Gumede case

NB CASE:

Elizabeth Gumede entered into a customary marriage in 1968. This was the only marriage to which the applicant's husband was party. The marriage has since broken down irretrievably, and in January 2003 her husband instituted divorce proceedings. Mrs Gumede did not work during the marriage, but maintained the family household as well as caring for the four children. The family acquired two pieces of immovable property during the course of the marriage. The value of these properties, together with the furniture and appliances, amounted to approximately R40 000 each.

She consulted a legal adviser who brought an application to stay divorce proceedings pending the determination of unfair discrimination and constitutional validity. (The law differentiates between a customary marriage before and after the commencement of the Act).
Her concern was that her matrimonial property regime discriminates against her as she is a woman and African.
Her second argument was that the Recognition of Customary Marriages Act has come into existence since the court a quo's decision which now recognises the discriminatory nature of her marriage. This was accepted in the regional court and on 11 September 2008 application was made to the CC for confirmation.
Moseneke examined sections 7(1) and 7(2) of the Recognition Act, which have the effect that marriages concluded prior to the enactment of the Recognition Act ("old" marriages) will continue to be governed by customary law, whilst those concluded after the enactment of the Recognition Act ("new" marriages) are to be marriages in community of property and of profit and loss, except where the parties agree otherwise.
He also examined the codified customary law of marriage in KwaZulu-Natal, which subjects a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property.
On 8 December 2008, Moseneke found these provisions to be self-evidently discriminatory on at least the one listed ground of gender. Only women in a customary marriage are subject to these unequal proprietary consequences. Because this discrimination is on a listed ground it is presumed to be unfair, and the burden fell on the respondents to justify the limitation on the equality right of women party to "old" marriages concluded under customary law.
Judge found that the respondents had failed to provide adequate justification for this unfair discrimination. He held that section 8(4)(a) of the Recognition Act, which gives a court granting a decree of divorce of a customary marriage the power to order how the assets of the customary marriage should be divided between the parties, is no answer to or justification for the unfair discrimination based on the listed ground of gender. This is because section 8(4)(a) of the RCMA does not cure the discrimination which a spouse in a customary marriage has to endure during the course of the marriage. The matrimonial proprietary system of

customary law during the subsistence of a marriage, as codified in the Natal Code and the KwaZulu Act, patently limits the equality dictates of our Constitution and of the RCMA. Judge confirmed the order of constitutional invalidity issued by the High Court and held that the following provisions are inconsistent with the Constitution and invalid:

1. Section 7(1) of the Recognition Act insofar as it provides that the proprietary consequences of a marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.
2. Section 7(2) of the Recognition Act, insofar as it distinguishes between a customary marriage entered into after and before the commencement of the Recognition Act, by virtue of the inclusion of the words "entered into after the commencement of this Act".

3. Section 20 of the KwaZulu Act on the Code of Zulu Law because it provides that during the course of a customary union the family head is the owner of and has control over all family property in the family home.

4. Section 20 of the Natal Code of Zulu Law because it provides that the family head is the owner of and has control over all family property in the family home.

5. Section 22 of the Natal Code of Zulu Law because it provides that the inmates of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

The unanimous Court also ordered that the government parties pay the legal costs of Mrs Gumede.
The effect of the ruling in this case therefore is that the proprietary consequences of marriages entered into before and after the commencement of the Act now enjoy the same status as they are both in community of profit.

case of Shilubana:

The case concerned the constitutional validity of the principle of male primogeniture that governed succession to chieftainship. The senior traditional leader of the Valoyi traditional community died in 1968 without a male heir. As a result of the application of the principle of male primogeniture governing the customary laws of succession, his daughter, S, was not considered for the position even though she was not only her father's eldest child, but his only child. He was instead succeeded by his younger brother, R.
In the course of 1996 and 1997, the Royal family of the Valoyi community passed resolutions, which were later approved by the royal council and the tribal council, to the effect that S would succeed him, since in the new Constitutional era, women are equal to men. Her succession was approved by the provincial government.
However, following the death of R in 2001, N interdicted S's installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as R's eldest son, was entitled to succeed his father. N subsequently sought a declaratory order in the Pretoria High Court to the effect that he is the rightful successor to R. Both the High Court and the Supreme Court of Appeal ruled in his favour, reasoning that even if traditions and customary law of the Valoyi currently permit women to succeed as N, as the eldest child of R, was entitled to succeed him. S appealed to the Constitutional Court against the judgment and order of the Supreme
Court of Appeal.
S claimed that the Royal family had acted well within their powers in amending customary law when they restored the traditional leadership to the house from which it had been removed on the basis of gender discrimination. N argued on the other hand that according to Valoyi customary law the eldest son of the previous traditional leader was the successor in title; and the appointment of S as traditional leader was grossly irregular and void as the traditional institutions had acted ultra vires in identifying someone else instead of the heir.
The Constitutional court held that both the traditions and the present practice of the community had to be considered and that the spirit, purport and objects of the Bill of Rights have to be promoted. The Court reasoned that the community had a right to develop its own laws and customs, and this right had to be respected where it is consistent with the continuing effective operation of the law and that the actions by the traditional authority reflected a valid change to customary law which resulted in S's succession to traditional leadership. Consequently, N did not have a right to the traditional leadership under the customary law of the Valoyi traditional community.

