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# WOMEN'S EQUALITY AND ECONOMIC RIGHTS

CASE COMPENDIUM



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# Case Compendium on Women's Equality and Economic Rights

This Case Compendium on Women's Equality and Economic Rights provides case briefs from decisions made by courts in Southern and Eastern African States. Each of the cases were carefully chosen for their progressive rulings and outstanding opinions that set a precedent recognizing the human rights of women, reflecting researched conducted up to December 2020. This Compendium is a living document, and we welcome updates and additions to fill in any gaps.

This Compendium aims to reflect progress made by the judiciary to guide actors in both the private and public sector to respect gender equality. By extension, we hope that our identification of these cases facilitates ongoing discussion by judicial actors to continue to deliver innovative decisions that empower women. These judgements are the start of an evolving body of jurisprudence that protects, respects, and fulfills the human rights of women.

The Compendium is arranged thematically by the following categories: rights to equality within marriage and the family, property rights, and work rights. Within each category of rights, cases are organized in reverse chronological order, with the most recent cases listed first. Key international and regional court decisions are also included. Each case is identified by the parties to the case, the court, date, and the judge or justices who wrote the opinion. The briefs include the issue(s) before the court, legally significant facts, holding, reasoning, and remedy.

This Case Compendium is part of a broader research project to assess progressive judicial developments with regards to women's economic rights and access to justice. It is accompanied by a White Paper, setting out key human rights standards and interpretations on women's equality and economic rights, and a Mapping of judicial officers and advocates in Eastern and Southern Africa who have been instrumental in advancing women's economic rights and access to justice.

This Compendium was drafted by Rebecca Ramirez and Sara Lilley, legal interns with the Human Rights Clinic of the University of Miami School of Law, under the supervision of the Clinic's Acting Director, Tamar Ezer. Ishita Dutta of the International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific) further provided important guidance. Additionally, valuable review and suggestions were provided by Allan Maleche and Nerima Were of the Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN), Lesego Nchunga of the Initiative for Strategic Litigation in Africa (ISLA) and Anneke Meerkotter of the Southern Africa Litigation Centre (SALC).

# RIGHTS TO EQUALITY WITHIN MARRIAGE AND THE FAMILY

## The High Court of Eswatini

### *Sacolo v Sacolo*<sup>1</sup>

The High Court of Eswatini

Date: August 30, 2019

Justice Titus Mlangeni, Justice Qinisile Mabuza, and Justice N.J. Hlophe

**Key Topics:** Marital power, community of property, marital property

**Case Synopsis:** The Court in *Sacolo v Sacolo* declared marital power discriminatory against women and constitutionally invalid and stated that both spouses must have equal authority to manage marital property.

#### **Issue:**

The Court addressed whether common law marital power violates the Constitutional right to equality before the law and the right to dignity. The Court also determined whether the word “African,” as used in sections 24 and 25 of The Marriage Act of 1964 (“Marriage Act”), is racially discriminatory.

#### **Facts:**

The applicant and respondent were married in community of property. Under the common law, women below the age of majority attain the status of the majority when “consent is given on their behalf and they get married.”<sup>2</sup> The husband argued that even though the wife attained the status of the majority, pursuant to the doctrine of marital power she remained a minor for purposes of managing the joint estate. In accordance with marital power, the wife can only handle marital assets with the knowledge and consent of her husband; yet he is not obligated to do the same. The wife argued that marital power is discriminatory against women and that Sections 24 and 25 of the Marriage Act are discriminatory against married women. Section 24 provides that marital powers issues are governed by common law for non-African couples while the same issues are governed by Swazi Law and custom for African couples. Section 25 of the Marriage Act similarly provides that marital issues that arise for African couples are governed by customary law unless the parties agree otherwise prior to marriage.

#### **Holding:**

The Court declared the common law doctrine of marital power as invalid because it is discriminatory against women and violates the constitutional right to equality before the law and the

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<sup>1</sup> Makhosazane Eunice Sacolo (nee Dlamini) and Another vs. Jukhi Justice Saco lo and 2 Others (1403/ 16) [2019] SZHC (166) 30th August 2019.

<sup>2</sup> *Id.* at 8.

right to dignity.<sup>3</sup> The Court further held that a portion of Section 24 of the Marriage Act is invalid and Section 25 of the Marriage Act is entirely invalid.

**Reasoning:**

The Court acknowledged that despite compelling precedent such as *Siblongonyane v. Siblongonyane*, “marital power of the husband is alive and well in [Eswatini], pervasive in its discriminatory shackles.<sup>4</sup> Section 20 of the Constitution affords women equality before the law and provides that “all persons are equal before and under the law” and further prohibits discrimination based on a variety of factors including gender and race.<sup>5</sup> Section 28 of the Constitution further describes the rights and freedoms of women as equal to that of men.<sup>6</sup> The Court stated that the rights granted to men under the common law rule of marital power “is often abused to the prejudice of the other spouse” and as a result, creates tension in marital relationships.<sup>7</sup> This occurrence violates the constitutional provisions of sections 20 and 28 and exemplifies inequality before the law. The Court stated that “[s]pouses married in terms of the Marriage Act and in community of property have equal capacity and authority to administer marital property.”<sup>8</sup>

Under the common law, the rights of husbands can be contractually restricted through antenuptial contracts that exclude community of property.<sup>9</sup> The Court determined it is unfair for women to be forced to enter into a contract to attain equality in marriage. Dignity is “an essential element of respect and honor” and when married women are “reduced to the status of perpetual minority within the marital regime and beyond” as a result of marital power, they are denied the constitutional right to dignity.<sup>10</sup>

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<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 7; *See also* THE CONSTITUTION OF THE KINGDOM OF SWAZILAND ACT 2005 at Section 20 (“20(1) “All persons are equal before and under the law in all spheres of political, - economic social and cultural life and in every other respect and shall enjoy equal protection of the Law. 20 (2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability 20 (3) For purposes of this section 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race...””).

<sup>6</sup> *Id.* at 7; *See also* THE CONSTITUTION OF THE KINGDOM OF SWAZILAND ACT 2005 at Section 28 (“Women have a right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities”).

<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.* at 14.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 10.

The term “African” in Sections 24 and 25<sup>11</sup> of the Marriage Act are discriminatory and vague.<sup>12</sup> Importantly, the Marriage Act does not define the word “African” and does not consider indigenous Africans, non-indigenous Africans, or non-Africans who may not be aware of Eswatini customary practices. In effect, the Marriage Act imposes customary law on African spouses while non-African spouses are subjected to common law.<sup>13</sup> As a result, the portion of Section 24 describing the rules for “Africans” was struck down while the entirety of Section 25 was also struck down.

**Remedy:**

The Court did not order specific remedies to the parties. See the “holding” section above.

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<sup>11</sup> THE MARRIAGE ACT NO. 47 /1964 at Section 24 and 25 (“24. The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law, as varied from time to time by any law, unless both parties to the marriage are Africans in which case, subject to the terms of Section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi Law and custom; “25 (1) If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them unless prior to the solemnization of the marriage the parties agree that the consequences following (sic) from the marriage shall be governed by the common law. (2) If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the marriage officer shall endorse on the original marriage register and on the duplicate original marriage register the fact of the agreement; and the production -of a marriage certificate, original marriage register or duplicate original marriage register so endorsed shall be prima facie evidence of that fact unless the contrary is proved”).

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 13.

# African Court on Human and Peoples' Rights

## *APDF and IHRDA v Republic of Mali*<sup>14</sup>

African Court on Human and Peoples' Rights

Date: May 11, 2018

Justices: Ben Kioko, Justice Gerard Niyungeko, Justice Marie Therese Mukamulisa

**Key Topics:** Right to inheritance, consent, elimination of harmful practices, and minimum age of marriage

**Case Synopsis:** The Court in *APDF and IHRDA v Republic of Mali* ruled that several provisions contained in Mali's Family Code violated international and regional human rights provisions where the Code did not state a minimum age of marriage, provide for the right to consent, or allow equitable inheritance for women and children.

### **Issue:**

This Court addressed whether the newly enacted Islamic Family Code was a violation of women's rights under international and regional law. The provisions addressed by the Court included a minimum age of marriage for girls, the right to consent, right to inheritance, and violation of the obligation to eliminate traditional practices and conduct harmful to the rights of women and children.<sup>15</sup>

### **Facts:**

In 2009, Mali passed a law called the Family Code, which regulated the rights of individuals and family, including the age of marriage and issues of inheritance. After protests from religious groups, lawmakers radically changed the law to be more socially conservative to allow for underage marriage, lack of consent, and discriminatory inheritance. African women's rights organizations such as The Association pour le progress et la defense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) filed a complaint before the African Court of Human Rights and Peoples' Rights. These organizations argued that this new law violated the Maputo Protocols, The African Charter on the Rights and Welfare of the Child (ACRWC), and CEDAW.

