

## **MTHEMBU v LETSELA AND ANOTHER 2000 (3) SA 867 (SCA)**

### **Headnote : Kopnota**

L, the deceased, had lived with the appellant and her two minor daughters, one of whom (T) was born of an intimate relationship between the appellant and the deceased, on a property in respect of which the deceased had held a long term leasehold title. The deceased had no other issue, died intestate and was survived by his father, the first respondent. The deceased's parents shared a house on the property with the appellant and her two daughters. When the deceased's estate was administered, it was indicated by a magistrate in Boksburg, the second respondent, that the deceased's estate was to devolve in terms of black law and custom. The first respondent accordingly claimed that the property belonging to the deceased had devolved upon him by virtue of the operation of the customary law rule of male primogenitary succession. In terms of this system of succession, whether or not T was the deceased's legitimate child, being female, she did not qualify as heir to the deceased's estate. When the head of a family died, his heir took his position as head of the family and became owner of all the deceased's property, became liable for the deceased's debts and assumed the deceased's position as guardian of the women and minor sons in the family. It was the heir's obligation to support and maintain the deceased's dependants.

The appellant had then brought an application in a Provincial Division for an order declaring the customary rule of primogeniture, which generally excluded African women from intestate succession, and reg 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks (the regulations), which gave the rule of succession legislative recognition, made in terms of s 23(10) of the Black Administration Act 38 of 1927 (the Act) invalid on grounds of being inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution). It was argued that the rule discriminated against all black women and girls and all black children who were not the eldest children by excluding them from participation in intestate succession, while not visiting the same disability upon eldest sons or any one who was not black. It was common cause that no customary union had existed between the appellant and the deceased when T was born, but the appellant did allege that lobola had been negotiated and paid in part.

The Court a quo found that the rule was not inconsistent with the fundamental rights contained in chap 3 of the interim Constitution and that the chapter could be construed so as not to negate the essential rights conferred by the rule. It held further that T was not a victim of gender discrimination because any illegitimate child of the deceased would have been disinherited. The appellant appealed against the decision contending that the regulation was *ultra vires* at common law as it constituted delegated legislation which could not be partial or unequal in its operation unless specifically authorised by an enabling Act; that the regulation had impliedly been repealed by s 1(1) read with s 1(4)(b) of the Intestate Succession Act 81 of 1987; that the rule was to be developed in terms of s 35(3) of the interim Constitution with due regard to the fundamental value of equality so as to avoid discrimination between the

children of a deceased; and that, if not so developed, the rule would be repugnant to the principles of public policy or natural justice within the meaning of s 1 of the Law of Evidence Amendment Act 45 of 1988 and courts would not apply it. The appellant argued further that, because there had been an agreement between the appellant and the deceased to marry and lobola had been paid in part, T was, at customary law, the deceased's legitimate daughter. Even if T was the deceased's illegitimate daughter, so it was argued, she was still a victim of gender discrimination as, in the absence of legitimate sons, customary law recognised the right of an illegitimate son, but not an illegitimate daughter, to succeed to the intestate estate of a deceased.

*Held*, that the appellant's interpretation of the authority leading to the conclusion that T was not illegitimate was incorrect. The crucial element was that there had to be a marriage (customary union) and not merely payment of bridewealth or part of it for the child to be 'transferred' into its father's family. With an illegitimate child, the child was legitimised by the subsequent payment of dowry and the marriage of the parents. (Paragraph [17] at 878I - 879A.)

*Held*, further, that, as it was common cause that there had been no customary union between the appellant and the deceased at the time of T's birth or subsequent thereto, it followed that the Court a quo had been correct in holding that T was illegitimate. (Paragraph [18] at 879B - C.)

*Held*, further, that the appellant's argument that the right of any illegitimate son to succeed was recognised in customary law was also incorrect as the authority used by the appellant referred strictly to the illegitimate son of a married woman born during the subsistence of a customary union between his mother and the deceased. (Paragraph [20] at 879G.)

*Held*, further, that the regulations embodying the rule were a form of delegated legislation and as such could be declared invalid on the ground of unreasonableness if they were found to be partial and unequal in their operation between different classes, unless the enabling Act specifically authorised such partiality and inequality. (Paragraph [22] at 879I - J.)

*Held*, further, that the regulation in issue did not introduce something foreign to black persons but merely gave recognition to a principle or system which had been in existence and followed for a long time. The existing law enabled black persons to avoid the application of the customary law of succession by drafting a will and accordingly if they took no steps to alter the devolution of their estates, the resulting consequences could not be assumed to be contrary to their wishes. The wishes of the deceased being paramount in our law, it was difficult to see how a regulation respecting that right could be unreasonable and ultra vires at common law. (Paragraphs [23] and [24] at 880C - D and D/E - F/G.)

*Held*, further, that an intestate estate, as referred to in the Intestate Succession Act 81 of 1987 was an estate which devolved neither under a will nor under s 23 of the Act. (Paragraph [27] at 881A - A/B.)

*Held*, further, that s 1(4)(b) of the Intestate Succession Act excluded from its operation any part of an estate of a deceased falling under s 23 of the Act. The Intestate Succession Act therefore did not profess or manifestly intend to regulate the whole subject of intestate succession. By excluding s 23 of the Act from the operation of the Intestate Succession Act, the Legislature clearly intended to preserve the rule. (Paragraph [29] at 881D, E/F - F and G.)

*Held*, further, that with intestate succession, the inheritance vested immediately upon the death of the deceased. The first respondent had therefore acquired a right to claim ownership of the property upon the death of the deceased and T had no right to succeed to the deceased as heir because as an illegitimate child she belonged to her mother's family in terms of customary law. The head of her mother's family was accordingly obliged to provide for her. (Paragraphs [34] and [37] at 882F - G and 883A/B.)

*Held*, further, as to whether the interim Constitution applied in the present matter, that, since it had come into operation on 27 April 1994, after the death of the deceased on 13 August 1993, the Constitution did not operate retrospectively. (Paragraph [35] at 882G/H.)

*Held*, further, that the present was not a case where the recognition and respecting of previously acquired rights would be so grossly unjust and abhorrent, in the light of the present constitutional order, that they could not be countenanced, nor was it an appropriate case to entertain an invitation to develop the rule. Such development should be left to the Legislature after a process of full investigation and consultation. To strike down the rule would be to dismiss an African institution without examining its essential purpose and content. (Paragraphs [40] and [47] at 883G/H - I and 885A - A/B.)

*Held*, further, that the interests of the community or the public were of paramount importance in relation to the concept of public policy: it reflected the mores and fundamental assumptions of the community and was the general sense of justice of the community, the *boni mores* manifested in public opinion. Questions of public policy were, however, not important in this case. If the deceased had made a will and bequeathed his entire estate to the first respondent, such a bequest could not have been challenged on grounds of public policy. Equally, the consequences of the deceased dying without a will are not subject to public policy as the deceased may well have known what such consequences would be and been content not to alter them. Furthermore, the rule was embodied in a statute and it could not successfully be argued that a statute could be struck down on grounds of public policy, which would be the effect if the rule were held to be invalid for being contrary to public policy as that concept was understood and applied at common law. (Paragraphs [43] - [45] at 884D - H/I.) Appeal dismissed.

The decision in the Transvaal Provincial Division in *Mthembu v Letsela and Another* 1998 (2) SA 675 confirmed.