



CONSTITUTIONAL COURT OF SOUTH AFRICA

**Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Others v Sidwell Nwamitwa
(The Commission for Gender Equality, the National Movement of Rural Women and
the Congress of Traditional Leaders of South Africa as amici curiae)**

**CCT 03/07
[2008] ZACC 9**

Date of Judgment: 4 June 2008

MEDIA SUMMARY

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

Today the Constitutional Court handed down judgment in the appeal by Ms Shilubana against a judgment and order of the Supreme Court of Appeal. The appeal concerned a dispute between Ms Shilubana and Mr Nwamitwa over the right to succeed Mr Nwamitwa's father, Richard Nwamitwa, as Hosi (Chief) of the Valoyi traditional community in Limpopo.

In 1968 Ms Shilubana's father, Hosi Fofeza Nwamitwa, died without a male heir. Because customary law at the time did not permit a woman to become Hosi, Ms Shilubana did not succeed him as Hosi although she was his eldest child. Hosi Fofeza was instead succeeded by his brother, Richard Nwamitwa. During 1996 and 1997 the traditional authorities of the Valoyi community passed resolutions deciding that Ms Shilubana would succeed Hosi Richard, since in the new constitutional era women were equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, Mr Nwamitwa interdicted Ms Shilubana's installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as Hosi Richard's eldest son, was entitled to succeed his father.

Mr Nwamitwa subsequently sought a declaration in the Pretoria High Court that he is the rightful successor to Hosi Richard. Both the Pretoria High Court and the Supreme Court of Appeal ruled in favour of Mr Nwamitwa.

Van der Westhuizen J, writing for a unanimous Court, held that the High Court and the Supreme Court of Appeal failed to acknowledge the power of the traditional authorities to develop customary law. In seeking to determine customary law, courts must consider the past practice of the community. Section 211(2) of the Constitution however requires courts to respect the right of traditional communities to develop their own law. Courts, after receiving evidence from the parties of the present practice of traditional communities, must acknowledge developments if they have occurred. Finally, courts must balance the need for

flexibility and the imperative to facilitate development against the value of legal certainty and respect for vested rights. Relevant factors for this balancing test include the nature of the law in question, in particular the implications of the change on constitutional and other legal rights, the process by which the alleged change occurred or is occurring, and the vulnerability of parties affected by the law.

Applying this test, the Court found that the succession to the leadership of the Valoyi had operated in the past according to the principle of male primogeniture. However, the traditional authorities had the authority to develop customary law. They did so in accordance with the constitutional right to equality. The value of recognising the development by a traditional community of its own law in accordance with the Constitution was not outweighed by the need for legal certainty or the protection of rights. The change in customary law did not create legal uncertainty and Mr Nwamitwa did not have a vested right to be Hosi.

The Court concluded that the traditional authorities had the authority to develop their customary law under the Constitution and that Mr Nwamitwa did not have a right to be declared Hosi. The appeal was upheld.