

**Bhe and others v The Magistrate, Khayelitsha and others Case CCT 49/03; Shibi v Sithole and others Case CCT 69/03; South African Human Rights Commission and another v President of the Republic of South Africa and another Case CCT 50/03**

**1) Reference Details**

Jurisdiction: South African, Constitutional Court of South Africa

Date of Decision: 15 October 2004

Case Status: Concluded

Link to full case:

<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/Gfk5wzXCAA/MAIN/25970048/9>

**2) 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 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 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.

*Bhe and others v The Magistrate, Khayelitsha and others (Bhe)* and *Shibi v Sithole and others (Shibi)* were applications 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.

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.

**3) Law**

- 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)

#### **4) Issues for Determination by the Court**

The court was asked for confirmation of the orders of constitutional invalidity made by the Cape High Court and the Pretoria High Court respectively.

#### **5) Decision**

##### *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 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.