Shilubana and Others v Nwamitwa Case CCT 3/07

1) Reference Details

Jurisdiction: Constitutional Court of South Africa
Date of Decision: 4 June 2008
Link to case:
http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/20080605083932/SIRSI/0/520/J-CCT3-07C

2) Facts

The case involved a dispute between Ms Shilubana (applicant) the daughter of Hosi Fofoza Nwamitwa (Hosi Fofoza) and Mr Nwamitwa (respondent) the son of Hosi Malathini Richard Nwamitwa (Hosi Richard). On 24 February 1968 Hosi Fofoza died without a male heir. At that time, succession to Hosi (the Chieftainship) was governed by the principle of male primogeniture. Therefore, Ms Shilubana, Hosi Fofoza's eldest daughter, was not considered for the position, despite being of age in 1968. Instead, Hosi Fofoza's younger brother, Richard, succeeded him as Hosi of the Valoyi community. The dispute in this case arose following the death of Hosi Richard on 1 October 2001.

On 22 December 1996, during the reign and with the participation of Hosi Richard, the Royal Family of the Valoyi met and unanimously resolved to confer chieftainship on Ms Shilubana. On 17 July 1997, in the presence of the Chief Magistrate and 26 witnesses, Hosi Richard acknowledged that Ms Shilubana was the heiress to the Valoyi chieftainship. On 5 August 1997 the Royal Council accepted and confirmed that Hosi Richard would transfer his powers to Ms Shilubana. On the same day, a "duly constituted meeting of the Valoyi tribe" under Hosi Richard resolved that "in accordance with the usages and customs of the tribe" Ms Shilubana would be appointed Hosi.

On 25 February 1999 Hosi Richard wrote a letter which, though not unequivocal, was accepted by the High Court and the Supreme Court of Appeal as a withdrawal of his support for Ms Shilubana's chieftainship. The Royal Family met again on 4 November 2001, after Hosi Richard had died, and confirmed that Ms Shilubana would become Hosi. On 25 November 2001, at a meeting of the Royal Family, Tribal Council, representatives of local government, civic structures and stakeholders of various organisations, Ms Shilubana was again pronounced Hosi. On 3 July 2002 the Provincial Executive Council wrote a letter approving Ms Shilubana's appointment as Hosi, effective 22 May 2002. An inauguration ceremony scheduled for Ms Shilubana by the provincial Department of Local Government and Housing on 29 November 2002 was interdicted by Mr Nwamitwa.

On 16 September 2002 Mr Nwamitwa instituted proceedings in the Pretoria High Court seeking a declarator that he, and not Ms Shilubana, is heir to the chieftainship of the Valoyi and thus entitled to succeed Hosi Richard. The High Court and thereafter the Supreme Court of Appeal held in Mr Nwamitwa's favour. Both courts reasoned that even if the traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr Nwamitwa, as the eldest child of Hosi Richard, is entitled to succeed him.

3) Law

- Valoyi Customary Law
- South African Constitution Section 211
- South African Constitution Section 39(2)

- South African Constitution Section 9(2)

4) Legal Arguments

The applicants

The applicants argued that customary law is dynamic and adaptable and that the only constraints are those imposed by the Constitution and applicable legislation in terms of section 211(2) of the Constitution. Furthermore they submitted that the Valoyi were acting well within their power, under customary law, to amend their customs and traditions to reflect changed circumstances. In support of this they submitted that in foreign jurisdictions other communities have adapted their succession laws to move away from male primogeniture.

The respondent

The respondent argued that the question before the court is not only of gender but also lineage. In addition to the fact that it is not the custom that a woman may be a Hosi, it was not permissible to "elect" Ms Shilubana to the chieftainship, ignoring the traditional family line.

The respondent also argued that any discrimination that may exist in male primogeniture relating to succession is "very fair", since allowing Ms Shilubana to succeed as Hosi would result in the next Hosi not being fathered by a Hosi, which would lead to confusion and chaos in the community.

