ADVANCED AFRICAN CUSTOMARY LAW: CASES:

ADMINISTRATION OF INTESTATE ESTATES AND THE CONSTITUTION:

- Section 23(7) (a) of the Black Administration Act and regulation 3(1) of the Government Notice R200 created a dual system of administration of intestate estates.
- The position was that all testate and intestate estates of non-blacks be administered by the Master of the High court while the estates of blacks, be administered by the local Magistrate.
- The Monseneke case dealt with these statutory provisions and argued that the separate ways of administering the estates offended the right to equality and the right to dignity.

1) MONSENEKE:

In terms of s23(7)(a) of the Black Administrative Act and Regulation 3(1) of the Government Notice R200, all testate and intestate estates of non-blacks were administered by the Master of the High Court, while intestate estates of blacks were administered by the local magistrate.
In Monseneke it was argued that the separate ways of administration of estates offended the right to equality and the right to dignity of non-whites.

Facts:
Mr M died in 1999, intestate. His estate included:

1. Immovable property
2. motor vehicles
3. shares
4. unit trusts and
5. Insurance policies.

He was survived by his wife and 4 sons (the family).
The family learned from the magistrate that the magistrate was administering the estate and not the Master, according to regulation 3(1). According to this regulation, estates of deceased blacks leaving no will shall be administered under the supervision of the magistrate in whose area the deceased ordinarily resided. The effect of this provision was that the Master of the High Court has no power to deal with the intestate estates of blacks.

The family wrote to the Master expressing concern at being subjected to differential treatment on the grounds of race and stated that there was nothing in the Black Administration Act which prohibited the Mater from proceeding with the administration and distribution of the estate. This was however, incorrect. The family commenced proceedings in the WLD.

The president of this court issued directions which required the parties to consider whether an invalidation of s23 (7) by the High Court could be inferred and whether this court could confirm this validation. In response the family submitted a written argument stating that the High Court had indeed implicitly invalidated the section. The Minister had not appreciated the implications of the order and contended that the High Court order was subject to confirmation by this court and argued that it should be confirmed. If the court were to confirm the order, he argued that the declaration of invalidity should be suspended for 3 years to allow parliament to correct the defects in the legislation.
The Master, arguing why he was not in a position to manage the intestate estates of blacks, was because of lack of human resources, infrastructure, training and finances. He argued that the administration of blacks should remain in the hands of the magistrates because they are found in every small town, located close to the people, their administration in informal and swift, they have a better understanding of customary law and then the Master's fees don't have to be paid.

The judge acknowledged 3 special factors in this case:

1. The interests of justice require a speedy unblocking of this section.
2. This section is manifestly discriminatory and unconstitutional.
3. The minister and the Master supported the matter being dealt with on the basis of direct access (S v Zuma).

The judge said that it is insulting that people are still treated as blacks rather than as ordinary people seeking to wind up an estate.
Therefore he concluded both provisions create unfair discrimination in terms of s9 of the Constitution and that the provisions are not reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality s36).

Held:
That the section and regulation are inconsistent with the constitution and invalid and that parliament was given 2 years to review the field of succession and administration of deceased estates in an effective manner which would respect the rights in the constitution for blacks. In the interim, they require the master to administer the estate or opt for the cheaper process under the control of the magistrate. The judge said that the Master of the High Court in Pretoria shall administer the estate of the late Mr M.

