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| ***Advanced Indigenous Law* LCP4804**  **October/November 2020** |

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**Abbreviations**

**RCMA** = Recognition of patrimonial marriages act 120 of 1998

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# **Question 1**



In terms of *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)( *imvume)* and *Mabuza v Mbatha* 2003 (7) BCLR 43 (C) *(ukumekeza)* the observance of these customs is no longer essential in the urban and different environments in which today’s conditions obtain. Transformation means that once the requirements of section 3(1) of the Act are observed the customary marriage will be valid. Thus the enjoyment of the relevant traditions has been reduced to the level of nice festivities to grace the wedding, but no longer essential requirements for a valid customary marriage. You must note that proof of these festivities may still help the court in a difficult case where evidence is needed to define the occasion as a customary marriage. In such a case it would be difficult for a party who admit *imvume/ukumekeza* were held, to then dispute that the occasion was a customary marriage wedding *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)*,* The court held:

Once it is clear that the negotiations have taken place, the next inquiry, applying the Act is whether there are any factors that show that the marriage was “entered into” or “celebrated”.

The validity of a customary marriage was impuned on the basis that the traditional *imvume* ritual, the Zulu variation of *ukumekeza* (Swazi), for integrating the bride into the groom’s family, had not been observed before the death of the husband. Tshiqi J examined the requirements for be a valid customary marriage as laid down in section 3 of the Recognition of Customary Marriages Act.

On the basis of these requirements the judge concluded that customary marriage has evolved over the years, and that this evolution has been accepted by the South African courts. The judge then rejected the pre-transformation “official” version of customary law which held that the nonobservance of the *imvume* ritual was fatal to the validity of a customary marriage. The judge accordingly approved the validity of the customary

marriage, confirming the bride’s averment that the *imvume* practice was not an essential requirement for the validity of her customary marriage.

The case of *Motsoatsoa v Roro* All SA 324 (GSJ) is important for emphasising the value of integration of the bride to mark the transfer from one family to another. The case is important for understanding the meaning of 'entered into' or celebrated in section 3(1)(b) of the Act. What was in issue here was lack of handing over of the bride. The question was:

can the woman hand herself over? *Fanti v Boto and Others* 2008 (5) SA 405 (C) also does the same thing but focuses on the importance of involvement of the two families in the formation of the customary marriage. P a g e 18 | 39

The question was: can the husband decide, without the involvement of his in-laws, that their daughter is now his wife? ££££££££££££££££££££££££££*Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) where it was similarly held that no-observance of the *imvume* tradition is no longer essential. Transformation means that once the requirements of section 3(1) of the Act are observed the customary marriage will be valid. Thus the enjoyment of the relevant traditions has been reduced to the level of nice festivities to grace the wedding, but no longer essential requirements for a valid customary marriage. Yet proof of these festivities may still help the court in a difficult case where evidence is needed to define the occasion as a customary marriage. In such a case it would be difficult for a party who admits that *imvume* or *ukumekeza* were held, to then dispute that the occasion was a customary marriage wedding. This means that, whilst *ukumekeza* or *imvume* are not essential requirements for customary marriages, their performance is uniquely observed in those marriages. £££££££££££££££££ ***Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported)** The court held that even though the integration of the bride might not have been observed, but the spouses themselves showed by the way they related to each other that they accepted that they were husband and wife. Therefore, in a difficult case, where, after the negotiations have been completed, the requirements of "entered into or celebrated" cannot be proved, the behaviour of the spouses towards each other becomes important.$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$$ See also *Maluleke v Minister of Home Affairs* Case no 02/24921 [2008] ZAGPHC 129 (9 April 2008) (unreported) where the court held that even though the integration

of the bride might not have been observed, but the spouses themselves showed by the way they related to each other that they accepted that they were husband and wife. Therefore, in a difficult case, where, after the negotiations have been completed, the requirements of "entered into or celebrated" cannot be proved, the behaviour of the spouses towards each other becomes important.

*Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC)) is authority for jettisoning the discredited apartheid rule entrenched in section 23 of the Black Administration Act (BAA), which preferred males to females in matters of succession. As a result, section 23 of the BAA, the principle of male primogeniture; the distinction between legitimate and illegitimate children were all declared unconstitutional and removed from customary law. The court went on to incorporate the provisions of the Intestate Succession Act, 81 of 1987, dealing with child portions. After making the necessary adjustments, all the children of the deceased, legitimate and illegitimate, together with all his widows/widowers must get child portions. **Textbook pages 173-182**

This is an extract from *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC)….(10). Students must explain the purpose of indigenous traditions of succession, taking into accounts the successor’s rights and responsibilities.

