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

**Name**: Mpumelelo Hlongwane

**ID no.** 8510016038085

**Student number:** 45511209

**Abbreviations**

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

**SCA** =Supreme court of Appeal

**LCC** =Land Claims Court

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# **Question 1**



**Brief History**

In order for use to understand the development of customary law we must briefly examine the development of customary law in South Africa, particularly the areas that relegated the customary law from its primary law status in South Africa and what lead to it being placed as a source of law equivalent to the common law:

* Colonial era (period from 1652 – 1909):

This period sow the dispossession of indigenous people’s land, starting with the Khoisan and eventual the other.

* The Union era (1910 -1947):

What is notable in this period are the remarks of Schreiner JA in *ex parte Minister of Native Affairs: in re Yako v Beyi*. He mentions that the Native Administration Act 38 of 1927 does not give truth to the assumption that native law should be viewed as prima facie applicable between natives, his view was that law applicable to the parties and circumstances should be applied in general unless the native commissioner so fit to apply native law in a particular case

* The apartheid era (1948 – 1990): this period was a continuation of the views of Schreiner JA and the colonial period. Continuation of customary law being subjected to the repugnancy clause
* The Transitional era(1990 - 1996):

This era sow the constitution that priorities equality and promoted customary law to enjoy the same status as customary law. It will be applicable but subject to the constitution of South Africa 1996.[[1]](#footnote-1)

(This applies to all other questions on the development of customary law contained in the question paper)

***Imvume***

This is a custom practiced by amaZulu and amaXhosa and is a form of bringing the bride into the prospective groom’s family which usually involved the slaughtering of a small animal.[[2]](#footnote-2)

**The Recognition of customary marriages act 120 of 1998**

Section 3 of the act, requirements to conclude a valid customary marriage 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 question before the court**

The question was whether the marriage between the defendant and the deceased was valid. The plaintiff contends that there was no *imvume* conducted therefor no valid marriage came into force. The second respondent said the custom of *imvume* is not an essential requirement for concluding a customary marriage.[[6]](#footnote-6)

As in *Mabuza v Mbatha* where the emaSwati custom of *ukumekeza* was not observed, the court in the present case found that the observance of this custom is no longer an important part due to our urbanized and different environment. The court had to interpreter section 3(1)(b) of RCMA

*The marriage must be negotiated and entered into or celebrated in accordance with customary law*

and the issue was not with the negotiation requirement, both parties did not dispute that the negotiation took place. The dispute was with the requirement of the marriage needing to be celebrated. The marriage was not celebrated, when viewing the word in its ordinary meaning. [[7]](#footnote-7)

The court’s focused on the ‘entered into’ requirement of section 3(1)(b) rather that the ‘celebrated’ requirement I agree with. Likening this to a contract which would than merely require the consent of the parties (explicit or tacit) was a in my view correct.[[8]](#footnote-8) The fact that the deceased was living with the defendant at the time of his death, a date was set for the *imvume* ceremony and that the deceased was an adult who was under no obligation to disclose his living with the defendant shows an intention to enter into the marriage and on the strength of this the court found that the was indeed a valid marriage

This judgement demonstrate an evolution of the requirement for *imvume*, it shifts and the willingness to develop customary law this is also evidenced by cases such as *Mabena v letsoalo* which extended the act of negotiating *lobola* to woman as well. [[9]](#footnote-9)

1. –

*The Human Rights Commission v President of the Repuplic of South Africa 2005 (1) BCLR 580 (CC)* and the present case (*Bhe v Magistrate Khayelisha BCLR (1) (CC)* herein referred to as ‘Bhe case’) sow section 23 of the *BAA* rule that prefers males to females in matters of succession (male Primogeniture), the difference between legitimate and illegitimate children declared unconstitutional. The court

This was a constitutional challenge on the male Primogeniture in the African customary law of succession and section 23 of the *Black Administration Act 38 of 1927* (herein referred to as ‘BAA’) which favored males.[[10]](#footnote-10) The case had 2 other cases to be heard included at the behest of the chief justice due to all involving customary law intestate succession:

1. *Bhe v Magistrate Khayelisha BCLR (1) (CC)* (herein referred to as ‘Bhe case’)
2. *Charlotte Shibi v Mantabeni Freddy Sithole and others (herein reffered to as ‘Shibi case’)*
3. *Application for direct access brought by The South African human rights commission and the Woman’s legal center trust.[[11]](#footnote-11)*

**Question before the court**

The court was asked to confirm an order from the Cape High Court in the *Bhe case*,[[12]](#footnote-12) declared unconstitutional *s23 (10(a), (c)* and *(e)* of the *BAA* which informed the system of intestate succession, also included was regulation *S 2(e*) of the Regulation of the *Administration and Distribution of the Estate of Deceased Blacks* these promote and give force to the rule of male primogeniture. This disqualified the daughters of the deceased in the *Bhe case* from inheriting from their father in favor of the deceased father inheriting instead*.[[13]](#footnote-13) Section 1(4) (b) of the intestate Succession Act* was declared unconstitutional.[[14]](#footnote-14)

**Judgement**

The court upheld the challenge and struck down the statutory provisions and regulations, and placed an interim solution that, until these defects are fixed through legislation the distribution of black estates will be governed by *S 1* of the *intestate succession act 81 of 1987*

The provisions are said to violate the following rights of the constitution:

* Human dignity
* The right to equality
* The rights of Children

Male primogeniture comes about as a need for someone who will fill the role of the family head should they die. Someone from the family of the deceased must emerge as the head. The courts advanced sound reasoning in its minority judgement on the matter of the eldest child being given this responsibility (which can be seen to discriminate against the younger children), saying that this gives legal certainty in a possibility of conflicting claims to the position, The responsibility passes on to the next eldest should the eldest not be available.[[15]](#footnote-15) The courts says this person will not be stepping into this position to benefit from the inheritance but will be in a facilitation role of the responsibilities associated with heirship.[[16]](#footnote-16)

The role however was only advanced only males, and cascades down from the eldest son and if they are not available shifts down to the next available eldest son. Should there be no sons this responsibility moves to the father of the deceased, if he is not available it shifts to his other son and seeks sons under that branch of the family.[[17]](#footnote-17) This clearly violates the right to equality and dignity of woman. The rule might have found credence in the system of communal leaving based on reciprocal obligations, but in a modern constitutional state it violates the rights of woman.

*Ngcobo J* in his dissenting opinion reminded the court that it has a constitutional mandate to develop customary law to bring it in line with spirit, purports and objects of the Bill of rights (right to equality). For reasons above mentioned he submitted that Primogeniture should not be invalidated but should be development and only the offending provisions be struck down.[[18]](#footnote-18)

# **Question 2**

**Brief facts**

This is a case that originates from the Land Claims Court (herein referred to as ‘LCC’). The Ritchterveld community (herein refered to as ‘the community’) applied to the LCC under the provisions of the *Restitution of Land Rights Act,* the claim was dismissed. The *SCA* granted leave to appeal and set the LCC’s order and granted relief.[[19]](#footnote-19) The matter was subsequently appealed at the constitutional court with the 1st Appellant being Alexkor (to whom the land in question is registered) and the second being the government.

The LCC confined itself to deciding whether the community met the requirement of S2(1) that states that community was dispossessed of the right to land after the 19th June 1913 as a past racially discriminatory law or practice.[[20]](#footnote-20) According to the LCC the community failed to prove that the dispossession was a result of a discriminatory law or practice and that the community only occupied the land for less that 10 years prior to dispossession.[[21]](#footnote-21)

The SCA found that the community was in exclusive possession of the land prior to the and its annexation by the British Crown in 1847. It held that these rights are similar to those property rights offered by common law and that the community was dispossessed of these rights through a racially discriminatory act or practice that complied with the act.[[22]](#footnote-22)