ACT 4 OF 2000:

- Section 211(3) of constitution = application of IL when that law is applicable - this must be subject to the constitution and any legislation.
- IL has its root in the cultural system of patriarchy that discriminates against women.
- This led to a debate as to the future of IL within the Bill of Rights, and from this debate the main issue is the right to equality.
- On one hand = argued that cultural practices discriminating against women couldn't be tolerated.
- On other hand = the right to culture (s30 and s31 of constitution) says a degree of tolerance needed to stop the imposition of western norms on indigenous African people.
- Reform of IL marriages has taken place since the Recognition of Customary Marriages Act 120 of 1998, which took effect on the 15th of November 2000.
- Changes are now proposed to the IL law of succession, but have not been made law.
- Courts have in the meanwhile decided on the constitutionality of customs and statutory provisions concerning IL. These seem to indicate a more tolerant approach to IL. In the Mthembu case it was indicated that the development of the primogeniture principle was better left to the **legislature** to reform.
- Act 4 of 2000 has since been promulgated suggesting a LESS TOLERANT approach to discriminatory cultural practices. Section 8 is the most NB section, but has not yet come into operation.
- This Act strives to ensure compliance with SA's duties under international law and gives effect to s9 (equality).
- The preamble of Act 4 of 2000: consolidating of democracy in SA and the eradication of social and economic inequalities found from our history of apartheid and patriarchy which brought pain and suffering to majority of South Africans. References to "practices" throughout the Act indicate that every aspect of IL is intended to be subject to the Act. Patriarchy can be identified as the leading cause of inequality. So one of the objectives of the Act is to "purify" IL practices rooted in inequality, to the extent that they are harmful to women.
- Section 8 of the Act summarised as follows: no person may unfairly discriminate against any person on the ground of gender, including
  (a) preventing women from inheriting family property;
  (b) any practice of traditional, cultural or religious origin that impairs the dignity of women and undermines equality between women and men (including the female child);
  (c) any policy/conduct that unfairly limits access of women to land rights, finance etc.

Viewpoints that IL of inheritance is in conflict with the Constitution:

- The principle that only the eldest son can inherit is discrimination on grounds of gender and age.
- The recognition of the IL of inheritance continues discrimination on the grounds of ethnic descent.
- The fact that indigenous intestate estates are administered by the local Magistrate is unequal treatment by the law, as all other intestate estates are administered by the Master of the High Court.

2) MTHEMBU V LETSELA:

- This case is an appeal from TPD.
- T.J Letsela (deceased) died on August 1993, shot by someone.
- At death he was holder of a 99 year lease-hold title over immovable property.
- He lived on the property with the appellant and her two minor daughters, one of whom was Thembi Mthembu, who was born of a relationship between the deceased and the appellant.
- Deceased had no other kids except Thembi but was survived by his father (the 1st respondent) and his mother and three sisters.
- He died intestate.
- His parents, together with one of their daughters and her kids, share the same house on the property with the appellant and her 2 daughters.
- The Magistrate in Boksburg (the 2nd respondent) appointed the appellant (Mthembu) to administer the estate of the deceased. He said in a letter to the appellant's legal representatives that the deceased's estate was to devolve in terms of Black law and custom. The 2nd respondent (his dad) claimed that the property devolved on him due to the customary rules of succession.
- The appellant brought an application to the TPD for an order declaring that the customary law rule of primogeniture and regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks be made invalid due to being inconsistent with the Constitution of 1993. The judge dismissed the application but allowed the appeal.
- The appellant alleged that she and the deceased entered into a customary marriage in Brakpan and she had received the 1st instalment of R900 towards her lobolla of R2000, signed by her brother. The balance was to be paid soon thereafter.
- He died before this. The appellant thus claims to be his widow.
- The 1st respondent denied that a customary union was ever entered into, alleging that certain essentials of a customary union were not satisfied.
- The judge in court a quo could not resolve the dispute as to whether a customary union existed or not. Thus decided that Thembi was the deceased's illegitimate child. Council for appellant stated that Thembi is the only heir to the estate.
- Law of succession in SA IL is based on primogeniture. In monogamous household, the son of the family head is the heir, failing him, the eldest son's eldest male descendant.
- Where the eldest son has dies before the family head without leaving a male child, the second son becomes the heir; if he has died leaving no male child, the 3rd son inherits and so on through the sons. Where the family head dies without male children his father succeeds.
- Thus it follows that, whether Thembi is the deceased's legitimate child or not, being female, she does not qualify as heir to deceased estate. Women don't generally inherit in customary law. When the family head dies his heir takes the position as family head and becomes the owner of all the property of the deceased, movable and immovable. He becomes liable for all the debts and assumes the deceased's position as guardian over the women and minor sons in the family.