### **Parties' Arguments:**

The applicants, APDF and IHRDA maintained that in Mali, Islamic law mandates that a woman receives half of what a man would receive. They also point out that the majority of the population lacks the capacity to use the services of a notary to authenticate a will. Finally, the applicants stated that Mali has demonstrated a lack of willingness to eliminate the traditional practices that undermine the rights of women and girls and children born out of wedlock, especially early marriage. The applicants also argued against the Family Code's provisions on the lack of consent to marriage

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<sup>14</sup> APDF & IHRDA v. Republic of Mali ACtHPR (046/2016), 11 May 2018.

<sup>15</sup> *Id.* at 12.



and unequal inheritance. The allegations violated Article 1 of the ACRWC, which directly discourages such standards.<sup>16</sup>

### **Holding:**

The African Court on Human and Peoples' Rights found that Mali was in violation of the Maputo Protocol, the ACRWC, and CEDAW, specifically, where they deal with the minimum age of marriage, the right to inheritance and the importance of eliminating harmful practices. Furthermore, the Court held that the law must ensure women and natural children be entitled to inheritance.

### **Reasoning:**

The Applicants stated that, according to the World Bank survey conducted in Mali between 2012 and 2013, 59.9% of women aged 18 and 22 were married before the age of 18, 13.6% at 15 years and 3.4% before the age of 12.<sup>17</sup> The organizations argued that despite these alarming statistics on child marriage, Mali had not taken appropriate measures to eradicate this phenomenon. Mali responded that the Family Code should not be seen as a lowering of the marriage age or discriminatory against girls, but rather should be regarded as a provision that “is more in line with the realities in Mali; that it would serve no purpose to enact a legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with sociocultural realities.”<sup>18</sup> Regarding marriage consent, Article 287 of the impugned law prescribes sanctions against any civil registry official who performs marriage without verifying the consent of the parties, but no sanctions are prescribed against defaulting religious ministers who fail to perform the verification.

The Court also concluded that the Family Code was embedded with discriminatory practices which undermine the rights of women and children. This was a landmark decision because it was the first time the African Court found a violation of women's rights under international and regional law. Additionally, this was the first time that a women's rights case was brought before the African Court, it was also the first case brought on the basis of the Maputo Protocol, which is the only women's rights document in the African system.<sup>19</sup>

Regarding minimum age for marriage, the Court held that the Respondent State violated Article 6(b) of the Maputo Protocol. This article about marriage states “States Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that... the minimum age of marriage for women shall be 18 years.”<sup>20</sup> The Family Code also violated Articles 2 and 21 of the ACRWC. Article 2 clarifies that a child includes every human being below the age of 18 years.<sup>21</sup> Article 21 states that, “...Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural

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<sup>16</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999 (“[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency, be discouraged.”) [hereinafter *Rights and Welfare of the Child*].

<sup>17</sup> *APDF v. IHRDA*, (046/2016) at 17.

<sup>18</sup> *Id.* at 18.

<sup>19</sup> *Contentious Matters*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases> (last visited Oct. 30, 2020).

<sup>20</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [Maputo Protocol] (Addis Ababa, Ethiopia, 28 Mar. 2003) (2003), *entered into force* 25 Nov. 2005 at art. 6 [hereinafter *Maputo Protocol*].

<sup>21</sup> *Rights and Welfare of the Child*, *supra* note 16, at art. 2.

practices affecting the welfare, dignity, normal growth and development of the child and in particular those customs and practices prejudicial to the health or life of the child; and those customs and practices discriminatory to the child on the grounds of sex or other status...<sup>22</sup>

Regarding consent, the Court held that Mali has violated Article 6 (a) of the Maputo Protocol and Article 16 (1) (b) of CEDAW on the right to consent to marriage. The Maputo protocol states in Article 6(a) that “no marriage shall take place without the free and full consent of both parties.”<sup>23</sup> CEDAW Article 16(1)(b) states that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.”<sup>24</sup>

Regarding inheritance, the Court found Mali violated Article 21 (1) and (2) of the Maputo Protocol, and Article 3 of the ACRWC, on the right to inheritance for women and children born out of wedlock. Article 21 of Maputo deals with right to inheritance: “1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.” Additionally, “2. Women and men shall have the right to inherit, in equitable shares, their parents’ properties.”<sup>25</sup> The ACRWC article 3 states, “Every child should be allowed to enjoy the rights and freedoms in this Charter, regardless of his or her race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.”<sup>26</sup>

Finally, in addressing eliminating harmful practices, the Court held that Mali violated Article 2 (2) of the Maputo Protocol, Articles 1(discouraging violations) and 21 of the ACRWC, and Article 5 (a) of CEDAW on the elimination of traditional and cultural practices harmful to the rights of women and children. Article 2 of the Maputo Protocol discusses elimination of discrimination against women by States Parties, who must “include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.”<sup>27</sup> Article 21 of the ACRWC reminds that, “Governments should do what they can to stop harmful social and cultural practices, such as child marriage, that affect the welfare and dignity of children.”<sup>28</sup> Mali, as shown through the statistics and trends of law such as the Family Code display how Mali has failed to stop these harmful practices. The court also referred to article 5(a) of CEDAW which states “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>29</sup>

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<sup>22</sup> *APDF v IHRDA*, (046/2016) at 2.

<sup>23</sup> *Maputo Protocol*, *supra* note 20, at art. 6.

<sup>24</sup> Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 13,19 I.L.M. 33 (1980), *entered into force* 3 Sept. 1981 [hereinafter *CEDAW*].

<sup>25</sup> *Maputo Protocol*, *supra* note 20, at art. 21.

<sup>26</sup> *Rights and Welfare of the Child*, *supra* note 16, at art. 3.

<sup>27</sup> *Maputo Protocol*, *supra* note 20, at art. 2.

<sup>28</sup> *Rights and Welfare of the Child*, *supra* note 16, at art. 21.

<sup>29</sup> *CEDAW*, *supra* note 24, at art. 5.

The Court greatly utilized international and regional standards to remind Mali of its obligations and how they have failed in all of the above ways to abide by these standards and ensure equality between both women and children.

**Remedy:**

The Court required that the State of Mali amend the law to reflect standards established in the Maputo Protocol, such as changing the minimum age of marriage to 18 for both girls and boys and mandating consent prior to marriage. Reparations included educating the state, training religious ministers, disseminating the Family Code, and requiring Mali to give an updated report of their changes and improvements by the year 2020.

# South Africa

## *Mayelane v Ngwenyama*<sup>30</sup>

Constitutional Court of South Africa

Date: May 30, 2013

Justice Johan Froneman and Justice Sisi Khampepe

**Key Topics:** Customary marriage, the role of consent by a previous wife in polygamous marriage

**Case Synopsis:** The Court in *Mayelane v Ngwenyama* ruled on the basis of South African constitutional law that the principles of equality and dignity requires that both a husband and wife provide consent should a husband seek to marry another woman in Xitsonga customary marriages.

**Issue:**

The issue before the Court was whether consent of an existing wife in a customary marriage is required in order to validate any subsequent polygamous customary marriages.

