SHILUBANA V NWAMITWA

Constitutional Court of South Africa (Moseneke DCJ, Madala, Mpati, Ngcobo, Nkabinde, Sachs, Skweyiya, Yacoob and Van der Westhuizen JJ)
4 June 2008
[2008] ZACC 9

South Africa – customary law – right of succession – gender inequality – determining content of customary law – development of customary law – relationship of customary law with the *Constitution of South Africa*

Facts:

This appeal from the Supreme Court of Appeal of South Africa involved a dispute over who had the right to succeed as Hosi (chief) of the Valoyi traditional community in Limpopo, following the death of Hosi Richard Nwamitwa in 2001. The appellant, Ms Shilubana, was the daughter of former Hosi, Fofoza Nwamitwa, who had died without a male heir in 1968. Customary law at the time, under which a Hosi's eldest son would succeed, did not allow Ms Shilubana to succeed her father in 1968, despite being his eldest child. Instead, Hosi Fofoza's brother Richard Nwamitwa succeeded.

In 1996 and 1997, it was resolved by the Valoyi traditional authorities that, given the implementation of the *South African Constitution*, which enshrines gender equality, Ms Shilubana would succeed Hosi Richard. This was contested by the appellant, Hosi Richard's eldest son Mr Nwamitwa, who claimed that the traditional authorities had no legal power to appoint someone other than the heir, and their actions did not amount to a change of the law entitling them to do so. Mr Nwamitwa claimed that, by virtue of Valoyi customary law, he was the rightful successor to Hosi Richard. The High Court and Supreme Court of Appeal had previously found in Mr Nwamitwa's favour.

In the current appeal, the first issue was for the Court to determine the proper approach to adopt when seeking to determine a rule of customary law. The Court then had to decide whether the traditional authorities had the power: to develop the laws of the Valoyi community to outlaw gender discrimination in the succession of traditional leadership; and to restore the chieftainship to the house from which it was removed by reason of pre-constitutional gender discrimination.

Held, allowing the appeal, per Van der Westhuizen J (Moseneke DCJ, Madala, Mpati, Ngcobo, Nkabinde, Sachs, Skweyiya and Yacoob JJ agreeing):

1. In determining the content of a customary law norm, courts must be informed by several factors. Firstly, it will be necessary to consider the traditions of the community concerned. This will invariably involve a consideration of the past practice of the community, with the inquiry focusing on customary law in its own setting rather than in terms of the common law paradigm: [44]; *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17 followed; *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18 followed.

2. The second consideration when determining the content of a customary law norm is the right of traditional communities to develop, amend and repeal their own customs. The present practice and usage by a particular community of their customary law is relevant, and the courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred: [45]–[46], [55]–[56]; *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17 cited; *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18 cited; *Du Plessis v De Klerk* [1996] ZACC 10 cited; *Mabuza v Mbatha* 2003 (4) SA 218 (C) cited; *Mabuza v Mbatha* 2003 (4) SA 218 (T) cited; *Van Breda v Jacobs* 1921 AD 330 distinguished.

3. The third consideration that courts determining the content of customary law must be cognisant of is the fact that customary law regulates the lives of people. Accordingly, the need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights. Relevant factors in this inquiry will include, but are not limited to, the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law: [47]; *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17 cited.

4. Finally, a court determining the content of customary law must be mindful of its obligations under s 39(2) of the *Constitution* to promote the spirit, purport and objects of the Bill of Rights. Courts are obliged to consider whether there is a need to bring customary law in line with the *Constitution*, and to develop it if so: [48]; *Carmichele v Minister of Safety and Security* [2001] ZACC 22 cited; *Bhe v Magistrate, Khayelitsha* [2004] ZACC 17 cited.

5. In the present case, the past practice of the Valoyi is important but not decisive in determining whether Mr Nwamitwa has the right to succeed: [57].

6. It was not established on the evidence that the Valoyi's customary law, without amendment, permitted the installation of Ms Shilubana as successor: [66].

7. In installing Ms Shilubana, the Valoyi traditional authorities intended to bring their laws of succession into line with the values and rights of the *Constitution*. The traditional authorities had the power to act as they did because it would be contrary to the *Constitution* if they did not. Their actions accordingly represent a development of customary law: [68], [73]–[75]; *Du Plessis v De Klerk* [1996] ZACC 10 cited; *R v Salituro* (1992) 8 CRR (2d) 173 cited.

8. The value of recognising the development by the Valoyi community of its own law is not here outweighed by factors relating to legal certainty or the protection of rights: [84].