- The customary law of succession in terms of primogeniture has legislative recognition found in regulation 2 of the Regulations which states that if a Black dies leaving no valid will, his property should be distributed according to black law.
- The Judge found that the rule of primogeniture is grossly discriminatory, against all women and girls and all black children who are not the eldest, by excluding them from intestate succession.
- Thus this regulation discriminates in terms of s8 of the 1993 constitution (equality).
- In this case the court found 4 grounds of attack against the rule of primogeniture:
  1) the regulation is ultra vires at common law
  2) the regulation has impliedly been repealed by the Intestate Succession Act.
  3) The rule is to be developed in terms of the constitution with due regard to the fundamental principle of equality – to avoid discrimination between children of a deceased.
  4) If not so developed the rule would be repugnant (gross) with the principles of natural justice and public policy and the courts will thus not apply it.
- The council for appellant stated that Thembi would have succeeded intestate but for the fact that she was female.
- The customary rule of primogeniture is offensive to public policy and natural justice as it's against the equality clause.

- The judge a quo held that Thembi was not a victim of gender discrimination because any illegitimate child of the deceased would not have inherited. In casu, the judge felt the applicant was not married to the deceased, her child was thus illegitimate. Thembi had no right to inherit, just because she is not legitimate. Even an illegitimate male child would not have inherited, thus the court a quo found no gender discrimination.

- According to the intestate inheritance rules in IL, the father of the deceased (the 1st respondent) acquired the right to claim ownership over the property upon the death of the deceased. Thembi had no right to succeed the deceased as heir. This is because she is an illegitimate child and belongs to her mother's house.

- Court referred to Amod v MMVAF and found it did not assist the appellant in this case.

- The conclusion of the case is that all 4 ground of attack must fail and the appeal must fail.

INTESTATE INHERITANCE OF ILLEGITIMATE CHILDREN AND THE CONSTITUTION:

- The constitutionality of regulation 2 of the Regulations for the Administration and Distribution of Estates of Deceased Blacks R200 of 1987 was considered.
- The effect of the regulation was that illegitimate children of a deceased man whose civil marriage was regulated by s22 of the Black Administration Act would not inherit from the estate if the deceased died intestate.
- The Zondi case was decided in the Natal division of the High Court.

3) THE ZONDI CASE:

- SM Ngidi died in June 1995 (the deceased).
- He was married to a Beauty Ngidi. Marriage was not in COP.
- Blacks married in terms of the Black Administration Act were married out of COP unless they declared, jointly, before a Magistrate that they intended being married in COP.
- No children were born of the marriage.
- Beauty passed away in 1992.
- At the time of his death then, the deceased was not a partner in a customary marriage. He did however; father 2 illegitimate children, the applicant and the 5th respondent.
- The estate of the deceased fell to be administered in terms of the Government Notice R200 – if a black dies leaving no valid will, so much of his property, including immovable property, not regulated in terms of ss 1 or ss 2 of the Act shall be distributed in following manner:
  * if the deceased was at time of death, a partner in a marriage in COP or under an anc or
  * a widower, widow or divorcee of a marriage in COP or under an anc, and was not survived by a partner to a customary union entered into subsequent to the dissolution of such marriage, the property will devolve as if the deceased had been a European.
  * if he is survived by a partner in a customary union or a marriage in COP or lived with someone under a putative marriage, the Minister may direct the estate be devolved as if the Black and the said partner had been married out of COP.
- Although the deceased was a widower, his marriage to his late wife was not one in COP nor in terms of an anc – thus his estate fell to be administered in terms of black law and custom.
- A declaratory order was sought to the effect that the regulations in question are unconstitutional.
- Because of the system of primogeniture, the deceased's brother constituted an heir and his illegitimate kids not.
- The Black Administration Act dealt with marriages between blacks. He/she could marry by anc according to the law of the land. A marriage in COP could be entered into, as long a couple jointly declared to a Magistrate that they intended this. Finally there was the traditional customary union marriages which recognised the relationship between a man and woman in accordance with the

custom and law of IL. For the purposes of succession, intestate, the regulations draw a distinction between an out of COP marriage and those entered into in terms of an anc and in COP.