**Facts:**

The applicant and first respondent both were part of a customary marriage with Mr. Hlengani Dyson Moyana. Ms. Mayelane alleges that she commenced a valid customary marriage with Moyana on 1 January 1984. Ms. Ngwenyama alleges that she married Moyana on 26 January 2008. Moyana passed away on 28 February 2009. Both wives subsequently sought registration of their respective marriages under the Recognition of Customary Marriages Act. At the same time, both disputed the validity of the other's marriage. Mayelane, the first wife, then applied to the High Court for an order declaring her customary marriage valid and that of Ngwenyama null and void on the basis that Mayelane had not consented to it.<sup>31</sup>

**Holding:**

The second marriage is not valid because it was made without the consent of the first wife. The rule that both parties (husband and wife) must consent to the husband's new wife applies to all Xitsonga Customary marriages is to be applied moving forward (May 30, 2013).<sup>32</sup>

**Reasoning:**

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<sup>30</sup> *Mayelane v Ngwenyama and Another* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

This case transforms spousal relations in customary marriages and was a step in addressing the marital power of husband over the wife.<sup>33</sup> The South African Constitutional Court explained how customary law develops to meet the needs of the community. Paradoxically, the strength of customary law, which is inherently flexible and adaptive, also poses a potential difficulty for magistrates and judges when attempting to apply and enforce it in a court of law. Having emphasized dignity as both a value and right that is firmly entrenched in the Constitution of South Africa,<sup>34</sup> the Court affirmed the need for women to have agency over their own lives as an integral part of realizing their right to dignity. Failure to allow a woman to exercise agency over her own life and marriage is an affront to dignity. As such, the Court specifically stated that:

... the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances is a fundamental aspect of human dignity. However, a wife has no effective autonomy over her family life if her husband is entitled to take a second wife without her consent. Respect for human dignity requires that her husband be obliged to seek her consent and that she be entitled to engage in the cultural and family processes regarding the undertaking of a second marriage. Given that marriage is a highly personal and private contract, it would be a blatant intrusion on the dignity of one partner to introduce a new member to that union without obtaining that partner's consent.<sup>35</sup>

The judgment also highlighted the importance of the equality clause when it is stated that, “the Constitution demands equality in the personal realm of rights and duties as well.”<sup>36</sup> The demand of equality in customary marriages is emphasized by the Court when they explain:

It requires little imagination or analysis to recognize that polygynous marriages differentiate between men and women. Men may marry more than one wife; women may not marry more than one husband. Nevertheless, the validity of polygynous marriages as a legal institution has not been challenged before us and, for present purposes, we must work within a framework that assumes its existence and validity. Are the first wife's rights to equality and human dignity compatible with

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<sup>33</sup> *Mayelane V Ngwenyama on the Importance of Consent and its Application to all Polygynous Marriages in South Africa*, LEGAL RESOURCE CENTRE, <http://resources.lrc.org.za/mayelane-v-ngwenyama-on-the-importance-of-consent-and-its-application-to-all-polygynous-marriages-in-south-africa/> (last visited Oct. 5, 2019).

<sup>34</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996 ch. 1, § 10 (“Everyone has inherent dignity and the right to have their dignity respected and protected.”).

<sup>35</sup> *Mayelane*, (CCT 57/12) at para. 70-1.

<sup>36</sup> *Mayelane V Ngwenyama on the Importance of Consent and its Application to all Polygynous Marriages in South Africa*, LEGAL RESOURCE CENTRE, <http://resources.lrc.org.za/mayelane-v-ngwenyama-on-the-importance-of-consent-and-its-application-to-all-polygynous-marriages-in-south-africa/> (last visited Oct. 5, 2019).

allowing her husband to marry another woman without her consent? We think not. The potential for infringement of the dignity and equality rights of wives in polygynous marriages is undoubtedly present. First, it must be acknowledged that “even in idyllic pre-colonial communities, group interests were framed in favor of men and often to the grave disadvantage of women and children.” While we must accord customary law the respect it deserves, we cannot shy away from our obligation to ensure that it develops in accordance with the normative framework of the Constitution.

The Court also addressed that, “The outcome of this judgment will affect not only the parties before us but entire communities who live according to Xitsonga custom...” and, “may more broadly affect the courts’ jurisprudence related to the development of customary law.”<sup>37</sup>

**Remedy:**

The rule that both parties must consent to husband’s new wife applies to all Xitsonga Customary marriages concluded after May 30, 2013.

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<sup>37</sup> *Id.*

# South Africa

## *Butters v Mncora*<sup>38</sup>

Court: The Supreme Court of Appeal of South Africa

Date: March 28, 2012

Justices: Fitz Brand, Jonathan Arthur Heher, Azhar Cachalia, Nonkosi Zoliswa Mhlantla, and Zukisa Laura Lumka Tshiqi

**Key Topics:** Universal partnership and relationship resembling marriage

**Case Synopsis:** The Court in *Butters v Mncora* determined that a universal partnership existed between a couple that was not legally married, though they maintained a long-term relationship that resembled marriage and both parties contributed to the home and family.

**Issue:**

The issue before the court was whether a universal partnership<sup>39</sup> existed between a couple who lived for 20 years in a relationship that resembled marriage.<sup>40</sup>

**Facts:**

The appellant, Mr. Butters and respondent, Ms. Mncora lived together as husband and wife for almost 20 years, though they were not legally married.<sup>41</sup> The appellant owned a security business and the respondent worked as a secretary for only two years before leaving her position to “stay at home with the children.”<sup>42</sup> Ten years into the relationship, the appellant proposed to the respondent, gave her an engagement ring, publicly announced their engagement, yet he never married her.<sup>43</sup> Over time the appellant “became a very generous provider while the respondent took responsibility for raising the children and maintaining their common home, which the appellant visited over weekends.”<sup>44</sup> In 2007, the respondent found the appellant with another woman and was informed that the appellant had married her months earlier.<sup>45</sup> The relationship ended, and the respondent was left “unemployed and without any personal income at the age of 44.”<sup>46</sup> The “appellant was by all accounts a wealthy man while the [respondent] owned no assets worthy of mention.”<sup>47</sup>

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<sup>38</sup> *Butters v. Mncora* (181/2011) [2012] ZASCA 29 (28 March 2012).

<sup>39</sup> A universal partnership is defined as “partnership where each person gives all of his property to the partnership.” *Universal Partnership*, BLACK’S LAW DICTIONARY (9<sup>th</sup> ed. 2009).

<sup>40</sup> *Butters*, ZASCA 29 at 3.

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 4.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Id.* at 5-6.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 2.

The “‘common home’ and all other immovable properties” were registered in the appellant’s name.<sup>48</sup> On the one hand, the respondent testified that she understood everything was to be shared while on the other hand, the appellant maintained that “whatever he acquired was his and his alone.”<sup>49</sup> The [respondent] contention remained that “while she made no direct contribution to the appellant’s business. . . she supported him, cared for him and the children and maintained their common home.”<sup>50</sup> The “[appellant]’s counter-position was that the [respondent] played no part in his business life; that he was the only one who earned any income while she, as he put it, at best brought up the children and paid the household expenses with money provided by him.”<sup>51</sup> In the lower court the respondent claimed that a “tacit universal partnership existed between the parties in which they held equal shares.”<sup>52</sup> The court agreed that a “tacit universal partnership did in fact exist” and awarded the respondent accordingly.<sup>53</sup>

### **Holding:**

The appellant’s appeal of the High Court decision is dismissed with costs, on the basis that the appellant failed to satisfy the Court that there was no tacit universal partnership, between himself and the respondent.

### **Reasoning:**

The Court relied upon Sinclair’s “*The Law of Marriage Vol 1 274*,” which states that “the general rule of our law is that cohabitation does not give rise to special legal consequences and the protective measures of family law “are generally not available to those who remain unmarried, despite their cohabitation, even for a lengthy period”<sup>54</sup> However, the respondent- cohabitee sought relief through the private law of partnership.<sup>55</sup> The three elements required to prove a partnership in a court of law were established by Pothier<sup>56</sup> and states: (1) each party must bring something into the partnership such as money, labor or skill; (2) the “partnership business should be carried on for the joint benefit of both parties;” and (3) “the object should be to make a profit.”<sup>57</sup> Courts have held that existing South African laws on universal partnerships of all property originates from Roman Dutch law and that universal partnerships do “not require an express agreement” to be a valid contract.<sup>58</sup>

The respondent satisfied the first element of Pothier’s rule as she “spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children.”<sup>59</sup>

The partnership satisfied the second element of Posthier’s rule as it jointly benefitted both parties.<sup>60</sup> The Court held that if the appellant were to retain all of his own income, “it would mean

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<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*; *See* (R J Pothier A Treatise on the Law of Partnership (Tudor’s Translation 1.3.8).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 13.



that even a negligible monetary contribution would outweigh an invaluable non-financial contribution to the family life of the parties.”<sup>61</sup> The court instead evaluated the contribution of the respondent which, “accords with a greater awareness in modern society of the value of the contribution of those who are prepared to sacrifice the satisfaction of pursuing their own careers, in the best interests of their families.”<sup>62</sup> The court found that the “[appellant] shared the benefits of the [respondent’s] contribution to the maintenance of their common home and the raising of the children.”<sup>63</sup> Furthermore, the respondent “shared in the benefits of the [appellant]’s financial contribution” yet it would be unfair for the appellant to “retain the surplus income and accumulate assets only for himself.”<sup>64</sup>

The respondent met the third element of Pothier’s rule because the parties’ “home life and the business conducted by the [appellant] was aimed at profit . . . [which] they tacitly agreed to share.”<sup>65</sup>

**Remedy:** The appeal was dismissed with costs including attorneys’ fees.<sup>66</sup>

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<sup>61</sup> *Id.* at 11.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 12.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.*

# Lesotho

## *Mohlekoa v Mohlekoa and Others*<sup>67</sup>

Court: Lesotho High Court

Date: March 6, 2006

Justices Honourable and Justice G. N. Mofolo

**Key Topics:** Marriage in community of property, marital consent, and matrimonial property

**Case Synopsis:** The Court in *Mohlekoa v Mohlekoa and Others* held that an exception to the doctrine of marital power exists in customary Lesothian law that prohibits a husband from depriving his wife of property held in the couple's joint estate when he engages in fraudulent acts.

