that estates that would previously have devolved according to the rules in the Black Administration Act and the customary law rule of male primogeniture must now devolve according to the rules provided in the Intestate Succession Act. Special provision is made in the order for polygynous unions.

The order of this Court in respect of the rules of inheritance is made retrospective to the 27 April 1994, but will not apply to completed transfers of ownership, except where an heir had notice of a challenge to the legal validity of the statutory provisions and the customary law rule of male primogeniture.

In relation to the administration of estates, the Court orders that in future deceased estates which would have previously been administered by magistrates in terms of the Black Administration Act, must now be administered by the Master of the Supreme Court in terms of the Administration of

Estates Act, 66 of 1965. However the order of the court in respect of the administration of estates is not made retrospective, so estates currently being administered by magistrates in terms of section 23 of the Black Administration Act will continue to be administered by those magistrates. From the date of this judgment, new estates will be administered by the Master of the High Court in terms of the Administration of Estates Act.

In a partially dissenting judgment, Ngcobo J agreed with Langa DCJ that section 23 of the Black Administration Act together with the regulations made under that Act, and section 1(4)(b) of the Intestate Successions Act violate the right to equality and the right to dignity and are therefore unconstitutional. He also agrees that the principle of male primogeniture discriminates unfairly against women. He holds, however, that the principle of primogeniture does not unfairly discriminate against younger children. He stresses the fact that one of the primary purposes of the rule is to determine someone who will take over the responsibilities of the deceased head of the family. These responsibilities include the obligation to maintain and support the minor children and other dependants of the deceased. They also include the power to control and administer the family property on behalf of all family members. He also stresses the fact that an indlalifa does not become the owner of the property but holds the property on behalf of all family members.

Ngcobo J also holds that courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality. He holds therefore that the principle of primogeniture should not be struck down but instead should be developed so as to be brought in line with the right to equality, by allowing women to succeed to the deceased as well.

As the striking down of section 23 and the relevant regulations would result in the absence of choice of rules to determine when indigenous law is to be applied, Ngcobo J holds that Parliament must

make laws governing the application of indigenous law. He accepts that pending the enactment of that law, an interim measure must be put in place to regulate succession. He finds that the application only of the Intestate Succession Act may, in certain circumstances, lead to an injustice. This is so because the provisions of this statute are inadequate to cater for the social settings that indigenous laws of succession were designed to cater for, in particular, the transfer of the obligation to look after minor children and other dependants of a deceased. He also finds that the application of the indigenous laws of succession may be inappropriate in certain circumstances. He therefore holds that pending the enactment of the relevant law by Parliament, both the indigenous laws of succession and the Intestate Succession Act should be applied subject to the requirements of fairness, justice and equity. He holds that in the interim, the question of which system of law should be applied must be determined by agreement among family members. However, where there is a dispute, such a dispute must be resolved by the magistrates' court having jurisdiction.