The most important case in respect of the challenge to the principle of male primogeniture was *Bhe*. At the time when the case was heard, the SALRC had already made certain proposals relating to the customary law of succession. A customary marriage at that time was recognised for all legal purposes as a valid marriage and the Commission had proposed that wives of these marriages be regarded as intestate heirs on the same basis as wives of civil marriages. The children of such marriages, irrespective of sex and age, also had to be recognized on the same footing as children of civil marriages for purposes of intestate succession. According to these proposals, the Intestate Succession Act had to be amended to include a spouse or spouses of a customary marriage and all children as intestate heirs. The Maintenance of Surviving Spouses Act also had to be amended to extend the meaning of the term ‘spouse’ to include a spouse or spouses of a customary marriage.

*Bhe* followed a decision by the Magistrate of Khayelitsha and, on appeal, that of

the Cape High Court. The Cape High Court declared the provisions of the BAA which dealt with male primogeniture unconstitutional and invalid. The Court also declared P a g e 9 | 39

unconstitutional provisions of the Intestate Succession Act in so far as they excluded from their operation people whose estates devolved in terms of the BAA.

Another case which declared male primogeniture unconstitutional was *Shibi v*

*Sithole*. Here also section 23 of the BAA and regulation 2(*c*) of the Regulations for

the Administration and Distribution of Intestate Estates of Blacks were declared

unconstitutional. In both cases, the Courts ordered that the distribution of intestate

estates of black people had to be governed by the Intestate Succession Act.

The judgments in *Bhe* and *Shibi* were placed before the Constitutional Court for confirmation. The Constitutional Court heard these cases at the same time because they concerned the application of the rule of male primogeniture in the customary law of succession. The case of *Bhe* therefore concerned an application for the confirmation of an order of the constitutional invalidity relating to the application of the rule of male primogeniture and the relevant provisions of the BAA as well as those of the Intestate Succession Act.

The Constitutional Court held that section 23 of the BAA and its regulations were

manifestly discriminatory in that they violated the right to equality, the right to dignity and children’s rights.

The Court held that the customary law rule of male primogeniture was unfairly discriminatory against women, children of the deceased as well as extramarital children and declared the rule unconstitutional. The Court thus found that the discrimination brought about by the application of this rule could not be justified in terms of section 36 of the Constitution. Consequently, the Court ordered that intestate estates that had previously devolved in accordance with customary law had now to devolve in terms of the rules provided for in the Intestate Succession Act (as amended by the Court). In this regard, the wife or wives in a customary marriage as well as all their children, irrespective of age and sex, would all be intestate heirs. The Court thus declared section 23 of the BAA, regulation 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks as well as section 1(4)(*b*) of the Intestate Succession Act, in as so far as it excluded from its application any estate or part thereof which is governed by customary law, unconstitutional. The order was in force until the matter was corrected by appropriate legislation.

The order of the Constitutional Court was made retrospective to 27 April 1994, that

is, the date of the coming into operation of the interim Constitution with two exceptions. First, the declaration of invalidity did not apply to any completed transfer of ownership to an heir who had had no notice of the challenge to the validity of section 23 of the BAA and the rule of male primogeniture. Second, the order did not apply to ‘anything done pursuant to the winding-up of an estate in terms of the [BAA], other than the identification of heirs in a manner inconsistent with this judgment.’

**PAUSE FOR REFLECTION**

***Bhe:* opens the space for the development of living customary law**

In addition to invalidating the principle of male primogeniture, the Constitutional Court in *Bhe* ruled that its order to apply the Intestate Succession Act to estates previously governed by customary law did not mean that the relevant provisions of the Intestate P a g e 10 | 39

Succession Act were fixed rules that must be applied regardless of any agreement by all interested parties that the estate should devolve in a different way.

In other words, the Intestate Succession Act did not preclude the possibility of interested parties reaching an agreement requiring the estate to devolve in a different way provided that the agreement was consistent with the provisions of the Act. Presumably, the Court envisaged the agreements complying with the provisions of the Intestate Succession Act in broad terms only as opposed to strictly within the letter of the provisions.

The Court adopted this approach to ensure that, through the agreements, customary law would continue to develop spontaneously. We submit that one of the ways this development could happen would be through agreements of members of local communities, especially members of the deceased person’s family. This would undoubtedly promote the development of the living customary law of succession,

albeit within the broad framework of the Intestate Succession Act. As a result of the judgment in *Bhe* and the recommendations of the SALRC, the legislature enacted the RCLSA.

***Bhe* cases (*Bhe v The Magistrate Khayelitsha* 1998 (3) 2004 (1) BCLR 27 (C), *Bhe v The Magistrate Khayelitsha*; *Shibi v Sithole*; *Human Rights Commission v President of Republic of South Africa* 2005 (1) BCLR 580 (CC)),**

**Facts**

The cases concerned a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as constitutional challenges P a g e 31 | 39

to section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and s. 1(4)(b) of the Intestate Succession Act, 81 of 1987.