### **Issue:**

The issues to be decided include whether: (1) a woman married in community of property has a right to bring an action in court; (2) if the woman lacks this right, whether she can bring an "application without her husband's consent;" and (3) if she lacks consent, whether she is able to approach the Court and request permission to initiate litigation.

### **Facts:**

A wife alleged that her husband attempted to illegally transfer the title of their house without her consent. She also alleged that the husband fraudulently exercised his marital power by selling their motor vehicle to a third party. The wife accused the husband of being prodigal and unable to manage money such that their matrimonial property was in danger of being sold frivolously.

### **Holding:**

The Court held that the husband violated the common law rule governing marriages in community of goods. By common law a "husband is not obliged to account to his wife for dispositions of the joint estate." However, the husband's actions fell into the exception to this rule as he acted "fraudulently and foolishly to reduce his family to destitution." The Court held that the wife was capable of applying for a court order without her husband's consent. Therefore, the husband was prohibited from continuing to defraud his wife.

### **Reasoning:**

Mr. Mosita contended that under marital power, a wife has no right to bring an action in court or to address court. He alleged that without her husband's specific consent, a wife is unable to bring an action in Court. The Court agreed that while "Mr. Mosito is basically right," in his assessment of marital power, he did not consider when exceptions to this broad rule may apply.

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<sup>67</sup> *Mohlekoa v Mohlekoa and Others* (CIV/APN/476/05) (CIV/APN/476/05) [2006] LSHC 5 (06 March 2006).

The common law of Lesotho originates from Holland's Roman- Dutch law. Dating back to the thirteenth century, the matrimonial property regime of Holland consisted of "community of property and of profit and loss." Under this regime, the "assets and liabilities of the spouses" were merged into a joint estate upon marriage and the husband had the sole authority to administer those assets through virtue of his marital power.

The exception to this rule stated that if a husband "acted fraudulently and foolishly threatening to reduce his family to destitution, she could apply to court for an order of separation of goods." Furthermore, "the husband was not allowed to make donations to third parties in fraud of his wife."

The Court analyzed the development of historical matrimonial law and relied upon findings from "Sinclair's (the Law of Marriage Vol. 1 pp 190-198) synopsis." The Roman Dotal system of the middle ages said "wives everywhere were subject to the guardianship of their husbands who represented them in Court, administered the joint estate as well as separate estates of their wives, acted for them in business matters and in their lordly discretion administered to them moderate chastisement." The Court explained that under Roman- Dutch law, biblical authority, and "cannons of the Church" justified the perception of women as a weaker sex and thus inferior to their husbands.

The Court reiterated that Lesotho common law mandates that a husband is "not allowed to make donations to third parties in fraud of his wife." The Court found that the husband was attempting to engage in a fraudulent act by "transferring property to third parties without consideration and in fraud of his wife to avoid consequences of a divorce action." The Court found that the husband acted to the "prejudice and detriment of his wife's interests" or family interests and the wife is, therefore, entitled to bring an action against her husband without his consent.

The Court said that if it did not rule in favor of the wife, then she would "suffer more injury" than her husband. The Court found that although the property and buildings had not been fully transferred, this did not harm the wife's claim because her action was brought in an attempt to prevent the imminent transfer. Furthermore, it was irrelevant that the vehicle was already sold without the wife's consent, the Court could still make a judgment on the matter.

### **Remedy:**

The Court prohibited the husband "from using or in any manner whatsoever alienating or issuing a lease in respect of property" of the family home. The husband was also prohibited from "using, alienating or in any manner whatsoever transferring" the family vehicle. The husband was also interdicted from "alienating, mortgaging or pledging any property forming part of the joint estate" between the married couple.

# PROPERTY RIGHTS

## The High Court of Malawi

### *Tewesa v Tewesa*<sup>68</sup>

The High Court of Malawi

Date: August 31, 2020

Justice Sylvester Kalembera

**Key Topics:** Matrimonial property, women’s inheritance, distribution of estate

**Case Synopsis:** The Court in *Tewesa v Tewesa* held that under Malawi constitutional and customary law a wife was entitled to compensation and a share of matrimonial property upon the dissolution of her marriage when she contributed to the household both financially and in non-monetary ways while her husband sought a bachelor’s degree.

**Issue:**

The Court determined whether educational qualifications are marital or family property when a wife contributed to the home both financially and otherwise while the husband sought a degree in higher education.

**Facts:**

The petitioner, Ellen Tewesa and the respondent, Chimwemwe Tewesa were married under customary law for 17 years. The Court described the petitioner as a “housewife” who contributed to the marriage by cooking and contributing to the family’s budget. The respondent was the “bread winner” who worked towards a bachelor’s degree while the two were married and later became a teacher and lecturer. Upon the dissolution of the marriage, the two sought distribution of their matrimonial property by a magistrate judge. Lacking jurisdiction, the magistrate deferred the issue of distribution of matrimonial property to the High Court. The Court noted the couple had no children together, “were not financially independent and they were on unequal footing.”<sup>69</sup> The wife argued that she had a beneficial property interest in her husband’s bachelor degree and that their marital property and household items be divided equally upon dissolution of their marriage.

**Holding:**

The High Court of Malawi found that the petitioner is entitled to a share of matrimonial property. The Court further held that while the respondent’s bachelor’s degree is considered a form of property, it is uninheritable and indivisible. The Court also held that educational qualifications are not family property. However, practicing licenses were deemed marital property.

**Reasoning:**

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<sup>68</sup> *Tewesa v Tewesa* (Matrimonial Cause Number 9 of 2012) [2020] MWHC 28 (31 August 2020).

<sup>69</sup> *Id.* at 2.

The Constitution and customary law of Malawi “both recognize that property acquired during subsistence of marriage is subject to fair and just distribution upon dissolution of marriage.”<sup>70</sup> Section 24 of the Constitution of the Republic of Malawi entitled the petitioner to a “fair distribution of the matrimonial property.”<sup>71</sup> Moreover, the Court stated that the principles of intention and contribution govern the distribution of marital property. More specifically, only property that is jointly held by a married couple, as demonstrated by evidence, can be distributed upon dissolution of the marriage.<sup>72</sup> The Court also relied upon Sections 24<sup>73</sup> and 28<sup>74</sup> of the Constitution to demonstrate that jointly held property must be distributed fairly to women and men on the dissolution of marriage. Malawian precedent requires a court to make a case-by-case determination and consider all relevant circumstances when assessing the fair disposition of property.<sup>75</sup>

The Court determined that the respondents’ educational qualifications are “uninheritable” and the degree only “vests in the owner whose name appears in it.”<sup>76</sup> This is because degrees have only “intangible or intellectual value” and would have negligible monetary worth if divided among spouses.<sup>77</sup> Moreover, educational degrees were held to not be “marital property because when the bearer dies, they cannot be inherited by any person to enable him or her to look for a job.”<sup>78</sup> However, practicing license and future earning capacity were deemed marital property because upon the death of an owner, a practice can be inherited by friends and family. Additionally, the Court concluded that a married couple maintains equitable claims to educational qualifications. However, because the marriage in this case dissolved, the wife’s interest in the husband’s educational qualifications also ceased to exist upon divorce. Although, the wife was ordered to be “compensated for such a loss through distribution of matrimonial property” and was awarded monetary damages.<sup>79</sup>

### **Remedy:**

The Court ordered the husband to compensate the wife for her contributions, both financial and in kind, that she provided while he was obtaining an education. The Court also stated that justice and fairness demanded that all of the household property owned by couple be shared equally between

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 4; *See also* CONSTITUTION OF THE REPUBLIC OF MALAWI at Section 24(1) (“Women have the right to full and equal protection by the law, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right - (b) on the dissolution of marriage- (i) to a fair disposition of property that is held jointly with a husband; and (ii) to fair maintenance, taking into consideration all the circumstances and, in particular, the means of the former husband and the needs of any children.”)

<sup>72</sup> *Id.* at 4-5.