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.

Bhe CASE

In 2003, however, the applicants in Bhe, and the applicants in Charlotte Shibi successfully challenged both the constitutional validity of sections 23(10)(a), (c) and (e) of the Black Administration Act (including regulation 2(e) of Government Notice R200) and the principle of primogeniture. Section 23(10) made provision for regulations to be enacted by the State President:

- prescribing the manner in which the estates of deceased blacks should be administered and distributed (subsection (a));
- dealing with the disherison of blacks (subsection (c)); and
- prescribing tables of succession regarding blacks (subsection (e)).

Both courts declared sections 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927 and regulation 2(e) to be invalid and unconstitutional.

The Cape High Court found that the applicants, namely N and A (the extramarital daughters of the deceased) were, in fact, the sole intestate heirs to the estate of their deceased father and the Pretoria High Court found Charlotte Shibi (the sister of the deceased) to be the sole intestate heir to the estate of her deceased brother. The intestate heirs in both these proceedings then made an application to the Constitutional Court in the case of Bhe for confirmation of the orders of the respective divisions of the High Court. Their applications were heard together by the Constitutional Court.

The Constitutional Court set aside the orders of the Cape High Court and the Pretoria High Court and declared the whole of section 23 and the regulations promulgated to be inconsistent with the Constitution and therefore invalid.

The reasons given were that:
The Act was manifestly racist in its purpose and effect. It discriminated on the grounds of race and colour. The combined effect of section 23 and
the regulations was to put in place a succession scheme, which discriminated on the basis of race and colour applying only to African people.
The limitation that this scheme imposed on the right of African people to equality could hardly be said to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The discrimination it perpetrated was an affront to the dignity of those that it governed. Section 23 was therefore inconsistent with the right to equality guaranteed in section 9(3) as well as the right to dignity protected by section 10 of the Constitution
As a result, the court confirmed the rulings of the court a quo that N, A and Charlotte were indeed the sole heirs to the respective deceased's estates.

The court held that:

The primogeniture rule as applied to the customary law of succession could not be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. The rule violated the equality rights of women and was an affront to their dignity. In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminated against them and infringed their right to dignity as well. The result was that the limitation it imposed on the rights of those subject to it was not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and
freedom.

The declaration of invalidity was made retrospective to 27 April 1994. Constitutional Court in the Bhe case finally brings the customary law of intestate succession into line with the values enshrined in the Constitution and eliminates the gender and birth inconsistencies prevalent in this system of law.

Critical CASE SUMMARY OF SHILUBANA

Discuss the case and judgement in the case of Shilubana v Nwamitwa 2008(9) BCLR 914 (CC) whilst addressing the following;

- **The facts of the case (5)**

The senior traditional leader (Hosi Fofoza Nwamitwa) of the Valoyi traditional community, died in 1968 without a male heir. As a result of the application of the principle of male primogeniture governing the customary laws of succession, his daughter, Lwandhlamuni Phillia Nwamitwa, was not considered for the position, even though she was not only her father's eldest child, but also his only child. Instead, Hosi Fofoza was succeeded by his younger brother, Richard Nwamitwa.
In the course of 1996 and 1997, the royal family of the Valoyi community passed resolutions, which were later approved by the royal council and the tribal council, to the effect that Ms Shilubana (i.e. Hosi Fofoza's daughter, Lwandhlamuni Phillia Nwamitwa, after she married) would succeed Hosi Richard, since in the new constitutional era, women are equal to men. Her succession was approved by the provincial government. However, following the death of Hosi Richard in 2001, Mr Nwamitwa (Hosi Richard's eldest son) 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 declaratory order in the Pretoria High Court to the effect that he is the rightful successor to Hosi Richard. Both the High Court and the Supreme Court of Appeal ruled in his favour, reasoning that even if traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr Nwamitwa, as the eldest child of Hosi Richard, was entitled to succeed him. Ms Shilubana appealed to the Constitutional Court against the judgment and order of the Supreme Court of Appeal.

- **The legal question that was answered by the court (7)**

The qualification imposed on the constitutional recognition of customary law subjecting it to the Bill of rights has implications for traditional leadership and discrimination. Principles of customary law regulating traditional leadership must now be interpreted in the light of fundamental rights, particularly in the light of the equality clause as provided for under section 9.

This section provides that;
'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

Most contemporary norms of customary law, particularly those relating to the regulation of traditional leadership institutions are often premised on discrimination, particularly on gender. This has created a potential conflict to equally opposing principles protected in the Constitution, recognizing customary law on the one hand and prohibiting discrimination on the other.

The case of **Shilubana v Nwamitwa** illustrates this conflict between principles of Traditional leadership and discrimination.