- In marriage by anc and in COP, intestate succession is dealt with by the law of the land and according to the Intestate Succession Act – like the rest of SA, those dying intestate their estates dealt with by the Master of the HIGH COURT.
- This judgement is not concerned with the constitutionality of customary law.
- Illegitimate children would be supported by the mother's side of the family, nit being entitled to support from father's side – so in terms of this case, the notion that because he was not married in cop or by anc, his intestate estate devolves according to customary law - judge felt this was extreme and there was no rational reason for this differentiation. The fact that the deceased married out of COP in first place points away from customary law.
- The question that thus arises is whether the regulation R200 is unconstitutional.
- The judge felt that the regulation offends the equality provisions, children born, both legitimate and illegitimate, of a deceased African person married by anc or in COP would qualify to inherit. Indeed illegitimate children of persons in same position would not qualify – this is what amounts to gross discrimination against the latter children. Thus, to protect the values endorsed in the constitution, the regulation should be struck down – giving all illegitimate children the same succession rights as legitimate children
- Thus the court directed that SM Ngidi's estate be devolved in accordance with the Intestate Succession Act by the Master of the High Court with jurisdiction.

4) SHILUBANA V NWAMITWA CASE:

In 1968 Ms Shilubana's father, Hosi Fofoza 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 Fofoza 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.

It was 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.

The Constitutional Court's judgment clarified two very important issues in customary public law, namely, the powers of traditional authorities to develop customary law under the Constitution, and the appointment of women, previously overlooked due to gender discrimination, in the positions of traditional leadership. The Court found that the Traditional authorities of the Valoyi community had the power in terms of section 211(2) of the

Constitution to develop their community's customary law to reflect equality between men and women as required by the Bill of Rights. This includes the right to amend and repeal their law. With regard to the primogeniture principle, it would seem that in public law the eldest child (male or female) of a Hosi has a claim to succeed his / her parent in that position. If such a child is a female she can still claim that position even though it was given to her nearest male relative due to unfair gender discrimination some decades ago during the long years of colonisation and apartheid.

5) BHE & OTHERS V MAGISTRATE, Khayelitsha and Others 2004:

Black Administration Act 38 of 1927 – section 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 declared to be unconstitutional and invalid – section 1(4)(b) of the Intestate Succession Act 81 of 1987 declared to be unconstitutional and invalid to the extent that it excludes from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 is applicable – until such defects corrected by a competent legislature, the distribution of intestate Black estates is to be governed by section 1 of the Intestate Succession Act 81 of 1987.

Equality - section 9 of the Final Constitution – right not to be unfairly discriminated against – Regulations for the Administration and Distribution of Estates of Deceased Blacks promulgated under Proclamation R200 of 1987 in terms of the Black Administration Act 38 of 1927 – Regulation 2(e) of the regulations declared to be inconsistent with the Constitution and invalid – section 1(4)(b) of the Intestate Succession Act 81 of 1987 declared to be unconstitutional and invalid to the extent that it excludes from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 is applicable – until such defects corrected.