Similarly he argued that any discrimination against Ms Shilubana would not be unconstitutional, being based on a reason that is acceptable, fair, reasonable and justifiable.

Finally the respondent argued that the Royal Family did not have the authority to develop the customs and traditions of the Valoyi so as to outlaw gender discrimination as it relates to Hosi succession. The Royal Family's role is only to recognise and confirm a Hosi. Similarly, he argued that the Royal Family did not have the authority to restore the position of traditional leadership to the house from which it was removed by reason of pre-constitutional gender discrimination.

Commission for Gender Equality

The Commission for Gender Equality as amicus argued that, where a traditional community has on its own accord developed its customary law to reflect the spirit and purport of the Constitution, courts must as far as possible recognise the development.

Rural Women

Rural Woman as amicus argued that the actions of the Valoyi were well within their powers and reflects the spirit of the Constitution. Further the emphasised that customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community.

Rural Women also argued that the actions of the Valoyi qualified as a measure taken under Section 9(2) of the Constitution as Section 9(2) is designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination.

5) Decision

Justice Van der Westhuizen wrote the unanimous opinion of the Court.

From the outset, the Constitutional Court (the Court) explained that the issue to be decided was whether the community has the authority to restore the position of traditional leadership to the house from which it was removed due to gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution.

The Court observed that the High Court and the Supreme Court of Appeal found that the authorities (the traditional authorities) who pronounced Ms Shilubana as Hosi had acted unlawfully. In deciding whether the previous decisions were correct the Court considered two issues together. The first issue concerned the authority of the Royal Family to develop the laws of the Valoyi community to outlaw gender discrimination in the succession of traditional leadership. The second issue concerned the authority of the Royal Family, in so doing, to restore the chieftainship to the house from which it was removed for reason of pre-constitutional gender discrimination.

Emphasising the importance of equality in South African society, the Court reasoned that the traditional authorities had the power to act as they did for the following reasons. First, if, as in the view of the High Court, the traditional authorities had only narrow discretion in matters of customary law, it followed that no other body in the community had more power in this regard, since no other body in the community had more power than those authorities. This meant that nobody in the customary community would have the power to make constitutionally-driven changes in traditional leadership. The Court considered that a narrow discretionary view of traditional authorities would result in a situation where they would have to approach the courts before a woman could be installed as Chief, unless there was no other heir or the male heir was unfit to rule.

The Court stated that this was not only undesirable, it was contrary to the Constitution. The Court reiterated that Section 211(2) specifically provides for the right of traditional communities to function subject to their own system of customary law, including amendment or repeal of laws. The Court stated that a community must be empowered to act so as to bring its customs into line with the norms and values of the Constitution. Any other result would be contrary to section 211(2) and would be disrespectful of the close bonds between a customary community, its leaders and its laws. The Court contended that if the traditional authority has only those powers accorded it by such a narrow view, it would be contrary to the Constitution and frustrate the achievement of the values in the Bill of Rights. Therefore, the Court held that they had the authority to act on constitutional considerations in fulfilling their role in matters of traditional leadership.

Second, if the traditional authority had only those powers accorded it by the narrow view; it would be contrary to the Constitution and would frustrate the achievement of the values in the Bill of Rights as Section 39(2) of the Constitution obliges the Court to develop the customary law in accordance with the spirit, purport and aims of the Bill of Rights. Furthermore, the Court stated that the value of recognising the development by a traditional community of its own law is not in this case outweighed by the need for legal certainty or the protection of rights.

The Court concluded that the decisions of the High Court and Supreme Court of Appeal - that the traditional authorities lacked the power to act as they did - were incorrect. Accordingly, Mr Nwamitwa has no vested right to the chieftainship of the Valoyi.

The Court held that, in view of the above conclusion, it was not necessary to consider the argument made by Rural Women that the decision should be seen as a step to address the consequences of past discrimination under Section 9(2) of the Constitution.