The application in Bhe was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. The applicants submitted 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 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 intervened in South African Human Rights Commission and another v President of the Republic of South Africa and another which was brought in the public interest 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.

**Issues for Determination by the Court**

• Section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and s. 1(4)(b) of the Intestate Succession Act, 81 of 1987.

• Section 9(3) and dignity in s. 10 of our Constitution. Administration of Estates Act, 66 of 1965

• Section 9 (3) of the South African Constitution (right to equality)

• Section 10 of the South African Constitution (dignity)

The court was asked for confirmation of the orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. The applications were for confirmation of orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively. Both Courts found s. 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 to be unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be unconstitutional insofar as it excluded from the application of s. 1 of that Act any estate or part of any estate in respect of which s. 23 of the Black Administration Act applied.

**Decision**

The Constitutional Court upheld the challenges, struck down the impugned statutory provisions and regulations, and put in place a new interim regime to govern intestate succession for black estates.

*The Majority*

Deputy Chief Justice Langa, wrote the majority opinion of the Court. He held that, construed in the light of its history and context, s. 23 of the Black Administration Act is an anachronistic piece of legislation which solidified “official” customary law and caused egregious violations of the rights of black African persons. The section created a parallel P a g e 32 | 39

system of succession for black Africans, without sensitivity to their wishes and circumstances. He concluded that s. 23 and its regulations are manifestly discriminatory and in breach of the rights to equality in s. 9(3) and dignity in s. 10 of the South African 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.

He then considered the African customary law rule of male primogeniture, in the form that it had come to be applied in relation to the inheritance of property. He held that it discriminates unfairly against women and illegitimate children. He accordingly declared it unconstitutional and invalid.

The court held 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 was not feasible in this matter, given the fact that the rule of male primogeniture is fundamental to customary law and not replicable on a case-by-case basis.

*Dissenting opinion*

Justice Ngcobo agreed with the majority that s. 23 of the Black Administration Act together with the regulations made under that Act, and s. 1(4)(b) of the Intestate Successions Act violated the right to equality and the right to dignity and are therefore unconstitutional. He also agreed that the principle of male primogeniture discriminated unfairly against women. However, 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, he held that the principle of primogeniture does not unfairly discriminate against younger children. Furthermore Ngcobo J. submitted 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 held 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.

# **Question 2**

***Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC)**

is proof that customary law and common law are equal components of South African law and the time when customary law was viewed with reference to common law was over. The current status of customary law is that of an original and independent system that has its own values and norms.

Names of the parties: *Alexkor v Richersveld Community*

Legal question: The ConCourt was asked whether the claim of indigenous people to their title on indigenous land endures and remains valid after the land had been placed under corporate ownership by a colonial statute; and whether indigenous law should continue being viewed through the lens of the common law.

Reasons for judgment: Indigenous people retain their indigenous title over indigenous land and colonial legislation cannot extinguish that title. The rights of indigenous people over their land must be determined with reference to indigenous law; not common law. Indigenous law is recognised by the Constitution as LCP4804/201/2/2018 distinct legal system which should be viewed with its own lens, not that of the common law.

# Decision of the court: The indigenous title of the Richersveld Community over their indigenous land was confirmed and the appeal by Alexkor was dismissed.

1. In *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) issued a landmark definition of the customary law of the 21st century when it unequivocally stated the jurisprudential equality of customary law and common law and finally jettisoned the repugnancy clause by decrying the previous practice of viewing the former through the lens of the latter. Hence customary
2. law must now be conceptualised through its own normative values and epistemological underpinnings, as opposed to previous practice of having to be consistent with Western standards of propriety…………………………………………(5)

If customary law is applied in terms of the principle developed in *Alexkor Ltd and Another v Richtersveld Community and Others* 2003 (12) BCLR 1301 (CC) (the application of customary LCP4804/201

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law freely from common law lens). According to this case customary law as recognised by the Constitution no longer has to be viewed with the lens of the common law. So, customary law must be viewed from the perspective of its own value system, which requires the maintenance of the lineage of the previous traditional leader in the appointment process. Hence the Act places the responsibility to identify the successor on the shoulders of the royal family. As the royal family has acted, X will most likely succeed.

# **Question 3**



A brief look into history will gives context to the benefit that woman received. Section 22(6) of the Black Administration Act 38 of 1927

Before 1988, civil marriages by black persons were governed by Section 22(6) of the Black Administration Act 38 of 1927. In terms of the Act, black marriages that took place before 1988 were automatically out of Community of Property (i.e. with the exclusion of profit and loss). If a couple wished to be married in Community of Property, they were required to declare this, jointly, before a magistrate, Bantu affairs commissioner or marriage officer. Such declaration had to be made at least one month prior to the marriage ceremony. This was, however, only possible where a husband was not already a party to a customary union with another woman. Section 22(6) was repealed in 1988 by the amendment of the Act, bringing black marriages in line with civil marriages recognised under the Marriages Act of 1961; i.e. black marriages are now automatically in Community of Property.