The question of the constitutionality of all these provisions arose in this case because Second Respondent claimed to be the intestate heir of a deceased man ("the deceased") by virtue of the African Customary Law and contended that he was therefore entitled to inherit an immovable property of the deceased in which the Applicants were residing. Third Applicant and deceased had lived together as husband and wife for a period of twelve years. First and Second Applicants were minor children born of that relationship. The Applicants were Black persons of Xhosa extraction. The deceased had died intestate. He was survived by two descendants, namely First and Second Applicants. The latter were unable to invoke the provisions of the Intestate Succession Act because in terms of section 1(4)(b) "intestate estate" was defined to include "any part of any estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act 38 of 1927 does not apply". An application of African Customary Law together with the other statutory provisions had the effect that the first two Applicants were precluded from inheriting from their father's estate merely because they were Black and they were females. This amounted *per se* to discrimination on grounds of race and gender. It was *prima facie* unfair and offended against the provisions of section 9(1) and (3) of the Constitution. Intestate succession under African Customary Law was based on the principle of primogeniture. The general rule was that only a male who was related to the deceased through a male line could qualify as intestate heir. The Court found that it was bound to declare such law unconstitutional and invalid.

The Court made an order declaring section 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 to be unconstitutional and invalid; declaring regulation 2(e) of the Regulations for the Administration and Distribution of Estates of Deceased Blacks to be invalid; and declaring section 1(4)(b) of the Intestate Succession Act 81 of 1987 to be unconstitutional and invalid insofar as it purported to exclude from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 was applicable. The Court ordered that until the defects in the legislation were corrected by a competent legislature, the distribution of intestate black estates would be governed by section 1 of the Intestate Succession Act. The crisp point for consideration in this matter is whether a female African person, whose parents were not married, or married according to African Law and Custom, is entitled to inherit *ab intestatio*, upon the death of her father.

Women do not participate in the intestate succession of the deceased's estate, save the house and personal property. Intestate succession in terms of African Customary Law is based on the principle of primogeniture. The general rule is that only a male who is related to the deceased through a male line, qualifies as intestate heir. In a monogamous family the elder son of the family head is his heir. If the elder son does not survive his father, then his (the elder son's) eldest male descendent is the heir. If there is no surviving male descendant in the line of the deceased's eldest son, then an heir is sought in the line of the second, third and further sons, in accordance with the principle of primogeniture. If the deceased is not survived by any male descendant, his father succeeds him. If his father also does not survive him, an heir is sought in the father's male descendants related to him through the male line.

<u>In the result I propose the following order:</u>

1. It is declared that section 23(10)(a); (c) and (e) of the Black Administration Act are unconstitutional and invalid and that Regulation 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks, published under *Government Gazette* No 10601 dated 7 February 1987 is consequently also invalid.
2. It is declared that section 1(4) (b) of the Intestate Succession Act 81 of 1987 is unconstitutional and invalid insofar as it excludes from the application of section 1 any estate or part of any estate in respect of which section 23 of the Black Administration Act 38 of 1927 applies.
3. It is declared that until the aforegoing defects are corrected by competent legislature, the distribution of intestate Black estate is governed by section 1 of the Intestate Succession Act 81 of 1987.
4. It is declared that the first and second applicants are the only heirs in the estate of the late Vuyu Elius Mgolombane, registered at Khayelitsha Magistrate Court under reference no 7/1/2–484/2002.
5. The second respondent is ordered to sign all documents and to take all other steps reasonably required of him to transfer the entire residue of the said estate to the first and second applicants in equal shares. If the second respondent fails to do so the Deputy Sheriff is authorised and directed to do so in his stead.
6. It is declared that the applicants are exclusively entitled to reside in the house at 35 Jula Street, Makaza situated at Erf 39678

Khayelitsha in the City of Tygerberg until its distribution and transfer in accordance with this order.

7. It is further ordered that any letters of appointment and administration of the deceased's estate issued to the second respondent be and are hereby set aside.
8. There is no order as to costs.

