

**BHE AND OTHERS v MAGISTRATE, KHAYELITSHA, AND OTHERS 2004
(2) SA 544 (C)**

Headnote : Kopnota

The third applicant and the deceased lived together as husband and wife for a period of 12 years. Two minor children were born out of the relationship, namely the first and second applicants in the present proceedings. The two applicants, being minors and females, were assisted by their mother, the third applicant. The first three applicants were Africans and of Xhosa extraction. The third applicant did not seek any relief on her own. The deceased and the third applicant acquired certain immovable property, which the deceased and the three applicants had occupied until the deceased died. Thereafter the first three applicants had continued to live on the property. The deceased had died without leaving a will. The second respondent, the grandfather of the first and second applicants and father of the deceased, had claimed that he was the intestate heir of the deceased by virtue of the African customary law and therefore he was entitled to inherit the property of the deceased, which he intended to sell.

The recognition and application of African customary law in South Africa had been controversial, spasmodic and inconsistent until 1927. In 1927 the then Union of South Africa passed the Black Administration Act 38 of 1927 (the Act) whereby African customary law was partially recognised throughout the then Union subject to the proviso that it was not repugnant to public policy. African customary law at best was partially recognised and applied intermittently by the courts. This was despite the provisions of s 11(1) of the Act, which gave the commissioner's courts (special courts established to decide civil disputes between Africans) a discretion to apply African customary law. The High Court required African customary law to be proved by expert evidence as if it were foreign law. The unwritten African customary law was underpinned by male domination. African customary law of immovable property generally did not have the same consequences as our common law. It was in this area where even legislation had not done much to accommodate the changing needs and demands brought to bear on this system of law. The development of African customary law had to take these eventualities into account. Intestate succession in terms of African customary law was based on the principle of primogeniture. The general rule was that only a male who was related to the deceased through a male line qualified as intestate heir. In a monogamous family the elder son of the family head was his heir. If the elder son did not survive his father, then his (the elder son's) eldest male descendant was the heir. If there was no surviving male descendant in the line of the deceased's eldest son, then an heir was sought in the line of the second, third and further sons, in accordance with the principle of primogeniture. If the deceased was not survived by any male descendant, his father succeeded him. If his father also did not survive him, an heir was sought in the father's male descendants relating to him through the male line. It was this system of succession and inheritance which, the applicants submitted, was unconstitutional, discriminatory and irrational. The Court was asked to either develop this system commensurate with the

Constitutional imperative or to declare it to be unconstitutional and therefore invalid.

The basic premise in our current constitutional regime was to test any law, be it common law, statute or African customary law, against the values enshrined in the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). At issue in the present case was a rule which was originally derived from an unwritten rule of African customary law. The principle of primogeniture had received legislative recognition in the Act and the Regulations promulgated thereunder. Section 23(10) of the Act gave the President the power to make regulations not inconsistent with the Act. The Act predated the Constitution. Pursuant thereto, the President made such regulations in 1987. They appeared in the Government Gazette 10601 dated 6 February 1987. The Act was not a code of African customary law. It was an Act of Parliament like all other legislation. However, its fundamental premise was racial inequality. The State, in terms of s 9(3) of the Constitution, shall not discriminate unfairly on grounds of, *inter alia*, race or gender. The provisions of reg 2(e) of the Regulations promulgated in terms of the Black Administration Act dictated that, on the facts of this case, the first two applicants could not inherit because of their gender and race. They were female and black. In terms of the Intestate Succession Act 81 of 1987 (which applied to all races in South Africa) if any person died intestate, either wholly or in part and was survived by a descendant, but not by his spouse, such descendant should inherit the intestate estate. 'Descendant' meant any descendant of the deceased person irrespective of race, gender or status. In this case the deceased had died intestate and left two descendants, namely the first and second applicants. They could not invoke the provisions of the Intestate Succession Act because in terms of s 1(4)(b) 'intestate' included any part of any estate which did not devolve by virtue of a will or in respect of which s 23 of the Act did not apply.

Held, that whether the first two applicants were legitimate or not did not alter the consequences flowing from the status of the legal relationship between their parents at the time of their father's death. (At 551H - H/I.) They were, however, legitimate on the second respondent's version, but that did not take the matter further, as the principle of primogeniture was not altered by their legitimacy. (At 563D/E - E.)

Held, further, that the only reason why the first two applicants could not inherit from their father's estate was because they were black and they were females. This was per se discrimination on grounds of race and gender. It was prima facie unfair and therefore offended against the provisions of s 9(1) and (3) of the Constitution. The Court was thus bound to declare such law unconstitutional and invalid. (At 554E - F/G)

Held, further, that African females, irrespective of age or social status, were entitled to inherit from their parents' intestate estate like any male person. This did not mean that there might not be instances where differentiation on gender lines may not be justified for purposes of certain rituals; as long as it

did not amount to disinheritance or prejudice to any female descendant. (At 55A - B.)

Held, accordingly, on the facts, that the first two applicants had to be declared to be the sole heirs to the deceased's estate and they were entitled to inherit equally. (At 55B - B/C.)

Held, further, that s 23(10)(a), (c) and (e) of the Black Administration Act had to be declared unconstitutional and invalid and that reg 2(e) of the Regulations of the Administration and Distribution of the Estates of Deceased Blacks, published under Government Gazette 10601 dated 6 February 1987 was consequently also invalid. (At 55C/D - D/E.)

Held, further, that s 1(4)(b) of the Intestate Succession Act 81 of 1987 had to be declared unconstitutional and invalid insofar as it excluded from the application of s 1 any estate or part of any estate in respect of which s 23 of the Black Administration Act 38 of 1927 applied. (At 55E.)

Held, further, that until the foregoing defects were corrected by competent Legislature, it had to be declared that the distribution of intestate black estates was governed by s 1 of the Intestate Succession Act 81 of 1987. (At 55E/F - F.)

Semble: The constitutional imperative of developing African customary law cannot be realised on the face of some provisions contained in the Black Administration Act (if not the Act in toto). The provisions of s 23 require a substantial revision. In particular the provisions of s 23(10) instruct the President to make regulations consistent with the Black Administration Act. The underlying imperative of the Black Administration Act was that of male preference as against equality of genders and that of African subordination against other races. It is up to Parliament to decide when this Act shall be repealed in toto. (At 55G - I/J.)