The Question before the court was whether Section 7(6) of **RCMA** imposed on the husband the requirement of the 1st wife to enter into a valid 2nd marriage, even though this section only deals with the matrimonial system used in a customary marriage.[[1]](#footnote-1) The court decided that the marriage is indeed a valid marriage although the matrimonial system that will be used is a marriage out of community of property as consent was not sort.[[2]](#footnote-2)

The appellant’s marriage complies with section 3 of **RCMA** which are: both parties are above the age of 18,[[3]](#footnote-3) they must consent to the marriage being a customary marriage,[[4]](#footnote-4) and the marriage must be negotiated and entered into or celebrated according to customary law.[[5]](#footnote-5)

The court correctly found that S7 (6) and S3 are not related or linked and the context of the act leads to the conclusion that S7 (6) was not meant to invalidate a marriage which complies with S3.[[6]](#footnote-6) The court mentions that the act is intended to protect all women in a polygynous marriage and not only the 1st wife,[[7]](#footnote-7) this complies with the constitutional requirement that all legislation be interpreted in accordance with the spirit and purports of the constitution as well as the bill of rights which prescribes equality and dignity for all. Reading non-compliance to S 7(6) as nullifying a marriage that was concluded in accordance with the provisions of S3 because the husband failed to apply to court (be it due to ignorance or deliberately) in accordance with S 7(6) would violate good faith second and subsequent wife’s right to dignity, fairness, equality and protection afforded by the constitution.[[8]](#footnote-8) The court had sight of the class of woman this interpretation could affect, “they least likely to have knowledge and resources” to comply with S7 (6). So the courts finding will afford these female spouses protection in a polygynous marriage.[[9]](#footnote-9)

The right to dignity of the 2nd and subsequent wife/s would be prejudiced

The interpretation that nullifies a marriage if S7(6) is not complied with will perpetuates inequality and disadvantage to mean non



Text



The potential marriage would be governed by S23 of the Black Administrative act 38 of 1927

One of question the appeal had to answer was whether the Magistrates court was correct in finding that a marriage did indeed exist in the absence of both the 2 party’s father’s participation in the lobola negotiations, they were conducted between the prospective husband and the mother of the female spouse.

The court found that the father’s participation was not essential because in the case of the groom he was an adult man capable of handling his own affairs in tems of the bride’s mother was found to

The Court accepted the rule of customary law tendered by the respondent to the effect that the bride’s mother had the right in certain circumstances, such as in the absence of the father, to

negotiate the *lobolo* and to consent to the marriage of her daughter

1. *Mabena v* Letsoalo is a case in point where the Court deviated from the standard
2. textbook approach and applied living customary law that recognises what people do
3. in practice. The prospective husband had negotiated the *lobolo* or *bogadi* of his future wife with his prospective mother-in-law. The court accepted this genderneutral practice P a g e 17 | 39
4. as consonant with the Bill of Rights.
5. The Court can also be credited with affirming African values where the husband can be seen as representing his family while the mother-in-law represented her husband’s family. The two families arrived at an agreement that was binding on them in terms of customary law.
6. The court found that the groom was an adult man capable of handling his own affairs, including negotiating his
7. marriage. His father’s participation was therefore not essential. Similarly, the bride’s mother was found to be capable of handling the affairs of her firmly whilst the husband had absconded, including consenting to her daughter’s customary marriage and accepting her

The court held

before the court was whether a woman could negotiate lobola

**Bibliography**

**Acts**

Recognition of patrimonial marriages act 120 of 1998.

**Cases**

Ngwenyama v Mayelane 2012 (10) BCLR 1071 (SCA).

1. Ngwenyama v Mayelane 2012 (10) BCLR 1071 (SCA) (herein referred to as ‘Ngwenyama’) para 1, 5, 6. [↑](#footnote-ref-1)
2. Ngwenyama para 28. [↑](#footnote-ref-2)
3. Recognition of patrimonial marriages act 120 of 1998 (hereafter referred to as ‘RCMA’) S 3(1)(a)(i). [↑](#footnote-ref-3)
4. RCMA S 3(1)(a)(ii). [↑](#footnote-ref-4)
5. RCMA S 3(1)(b). [↑](#footnote-ref-5)
6. Ngwenyama para 23, 37. [↑](#footnote-ref-6)
7. Ngwenyama para 37. [↑](#footnote-ref-7)
8. Ngwenyama para 37. [↑](#footnote-ref-8)
9. Ngwenyama para 37. [↑](#footnote-ref-9)