6) NWAMITWA V PHILLIA & OTHERS 2005 (3) SA536

The applicant sought an order declaring him to be the heir to the Valoyi tribe and to succeed the late Hosi chief as the Hosi of the Valoyi tribe and declaring that the first respondent was not entitled to succeed the late MR Mamitwa as Hosi. The respondents opposed the application. An order was made referring them matter for oral evidence to determine inter alia whether:

- In terms of the customs and traditions of the Tsonga/Shangaan tribe, and more particularly the Valoyi tribe, a female could be appointed as Hosi;
- Whether, when appointing the first respondent as a Hosi the royal family acted in terms of the customs and traditions of the Valoyi tribe;
- Whether the decision by the executive council of the Limpopo provincial government of 22 November 2002, appointing the first respondent as chief was in accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution.

It was held that on the evidence the customs and traditions of the Tsonga/Shangaan tribe, the Valoyi tribe, did not allow for the appointment of a woman as Hosi.

The royal family had acted in disregard of the customs and traditions of the tribe when it elected the first respondent. Their conduct amounted to a drastic departure from custom and did not constitute development or evolution, and as such it was beyond the functions and powers of the royal family.

The court had to apply customary law was it was applicable but that it could not do so in conflict with the Constitution or legislation dealing specifically with customary law.

The Bill of Rights did not deny the existence of any other rights or freedoms recognised by customary law, provided they were consistent with the Bill. The customary practices urged by the first respondent were in conflict with the right to equality and the prohibition against discrimination on the ground of gender. It was clear from the evidence that the first respondent's right to succeed to chieftainship was being attacked purely on the ground of her gender, and the first applicant would have failed to discharge his onus of demonstrating that the customary practice of primogeniture was a limitation by a low of general application that was reasonable and justifiable.

The first respondent was not disqualified because of her gender or the custom of primogeniture alone, but rather because there was no basis in custom for the royal family to re-establish the family line ex post facto by assuring they were right to elect the first respondent as Hosi.

7) BHE AND OTHERS v MAGISTRATE 2005

Two main issues were addressed, namely the constitutional validity of section 23 of the Black Administration Act 38 of 1927 and the principles of primogeniture in the context of customary law of succession.

In the 2004 *Bhe* case, two minor children, both extra-marital daughters, had failed to qualify as heirs in the intestate estate of their deceased father. Under the system of intestate succession created by s 23 and the regulations, minor children did not qualify to be heirs in the intestate estate of their deceased father. According to these provisions the estate fell to be distributed according to "Black law and custom". The applicants challenged the appointment of the deceased's father as heir and representative of the estate in the High Court. The High Court concluded that the legislative provisions that had been challenged, and on which the father of the deceased had relied, were inconsistent with the Constitution and therefore invalid.

It was held that it was in the interests of justice that the application for direct access to the Constitutional Court should be granted.
Held that s 23 was a racist provision that was fundamentally unconstitutional, being contrary to ss9 and 10 of the Constitution due to its blatant discrimination on grounds of race, colour and ethnic origin and its harmful effects on the dignity of persons affected by it. The effect of the invalidation of s 23 of the Act was that the customary law rules governing succession were applicable, including the customary-law rule of primogeniture attached in *Bhe*.

The rule of primogeniture was central to the customary law of succession. The general rule was that only a male related to the deceased qualified as intestate heir. Women did not participate in the intestate succession of deceased estates. The exclusion of women from hiership, and consequently from being able to inherit property, was in keeping with a patriarchal system which reserved for women a position of subservience and subordination in which they were regarded as perpetual minors under the tutelage of fathers, husbands or heads of the extended family.

The principle of primogeniture also violated the right of women to human dignity guaranteed by ss 10 of the Constitution because it implied that women were not fit or competent to own and administer property. Its effect was also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity was further affronted by the fact that, as women, they were also excluded from intestate succession and denied the right to be holders of and to control property.

It followed *Mthembu*, in that the customary law rule of primogeniture was not consistent with the equality protection under the Constitution.
The declaration of invalidity had to be made retrospective to 27 April 1994. Thus s 23 of the Act and s 1(4)(b) of the Intestate Succession Act were inconsistent with the Constitution and invalid.