<sup>73</sup> *Id.* at 5; *See also* CONSTITUTION OF THE REPUBLIC OF MALAWI at Section 24(1) (“Section 24 (1) (a) of the Constitution inter alia, grants women the same rights as men to enter into contracts, acquire and maintain rights in property. Section 24 (1) (b) (i) of the Constitution grants women the right, on the dissolution of marriage, to a fair disposition of property that is jointly held with the husband and applies to every marriage”).

<sup>74</sup> *Id.* at 5; *See also* CONSTITUTION OF THE REPUBLIC OF MALAWI at Section 28 (1) (providing that every person is entitled to acquire property alone or in association with others).

<sup>75</sup> *Id.* at 6.

<sup>76</sup> *Id.* at 8.

<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.* at 9.

<sup>79</sup> *Id.* at 11.

the parties.<sup>80</sup> The Court also determined the land owned by the parties was matrimonial property and therefore divided it into equal shares. The value of the vehicle was ordered to be sold with proceeds first going toward bank loans and the remaining funds were to be shared equally. The Court awarded K1,000,000.00 to the petitioner. Finally, given the fact that the petitioner will have to “re-start her life” and is unemployed, the Court ordered the respondent to “build a house” at the petitioner’s matrimonial home within ninety days or pay her a sum of K2,000,000.00 to build her own house.

**Notes:**

For additional information, on this case, please see the flowing article: *Malawi Judge Rules That Academic Qualifications Obtained While In Matrimonial Period Is Marital Property* by Nnessien accessible at the following link: <https://nnessien.com/2020/09/09/malawi-judge-rules-that-academic-qualifications-obtained-while-in-matrimonial-period-is-marital-property/>.<sup>81</sup>

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<sup>80</sup> *Id.* at 14.

<sup>81</sup> *Malawi Judge Rules That Academic Qualifications Obtained While in Matrimonial Period Is Marital Property*, NNESSIEN, <https://nnessien.com/2020/09/09/malawi-judge-rules-that-academic-qualifications-obtained-while-in-matrimonial-period-is-marital-property/> (last visited Oct. 30, 2020).

# UN Committee on the Elimination of Discrimination Against Women

## *E.S & S.C. v United Republic of Tanzania*<sup>82</sup>

UN Committee on the Elimination of Discrimination Against Women

Date: March 2, 2015

CEDAW Committee Members<sup>83</sup>

**Key Topics:** Islamic law, customary marriage, women's inheritance, and financial independence

**Case Synopsis:** The UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) in *E.S. & S.C. v United Republic of Tanzania* held that several of Tanzania's codified customary laws relating to the rights of women and widows to own, inherit, and manage property were discriminatory and in violation of international human rights law.

**Issue:**

The CEDAW Committee addressed whether customary law in Tanzania conflicted with the State's duties in enforcing women's equality in inheritance cases.

**Facts:**

E.S. and S.C. are Tanzanian nationals, who entered into customary marriages. When their respective husbands died, they were evicted from their homes by their husbands' families, did not inherit any of their husbands' estates and were denied the right to administer the estates. E.S. entered into customary marriage with M.M. in 1989. She is a tailor and has two daughters and one son. During her marriage, she and her husband jointly acquired the house in which they lived, which formed part of her husband's estate. Her husband died in 1999. Immediately thereafter, her brother-in-law ordered her to leave the house where she was living, and she was told that under Sukuma customary law she could not inherit her husband's estate. S.C. married R.M. in 1999. She is also a tailor and has a daughter. Her husband died in August 2000. He built the house in which they lived, before their marriage. She and her husband had jointly purchased a car. When her husband died, both her brother-in-law and her mother-in-law ordered her to leave the house because she did not contribute to the cost of its construction. They also decided to sell the car.

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<sup>82</sup> CEDAW, Communication 48 Views of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Sixtieth session, 2015), U.N. Doc. CEDAW/C/60/D/48/2013 (2015) [hereinafter *Communication 48*].

<sup>83</sup> *Id.* at 2 (“The following members of the Committee participated in the examination of the present communication: Ayse Feride Acar, Gladys Acosta Vargas, Malays Arocha Dominguez, Barbara Bailey, Niklas Bruun, Louiza Chalal, Náela Gabr, Hilary Gbedemah, Nahla Haidar, Ruth Halperin-Kaddari, Yoko Hayashi, Lilian Hofmeister, Ismat Jahan, Dalia Leinarte, Lia Nadaraia, Pramila Patten, Silvia Pimentel, Biancamaria Pomeranzi, Patricia Schulz and Xiaoqiao Zou.”).

There were three separate “intestate succession inheritance schemes”<sup>84</sup> in the State party: Islamic law,<sup>85</sup> customary law and the Indian Succession Act.<sup>86</sup> Customary law had been codified since 1963 and was in force in 30 districts, making it the most commonly applied form of law in Tanzania.<sup>87</sup> Under customary inheritance law, as codified in schedule 2 to the Local Customary Law (Declaration) (No. 4) Order, inheritance rules are patrilineal (rule 1). Rule 5, which pertains to the right to administer the deceased’s estates, states that “the administrator of the deceased’s property is the eldest brother of the deceased, or his father, and if there is no brother or father, it can be any other male relative chosen with the help of the clan council”<sup>88</sup> The previous Court dismissed the appeal on a procedural technicality concerning dates on court documents not attributable to E.S. or S.C. and which they later sought to have remedied without success. E.S. and S.C. subsequently submitted a communication to the Committee on the Elimination of Discrimination against Women, in which they claimed that the State Party had violated articles 2(c), 2(f), 5(a), 13(b), 15(1), 15(2), 16(1)(c) and 16(1)(h)<sup>89</sup> of the Convention on the Elimination of All Forms of Discrimination against Women, read together with the Committee’s General Recommendations Nos. 21 and 27.<sup>90</sup>

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<sup>84</sup> Tamar Ezer, *Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters*, 7, *GEO. J. GENDER & L.*, 599 (2006).

<sup>85</sup> *Communication 48, supra* note 82 at 3 (“Islamic law governs the inheritance of Muslims, approximately 45 per cent of the population.”).

<sup>86</sup> *Id.* (“The Indian Succession Act consists of codified English law from 1865, imported to the United Republic of Tanzania from India by the British. The authors indicate that the Act is rarely applied in the State party. It is mostly applied to Europeans, given that people of African origin are governed by customary rules.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at para. 2.2.

<sup>89</sup> *CEDAW, supra* note 24, at art. 2(c) “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; and 2 (f): To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Article 13 (b) states: States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: The right to bank loans, mortgages and other forms of financial credit. Article 15 states: (1) States Parties shall accord to women equality with men before the law; and (2) States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. Finally, Article 16 states: 1(c). States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women; and 1(h): The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.”)

<sup>90</sup> Specifically, E.S. and S.C. claimed that they were: discriminated against based on their sex/gender and therefore denied the ability to administer and inherit property after their husbands’ deaths and an effective remedy, in violation of articles 2(c), 2(f) and 5(a) of CEDAW



**Holding:**

The CEDAW Committee called on Tanzania to grant E.S. and S.C. appropriate reparation and adequate compensation, commensurate with the seriousness of the violations of their rights. Moreover, the Committee also urged Tanzania to repeal or amend its customary laws, including on inheritance.<sup>91</sup>

**Reasoning:**

The State knowingly failed its duty by giving unnecessary delays to decisions of progress for women. Tanzania's inheritance regime violated women's fundamental rights to equality, property, an adequate standard of living, family, and dignity under the Tanzania Constitution and binding international conventions. The CEDAW Committee went through the different CEDAW articles listed above and reviewed the merits. First, the Committee recalls that, under articles 2 (f) and 5 (a) of the Convention, States parties have an obligation to adopt appropriate measures to amend or abolish not only existing laws and regulations but also customs and practices that discriminate against women, including when States parties have multiple legal systems in which different personal status laws apply to individuals on the basis of identity factors such as ethnicity or religion. The Committee also brought up that, under article 13 of the Convention, States parties are required to take all appropriate measures to eliminate discrimination against women in areas of economic and social life, in particular with regard to their right to bank loans, mortgages and other forms of financial credit.

The Committee stressed that the rights provided in article 16 (1)(h) overlap with and complement those in article 15 (2) in which an obligation is placed on States parties to give women equal rights to administer property.<sup>92</sup> It was also the Committee's view that the right of women to own, manage, enjoy and dispose of property is imperative to their financial independence and may be necessary to their ability to earn a livelihood and to provide adequate housing and nutrition for themselves and for their children, especially in the event of the death of their spouse.