One of the issues was the law to be applied to events that took place prior to the interim constitution. The court had to also determine the nature of the right to land and whether this right survived annexation[[23]](#footnote-23) the court stated that the rights to land thet the community had and now to be determined must be determined through customary law and not common law. The court eventually found that the community’s right to the land was not extinguished as no steps were taken to extinguish these rights [[24]](#footnote-24)

Another concept that deserves attention in the context of the question at hand is Living customary law (customary law that is seen through the lived experiences of the people), the constitutional assembly committed to protect Africa’s diverse cultures and ensure application of customary law.[[25]](#footnote-25)

After the regonition of customary law by the constitution

# **Question 3**



The deceased entered in terms of Xitsonga law into marriages with 2 woman, the 1st of which was not registered and produced 3 children. Unbeknownst to the 1st wife the deceased concluded another marriage under the RCMA and registered it. Upon his death the 1st wife attempted to register her marriage to the deceased, in the process found out about the 2nd wife, the 1st wife approached the court to invalidate the marriage of the second wife and register her marriage to the deceased.[[26]](#footnote-26)

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.[[27]](#footnote-27) 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.[[28]](#footnote-28)

The appellant’s marriage complies with *section 3* of***RCMA*** which are: both parties are above the age of 18,[[29]](#footnote-29) they must consent to the marriage being a customary marriage,[[30]](#footnote-30) and the marriage must be negotiated and entered into or celebrated according to customary law.[[31]](#footnote-31)

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*.[[32]](#footnote-32) The court mentions that the act is intended to protect all women in a polygynous marriage and not only the 1st wife,[[33]](#footnote-33) 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.[[34]](#footnote-34) 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.[[35]](#footnote-35) S 3 protect the second and subsequent wives and S 7(6) protects the first wife’s proprietary status.

The court did not consider the customary requirements that come from Xitsonga customary law



This is an appeal of the above case, this appeal is based on whether a in accordance with Xitsonga custom can the marriage between the deceased and Ngwenyama (second wife) be valid without consent from the 1st wife



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. This is one of those judgements that is applauded an example of the court advancing the customary law and bridged the gap between rigid application of official customary law and lived reality of the people (living customary law).[[36]](#footnote-36)

The court in the current case held that are 2 forms of customary law: the official customary law and a living customary law[[37]](#footnote-37), there had to recognize living customary law so as to bring the law closer to the spirit, purport and objects of the bill of rights.[[38]](#footnote-38) They found that the need for the father to be involved they opened this function up to the mother as well.

As with *Mabuza v Mbatha (7) BCLR (7)* (herein referred to as ‘Mabuza’) the current cause advanced customary law, in the Mabuza case e.g. the from the rigid need for the *ukumekeza in mabuza,* what is notable in *Maluleke v Minister of home afairs case* was the recognition of the court and its expert Proffesor JC Bekker who recognized the need for a celebration to conclude a customary marriage but conceded that due to the changes in environment strict adherence to the rituals was not necessary.[[39]](#footnote-39) The observance of the parties intention to enter into the marriage as opposed to finding that non adherence to the “celebration” is fetal to the existence of the marriage shows courts favor using it constitutional mandate to develop customary law to be in line with the spirit, purports and objects of the bill of rights. T

**Bibliography**

**Acts**

Recognition of patrimonial marriages act 120 of 1998.

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2. Textbook page 174. [↑](#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. Maluleke v Minister of home affairs (herein referred to as ‘Maluleke’) para 6. [↑](#footnote-ref-6)
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10. Bhe para 3. [↑](#footnote-ref-10)
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12. Bhe para 7 [↑](#footnote-ref-12)
13. Bhe para 16 [↑](#footnote-ref-13)
14. Bhe para 19 [↑](#footnote-ref-14)
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16. Bhe para 180. [↑](#footnote-ref-16)
17. Bhe para 185. [↑](#footnote-ref-17)
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20. Alexkor para 7. [↑](#footnote-ref-20)
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24. Alexkor para 82. [↑](#footnote-ref-24)
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