Therefore, in this case, the constitutional court was called upon to decide whether the Valoyi community had the authority to restore the position of traditional leadership to the house from which it had been removed by reason of gender discrimination.
In deciding the above issue pertaining to a dispute over the position of successor to traditional leadership, the court also had to determine whether the Royal family had the Authority to develop the customary laws of the Valoyi community to outlaw gender discrimination in the succession to traditional leadership and thus determine if the Royal family had the authority to restore the traditional leadership to the house from which it had been removed by reason of pre-constitutional gender discrimination.

- **The decision of the court and reasons for the judgement (8)**

The Court acknowledged the fact that the succession to the traditional leadership of the Valoyi tribe had in the past operated in terms of the principle of male primogeniture. 10

However, the court held that both the High Court and the Supreme court of Appeal had failed to acknowledge the power of traditional authorities to develop customary law so as to eliminate gender-based discrimination in the customary succession to leadership**.**
Emphasizing the importance of equality, the court held that traditional authorities may develop customary law in accordance with norms and values of the Constitution to recognize a woman to succeed to a traditional leadership position. The development of customary law was recognized as that done by the traditional authorities in terms of section 211(2) which specifically provided for the right of Traditional communities to function subject to their own system of customary law, including the amendment or repeal of laws.

The court also reasoned on the basis of section 39(2) of the Constitution which obliges the Court to develop the customary law in accordance with the spirit, purport and aims of the Bill of Rights. Even though the Royal family developed the customary law and the court merely endorsed it.
Therefore, contrary to the findings of both the High Court and the Supreme Court of Appeal, Mr Sidwell Nwamitwa had no vested right to the chieftainship of the Valoyi tribe.

MAYELANDE V NGWENYAMA CASE

NOTE: Section 7(6) of the Recognition of customary marriages Act of 1998 basically provides that a husband to an existing customary marriage must apply to court to have a written contract approved which will regulate the future matrimonial property system of his marriages when he wishes to contract another customary marriage.

Compliance – and, particularly, non-compliance – with section 7(6) was the subject of debate by the courts in the case of Mayelane v Ngwenyama [2012] 3 All SA 408 (SCA), 2013 4 SA 415 (CC) when considering whether or not section 7(6) of the Act must be complied with to contract a subsequent customary marriage.

Miss Mayelane alleged that she concluded a valid customary marriage with Hlengani Dyson Moyana (Mr Moyana) on 1 January 1984. Ms Ngwenyama alleged that she married Mr Moyana on 26 January 2008. Mr Moyana passed away on 28 February 2009. Both Ms Mayelane and Ms Ngwenyama subsequently sought registration of their respective marriages under the Recognition of Customary Marriages Act (hereinafter "the Recognition Act"). Each disputed the validity of the other's marriage. Ms Mayelane then applied to the High Court for an order declaring her customary marriage valid and that of Ms Ngwenyama null and void on the basis that she (Ms Mayelane) had not consented to it. The High Court granted both orders. Ms Ngwenyama took the matter on appeal to the Supreme Court of Appeal (SCA). The SCA confirmed the order declaring Ms Mayelane's customary marriage valid, but overturned the order of invalidity in relation to Ms Ngwenyama's customary marriage. It found the latter customary marriage to be valid as well. Ms Mayelane sought leave to appeal against this latter part of the SCA's order.

Although Ms Mayelane alleged in her founding papers in the High Court that Xitsonga customary law required her consent for the validity of her husband's subsequent customary marriage and that she had never consented to his marriage to Ms Ngwenyama, this issue was not considered by either the High Court or the SCA. Both courts determined the matter by interpreting and applying section 7(6) of the Recognition Act and, therefore, did not consider it necessary to have regard to Xitsonga customary law on the issue of consent.

The High Court held that the second marriage that was entered into without the consent of the first wife/the court is void. The High Court stated that section 7(6) aimed to protect both the existing spouse and the new intended spouse by ensuring that the husband obtained the court's consent to a further customary marriage. The court also observed that both the existing spouse and the intended spouse had a vital interest in having their respective proprietary positions safeguarded by the procedure laid down in section 7(6). The effect of the High Court's decision was that all marriages of women in polygamous relationships are void.

On appeal, the SCA overturned the High Court's decision, holding that section 7(6) did not intend to invalidate the subsequent marriage.

When the SCA's decision was taken on appeal to the **Constitutional Court,** the judges agreed with the High Court's decision that the second marriage was void. However, it must be noted that the **Constitutional Court** decided the case on a different basis.

The Constitutional Court confirmed the finding of the SCA, namely that where there was a failure to obtain the contract envisaged by section 7(6) of the Recognition of Customary Marriages Act 120 of 1998***, the resultant second or further customary marriage is valid, but has to be regarded as being out of community of property and profit and loss.***

If it is accepted that a second or further customary marriage is out of community of property and of profit and loss, polygynous customary marriages may be regarded as having created distinct entities, which have their own property to be used for their exclusive benefit.

This is almost the same as the customary law arrangement of creating a "house" for each customary marriage contracted by a husband. To each wife, the husband was expected – in terms of customary law – to allot property, and certain kinds of property acquired in terms of customary law automatically accrued to a particular "house".