The Committee also utilized the Tanzania Constitution as justification for their recommendations and calling out the State for failing its duties. Article 13 of the Tanzania Constitution states, "All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law...No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect."<sup>93</sup> The Committee acknowledged that, although the Constitution includes provisions guaranteeing equality and non-discrimination, Tanzania still failed to revise or adopt legislation to eliminate the remaining discriminatory aspects of its codified customary law provisions with regard to widows. Consequently, E.S and S.C were deprived of the

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denied equal economic rights and opportunities, including access to mortgages and other forms of financial credit, in violation of article 13(b) denied equality before the law, in violation of article 15(1) prevented them from administering their husbands' property, as their legal capacity was not recognised, in violation of article 15(2) not afforded the same rights as men in the administration and inheritance of property upon the dissolution of marriage, in violation of articles 16(1)(c) and 16(1)(h); *See also* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (New York, 6 Oct. 1999) A/RES/54/4, *entered into force* 22 Dec. 2000 [hereinafter *CEDAW Optional Protocol*].

<sup>91</sup> CEDAW, Communication No. 48/2013 (Sixtieth session, 2010), U.N. DOC. CEDAW/C/60/D/48/2013 (2013).

<sup>92</sup> *Id.* at para 7.2.

<sup>93</sup> CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, Article 13.

right to administer their husbands' estates and excluded from inheriting any property upon the death of their spouses. The Committee considered Tanzania's legal framework, which treats widows and widowers differently in terms of their access to ownership, acquisition, management, administration, enjoyment and disposition of property, as discriminatory and thereby amounts to a violation of article 2 (f) in conjunction with articles 5, 15 and 16 of the Convention.<sup>94</sup>

**Remedy:**

The CEDAW Committee required that Tanzania give "due consideration to the views of the Committee."<sup>95</sup> and submit within six months a written response with information on any action taken in the light of the Committee's recommendations. Tanzania was further requested to publish and widely distribute the Committee's decision to reach "all relevant sectors of society."<sup>96</sup>

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<sup>94</sup> *Id.* at 12

<sup>95</sup> *Communication 48, supra* note 82 at 13. Recommendations included that Tanzania must: Expedite the constitutional review process and address the status of customary laws to ensure that rights guaranteed under the Convention have precedence over inconsistent and discriminatory customary provisions; (ii) Ensure that all discriminatory customary laws applicable in the State party, in particular provisions of the Local Customary Law (Declaration) (No. 4) Order, are repealed or amended and brought into full compliance with the Convention and the Committee's general recommendations, Ensure access to effective remedies, Provide mandatory capacity-building for judges, prosecutors, judicial personnel and lawyers, as well as of the monitoring of the implementation of the Committee's recommendations under the Optional Protocol.

<sup>96</sup> *Id.*

# Malawi

## *Madikhula v. Goba*<sup>97</sup>

The High Court of Malawi

Date: December 2, 2016

Judge Sun Madise

**Key Topics:** Rights of widows, land grabbing, deprivation of property, and financial independence

**Case Synopsis:** The Court condemned acts of land grabbing and property deprivation against widows and declared that such actions jeopardized the financial independence of women under domestic law principles.

**Issue:**

The Court addressed whether a widow and her daughters were the rightful occupiers of the farm land, with exclusive rights over the land in issue.

**Facts:**

Mary and her widowed mother, Idesi inherited land from their deceased father and husband respectively. After inheriting the land in 2006, Mary and her mother cultivated their land to grow and sell sugar cane. The land was their only source of income for themselves and their families. In April 2012, the Village Headman and the Cane Grower's Trust allocated Mary and her mother's sugarcane plot to an elite couple who were business people. This land allocation took place without Mary or her mother's consent. Both parties had been neighbors for about 20 years and the businessman knew that the women relied on that piece of land to grow and sell sugarcane to earn a living. The sugarcane business man spent six years hiring lawyers and launching a court battle trying to prevent the 89-year old woman and her daughter from getting back three hectares of land. Mary attempted to diplomatically resolve the dispute between herself and the elite couple, but these attempts failed. In August 2013, Mary took the matter to the Magistrate's Court to affirm her rights. The Court declared that the property belonged to Mary as she had inherited it in accordance with customary law. Mary then started working her land again. However, the elite couple maintained throughout this period that the property belonged to them and as such, commenced an action in the High Court in 2013. Three months later, Mary was served with an injunction.

As a result, Mary and her mother had been unable to use their land to grow the crops they need in order to support themselves and their families. The women were "traumatized from this experience due to the journey and physical toll it took on them. Furthermore, the prospect that the rest of their families would also endure the destitution and poverty that they endured during this

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<sup>97</sup> *Madikhula v. Goba* [High Court of Malawi] Civil Cause No. 248, 2013 (Malawi); *See also Malawi: Protecting Women From Illegal Land Seizure*, SOUTHERN AFRICAN LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/> (last visited Aug. 21, 2019).

process was unfathomable.”<sup>98</sup> According to LandNet, an NGO defending the landless in Malawi, land grabbing is a big issue in Malawi, thousands of farmers have lost land which has benefited multinational companies.<sup>99</sup>

### **Holding:**

The Court held that there is no evidence that the businessman acquired the land legitimately.

### **Reasoning:**

This case illustrates the struggles of women in Malawi who are often arbitrarily deprived of property and impeded in economic activities needed for financial independence. The High Court ruled that the lower court, the Magistrate’s Court that gave the land in issue back to the women, was a competent court with jurisdiction to hear customary land matters. The High Court noted that the businessman and his family, who were aggrieved by the decision of the Magistrate’s Court, did not seek leave to appeal nor did they apply for a stay of execution. Instead, they instituted a fresh action in the High Court to circumvent the appeal process. Judge Madise disputed the businessman’s claim that the Dwangwa Cane Growers Trust allocated him the land under a now defunct program that was run by the European Union for the purpose of empowering small scale sugarcane growers in 2010.<sup>100</sup> Malawi’s President at the time, Peter Mutharika, claimed that there were no issues of land grabbing in Malawi.<sup>101</sup> This decision helped to send a message to national elitist enablers that property grabbing will not be tolerated.<sup>102</sup>

### **Remedy:**

Following the judgement of the High Court, the businessman surrendered two hectares of land to Idesi and her daughter. Without deciding on the merits, the High Court accordingly dismissed the matter and ordered the Plaintiffs to pay the costs of the proceedings.

### **Notes:**

For additional information, on this case, please see the flowing article: *Malawi: Protecting Women From Illegal Land Seizure* by the Southern Africa Litigation Centre accessible at the following link: <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/>.<sup>103</sup>

Unfortunately, the businessman and his family filed another suit against women to take away their land. The Southern Africa Litigation Centre again supported the Gobas as it was clear that the

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<sup>98</sup> *Businessman Clings to Granny’s 3 Hectares Land: Judge Madise ruled against Madikhula*, NYASA TIMES, <https://www.nyasatimes.com/businessman-clings-grannys-3-hectares-land-judge-madise-ruled-madikhula/> (last visited Aug. 21, 2019).

<sup>99</sup> *Malawi’s Real Land Grab*, NYASA TIMES, <https://www.nyasatimes.com/malawis-real-land-grab/> (last visited Aug. 21, 2019).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* SALC lawyer, Brigadier Siachitema made a statement about this case saying, “This increasing phenomenon of land seizure by national elites has devastating consequences on vulnerable groups, especially women and children...”

<sup>103</sup> *Malawi: Protecting Women From Illegal Land Seizure*, SOUTHERN AFRICA LITIGATION CENTRE (May 22, 2017), <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/>.

case brought another attempt to dispossess the women of their land rights. On 22 May 2017, the High Court granted a permanent injunction against any further actions to dispossess the Goba family of their land. The High Court held that the actions of the Village Headman and Cane Growers' Trust to allocate customary land to new owners was unlawful.<sup>104</sup>

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<sup>104</sup> *Malawi: Protecting Women From Illegal Land Seizure*, SOUTHERN AFRICA LITIGATION CENTRE (May 22, 2017), <https://www.southernafricalitigationcentre.org/2017/05/22/malawi-protecting-women-from-illegal-land-seizure/>.

# Botswana

## *Ramantele v Mmusi and Others*<sup>105</sup>

Court of Appeal of Botswana

Date: September 3, 2013

Judge Isaac Lesetedi, Judge President Ian Kirby, Judge John Foxcroft, Judge Elijah Legwaila, and Judge Seth Twum

**Key Topics:** Customary law, equal protection of the law, and property inheritance

**Case Synopsis:** The Court in *Ramantele v Mmusi & Others* held that pursuant to the non-discrimination provisions of the Botswana Constitution and Ngwaketse Customary Law, four sisters were rightfully entitled to inherit the family homestead and were not prohibited from inheriting family property on the basis of gender.

