South African Constitutional Court protects customary law's development towards gender equality

On 4 June 2008, the Constitutional Court of South Africa handed down the decision in the case of Shilubana and Others v Nwamitwa (Case CCT 3/07). The case arose out of a succession dispute, following the death in 2001 of the chief of the Valoyi community in Limpopo. The eldest son of the deceased chief disputed a decision that the Royal Family adopted in December 1996 to end male primogeniture and confer chieftainship to the eldest daughter of the deceased's brother (and predecessor in title) of the then reigning chief.

On 22 December 1996, in an effort to develop customary law in accordance with the South African constitutional right to equality and to end gender discrimination that the principle of male primogeniture maintained, the Royal Family of the Valoyi unanimously resolved to confer chieftainship, in the next succession, on Ms Shilubana, daughter of Hosi Fofaza who died in 1968 and was succeeded by his brother Hosi Richard. On 5 August 1997, the Royal Council confirmed its decision and later that day, a meeting of the Valoyi tribe resolved that “in accordance with the usages and customs of the tribe” Ms Shilubana would be appointed Hosi. Hosi Richrad died in 2001.

In September 2002, Hosi Richard’s eldest son, Mr Nwamitwa, instituted proceedings in the Pretoria High Court seeking a declaration that he, and not Ms Shilubana, is heir to the chieftainship of the Valoyi and thus entitled to succeed his father. Subsequently, an inauguration ceremony scheduled for Ms Shilubana by the provincial Department of Local Government and Housing for 29 November 2002 was interdicted by Mr Nwamitwa. Both the High Court and the Supreme Court of Appeal found in favour of Mr Nwamitwa, because the process of pronouncing Ms Shilubana heir to the chieftainship was contrary to customary law.

The Constitutional Court of South Africa, however, overturned these judgments. Assessing the appealed judgments, with respect to the ability of the traditional authorities to develop customary law, the Constitutional Court stated:
“The conclusions of the High Court and Supreme Court of Appeal that the traditional authorities lacked the power to act as they did were incorrect. They erred in that their focus was too narrow, tied to the statement that a Hosi is never appointed, but born, and unable to countenance that the lineage would change from that of Hosi Richard to that of Hosi Fofoza.”

Justice Van der Westhuizen, writing the unanimous opinion of the Court explained that Section 211(2) of the Constitution requires courts to respect the right of traditional communities to develop their own law. Therefore, courts, after receiving evidence from the parties of the present practice of traditional communities, must acknowledge developments if they have occurred. Finally, the Constitutional Court stated that the value of recognising the development by a traditional community of its own law, in accordance with the constitutional right to equality, was not in this case outweighed by the need for legal certainty or the protection of rights.

This judgment is an important contribution to the jurisprudence on the development of customary law in South Africa. It affirms that courts should support decisions by communities living under customary law to adapt rules and traditions in a manner that promotes constitutional values. The decision of the Valoyi people that has been upheld is one which clearly promotes the value of gender equality.

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