**Issue:** The Court addressed whether the appellant was entitled to inherit property under Ngwaketse customary law which was interpreted by the appellant to state that “only the last-born son was entitled to inherit the family home on the intestacy of his parents at the expense of his siblings of either gender.”<sup>106</sup>

### **Facts:**

The core dispute of the litigation was the succession of the homestead owned by the deceased Mr. Silabo Ramantele.<sup>107</sup> Upon Mr. Ramantele’s death, his livestock and property were subsequently divided amongst his heirs, including his widow and children.<sup>108</sup> The homestead remained in the possession of Mr. Ramantele’s widow, Thwesane, for the duration of her life. The respondents in the case were the four surviving female children of Ms. Thwesane Ramantele. The sisters claimed they were entitled to inherit the property through intestate succession.<sup>109</sup> This claim was disputed by their nephew and appellant in this case, Molefi Ramantele. Molefi argued that under customary law the youngest son was entitled to inherit the family property and that he was, therefore, the rightful owner of the homestead. In response, the respondents maintained that the relevant Customary Law violated their right to equality before the law and disputed the appellant’s assertion of ownership over the homestead. The Lower Customary Court found in favor of the nephew. The Higher Customary Court held that all children of Silabo Ramantele were entitled to the property. The Customary Court of Appeal held the nephew was entitled to own the property under customary law.

### **Holding:**

The Court held in favor of the four sisters, and stated that as children of Silabo and Thwesane, the respondents were entitled to inherit the homestead. The Court declared that the “Ngwaketse

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<sup>105</sup> *Ramantele v Mmusi and Others* (CACGB-104-12) [2013] BWCA 1 [Bots.] [hereinafter *Mmusi*].

<sup>106</sup> *Id.* at 35.

<sup>107</sup> *Id.* at 4.

<sup>108</sup> *Id.* at 3.

<sup>109</sup> *Id.* at 4.

Customary Law of inheritance does not prohibit the female or elder children from inhering as intestate heirs to their deceased parents' family homestead.”<sup>110</sup>

**Reasoning:**

The Court first conducted an analysis of Section 3 of the Constitution of Botswana.<sup>111</sup> Section 3 holds that “every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest...”<sup>112</sup> The Court stated that the limitations set forth in Section 3 “were designed to ensure that the enjoyment of said rights and freedoms by any individual did not prejudice the rights and freedoms of others or the public interest.”<sup>113</sup> The Court determined that Section 15 (4)<sup>114</sup> of the Constitution, which provides equal protection of the law by prohibiting discrimination except when those rights “prejudice the rights and freedoms of other or the public interest,” is subordinate to Section 3 of the Constitution.<sup>115</sup> Accordingly, the Court agreed with the “respondents that the derogations contained in Section 15 (4) of the Constitution are not unchecked.”<sup>116</sup>

With respect to the issue of customary law, the Court stated that such laws are not static but rather “develops and modernizes with the times” as “harsh and inhumane aspects of custom” are discarded over time. Moreover, “more liberal and flexible aspects consistent with the society’s changing ethos [are] being retained and probably being continuously modified on a case by cases basis

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<sup>110</sup> *Id.* at 68.

<sup>111</sup> *Id.* at 35.

<sup>112</sup> CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. II, art. 3 (“Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely- (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his or her home and other property and from deprivation of property without compensation, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”).

<sup>113</sup> *Mmusi*, 2 BLR 590 HC at 41.

<sup>114</sup> CONSTITUTION OF BOTSWANA 1966 (rev. 2005), ch. II, art. 15 (“Protection from discrimination on the grounds of race, etc. (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. .... (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision..... (c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons or not...”).

<sup>115</sup> *Mmusi*, 2 BLR 590 HC at 42.

<sup>116</sup> *Id.* at 45.

or at the instance of the traditional leadership to keep pace with the times.”<sup>117</sup> The Court stated that there is no purpose in categorizing “customary law into a written or unwritten law” as the appellant attempted to do because in the Court’s jurisdiction, “customary law has not been codified or reduced into statutory form.”<sup>118</sup> When analyzing customary law, the inquiry must consider the “societal ambience of the concerned community.”<sup>119</sup> The Court concluded that in Botswana, it has become increasingly common for land to transfer to unmarried women upon the death of her parents.<sup>120</sup> The Court gave considerable weight to the constitutional value of equality before the law and the “increased levelling of the power structures with more and more women heading households and participating with men as equals in the public” and private sphere.<sup>121</sup> The Court concluded that given these circumstances, “there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems.”<sup>122</sup>

Finally, the Court found a number of factual and procedural errors committed by the lower courts.<sup>123</sup> First, the Customary Court incorrectly found that the appellant was “entitled to the property pursuant to Ngwaketse culture which says that the last born son is the one entitled to inherit the parent’s home” because the presiding officer incorrectly evaluated the evidence from two witnesses.<sup>124</sup> The Court further found that the Customary Court of Appeal ignored the fact that the property had not been distributed to the appellant’s father and that he had no right to inherit from the estate of Silabo and Thwesane Ramantele.<sup>125</sup> The Customary Court of Appeal also improperly found that “simply because according to [Ngwaketse] custom/culture that the person who keeps the homestead is the youngest son, it must *ipso facto* follow that indeed” the plaintiff properly inherited the property.<sup>126</sup>

### **Remedy:**

The Court vacated the Customary Court of Appeal’s decision, allowing the sisters to retain the family homestead.<sup>127</sup> Given the advanced age of the first respondent, the court determined that remanding the case for rehearing was not appropriate.<sup>128</sup> The Court also ordered the sisters to decide who would be responsible for taking care of the homestead for the family. The appellant was charged with bearing the costs of the appeal and the High Court.<sup>129</sup>

### **Notes:**

The Southern Africa Litigation Centre summarized Judge Lesetedi’s constitutional analysis in this case as follows: “First, laws should only be declared unconstitutional if there is no way of reading them to be in line with the Constitution. Second, rights must be given broad and generous

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<sup>117</sup> *Id.* at 48.

<sup>118</sup> *Id.* at 48-9.

<sup>119</sup> *Id.* at 49.

<sup>120</sup> *Id.* at 51.

<sup>121</sup> *Id.* at 51-2.

<sup>122</sup> *Id.* at 52.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 53.

<sup>125</sup> *Id.* at 59.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 65.

<sup>128</sup> *Id.* at 66.

<sup>129</sup> *Id.* at 68.



interpretation. Third, limitations on rights should be interpreted narrowly.”<sup>130</sup> Additionally, the Southern Africa Litigation Centre highlighted the following language from Judge Kirby’s concurrence: “any customary law or rule which discriminates in any case against a woman unfairly solely on the basis of her gender would not be in accordance with humanity, morality or natural justice. Nor would it be in accordance with the principles of justice, equity and good conscience.”<sup>131</sup>

Please find the entire case synopsis from the Southern Africa Litigation Centre at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Summary-of-CofA-Judgment.pdf>.<sup>132</sup>

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<sup>130</sup> *Ramantele v Mmusi & Others: Summary of Judgment*, SOUTHERN AFRICA LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Summary-of-CofA-Judgment.pdf> at 3 (last visited Oct. 30, 2020).

<sup>131</sup> *Id.* at 3-4; *See also* *Ramantele v Mmusi and Others* (judgment of Kirby JP), para 33.

<sup>132</sup> *Id.*

# Eswatini

## *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane*<sup>133</sup>

Court: High Court of Swaziland

Date: October 25, 2013

Justices: Yahya John Mandlakayise Hlophe

**Key Topics:** Marital power, marital consent, and community of property

**Case Synopsis:** The Court in *Sihlongonyane v Sihlongonyane* ruled pursuant to Swazi law, marital power is discriminatory against women and that a wife could not be deprived of property owned under the couples' joint estate.

### **Issue:**

This case was brought by a woman who challenged her husband's exercise of marital power<sup>134</sup> when he attempted to sell the family motor vehicle without her consent.<sup>135</sup> She alleged that his attempts to sell their marital assets without her consent were in "violation of the equality principle enshrined in the constitution."<sup>136</sup>

### **Facts:**

The couple "are husband and wife, married in terms of civil rites and in community of property."<sup>137</sup> The husband was a pastor and his church members gave him a motor vehicle as a "gift or a donation."<sup>138</sup> The vehicle in question was used as a family car until the marital relationship between the parties deteriorated.<sup>139</sup> "According to the wife, the gift in question formed part of the joint estate."<sup>140</sup> However, the husband disputed this and instead contended that the vehicle belonged to him alone, as it was a personal gift.<sup>141</sup>

The wife alleged that her husband, "started secretly dissipating assets of the joint estate, allegedly in exercise of the marital power."<sup>142</sup> The High Court came to the conclusion that the husband "was not entitled to exercise marital power as he pleased or to the exclusion of" his wife."<sup>143</sup> While the matter was pending in court, the husband "allegedly sold the motor vehicle in question to his sister

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<sup>133</sup> *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane & Another* (470/13) [2013].

<sup>134</sup> Marital power originates from Roman-Dutch common law and prohibits women from bringing a case to court, selling property, signing contracts, taking out a loan, working as the director of a company, or standing as the trustee of a trust. Under marital power, husbands control all of the property of the marriage, whether it was jointly or separately owned prior to the marriage. Legal Assistance Centre Namibia, *Guide to the Married Persons Equality Act*, 1, 5 (2009).

<sup>135</sup> *Id.* at 4.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 3.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.*

in law.”<sup>144</sup> The husband denied that he sold the motor vehicle.<sup>145</sup> The Court was tasked with determining if the vehicle was part of the joint estate or if the vehicle was the husband’s personal property.<sup>146</sup>

### **Holding:**

The Court held that the motor vehicle received from members of the husband’s church forms part of the joint estate.<sup>147</sup> Therefore, the husband could not deprive his wife of ownership of the car under the doctrine of marital power.

### **Reasoning:**

The Court stated “[t]he position of our law is long settled that where parties are married in terms of civil rites and in community of property they pool their assets together to form what is known as a joint estate.”<sup>148</sup> It is irrelevant “how the property was acquired for it to form part of the joint estate.”<sup>149</sup> Additionally, there was no condition or specific provision attached to the motor vehicle when it was given as a gift to the husband that stated it was not to form part of the joint estate.<sup>150</sup>

The Court denied the husband’s position “that a gift or donation is per se excluded from the joint estate.”<sup>151</sup> The Court cited to “Hahlo, The South African Law Of Husband And Wife, 4<sup>th</sup> Edition, 1982 Publication” to justify its position that all property “acquired during the tenancy of the marriage in community of property, becomes or forms part of the joint estate.”<sup>152</sup>

### **Remedy:**

The Court confirmed the “*rule nisi* issued by this court on the 8<sup>th</sup> day of May 2013,” thereby granting the wife return of her marital car.<sup>153</sup> The Court ordered that “costs are to follow the event on the ordinary scale.”<sup>154</sup>

### **Notes:**

Please find additional information on this case as well as an overview of domestic laws in Eswatini by the Southern Africa Litigation Centre in their article entitled *Alignment Of Eswatini’s Domestic Laws With Recommendations Of United Nations Human Rights Mechanism* at the following link: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/09/SALC-Eswatini-Human-Rights-Research-Report.pdf>.<sup>155</sup>

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 8.

<sup>148</sup> *Id.* at 6.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 8.

<sup>152</sup> *Id.* at 6.

<sup>153</sup> *Id.* at 8.

<sup>154</sup> *Id.*

<sup>155</sup> *Alignment Of Eswatini’s Domestic Laws With Recommendations Of United Nations Human Rights Mechanisms*, SOUTHERN AFRICA LITIGATION CENTRE (2019) <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/09/SALC-Eswatini-Human-Rights-Research-Report.pdf>.

# Eswatini

## *Aphane v Minister of Justice and Const. Affairs, Etc.*<sup>156</sup>

High Court of Swaziland

February 23, 2010

Justice Qinisile Mabuza

**Key Topics:** Community of property and immovable property bonds

**Case Synopsis:** The Court in *Aphane v Registrar of Deeds and Others* invalidated the Deeds Registry Act, a piece of Swaziland legislation, on constitutional grounds as it discriminated against women by preventing women married in community of property from owning property.

**Issue:**

The issue before the court was whether Section 16(3)<sup>157</sup> of the Deeds Registry Act was discriminatory towards women, notably wives, preventing them from co-owning property with their husbands, and, therefore, inconsistent with the Constitution. This Section stated, “immovable property bonds and other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property, save where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.”<sup>158</sup>

**Facts:**

The applicant and her husband are married and the deed of sale for their property reflects both of their names as purchasers. The couple hoped to have the property registered in their joint names. They were informed that the property would have to be registered in the sole name of the husband. It was stated by the Deeds Registry Act that the wife cannot lawfully register the immovable property to include both of their names because “a woman married in a community of property has no capacity to contract unassisted and hence immovable property is registered in the name of the husband in his capacity as the administrator.”<sup>159</sup> The wife and husband challenged section 16 (3) of the Deeds Registry Act as being unconstitutional because it, “not only unfairly differentiates and discriminates but it also contains a general prohibition which prevents women who are married in community of property from holding property either individually or jointly with their husbands.”<sup>160</sup>

**Holding:**

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<sup>156</sup> *Aphane v Registrar of Deeds and Others* ((383/09)) [2010] SZHC 29 (23 February 2010).

<sup>157</sup> Section 16(3) of the Deeds Registry Act states, “Immovable property bonds and other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property, save where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.”

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

The text of Section 16 (3) of the Deeds Registry Act is to be changed (refer to Remedy) so that it is not discriminatory against women and will allow them to co-own property with their husbands.

### Reasoning:

The court acknowledged that Swaziland is a constitutional state and the High Court is enjoined in terms of section 151 (2)(a) of the constitution to enforce fundamental human rights and freedoms that were granted by the constitution, even if it conflicts with customary law. Section 151 (2)(a), which deals with matters of the Jurisdiction of the High Court, states, “(2) Without derogating from the generality of subsection (1) the High Court has Jurisdiction: (a) to enforce the fundamental human rights and freedoms guaranteed by this Constitution.”<sup>161</sup> Abiding by this obligation, the Court discussed either getting rid of section 16 (3) provision of the Act or changing the language. They decided to change the language of the provision to actually empower women instead of just eliminating the provision altogether. In explaining the Court’s decision to act, Judge Mabuza of the High Court of Swaziland said, “respondents (Minister of Justice and Constitutional Affairs and others) have had sufficient time since the coming into effect of the constitution to embark on aggressive legal reforms especially those relating to women who have been marginalized over the years in many areas of the law...”<sup>162</sup>

### Remedy:

The text of Section 16 (3) of the Deeds Registry Act was changed to not discriminate against women. The words “not” and “save” are hereby severed from section 16 (3) and the word “even” is read in place of “save.” This changed the provision from saying:

“Immovable property bonds and other real rights shall **not** (emphasis added) be transferred or ceded to, or registered in the name of, a woman married in community of property, **save** where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.”

To now saying:

“Immovable property bonds and other real rights shall be transferred or ceded to, or registered in the name of, a woman married in community of property, **even** where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.”<sup>163</sup>

In addition to the changed language, the Court granted the applicant the costs of the lawsuit.

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<sup>161</sup>*The Constitution of the Kingdom of Swaziland Act 2005*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <https://www.wipo.int/edocs/lexdocs/laws/en/sz/sz010en.pdf> (last visited Aug. 21, 2019).

<sup>162</sup> See generally *Aphane v Registrar of Deeds and Others ((383/09))* [2010] SZHC 29 (23 February 2010).

<sup>163</sup> *Id.*

# South Africa

## *Gumede (born Shange) v President of the Republic of South Africa and Others*<sup>164</sup>

Court: Constitutional Court of South Africa

Date: December 8, 2008

Justice Dikgang Ernest Moseneke

**Key Topics:** Gender and racial discrimination, customary marriage, and community of property

**Case Synopsis:** The Court in *Gumede (born Shange) v. President of the Republic of South Africa and Others* invalidated several South African statutes as they were deemed discriminatory against women in customary marriages because they afforded husbands exclusive control over family property and deprived women of their marital property rights in violation of the South African Constitution and regional and international human rights law.

### **Issue:**

The issue before the Court concerns allegations of unfair gender and racial discrimination against women married under customary law. The Court was tasked with determining whether section 7(1) of the Recognition of Customary Marriages Act (“Recognition Act”), section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code unfairly discriminated against wives in customary marriages.<sup>165</sup> If the legislative provision was determined to be discriminatory, then the Court was then to determine whether grounds existed to justify the unconstitutionality of the provisions.<sup>166</sup>

### **Facts:**

“Mrs. Gumede and her husband were in a customary marriage for 40 years.<sup>167</sup> Mr. Gumede did not permit his wife to work under formal employment and she instead “maintained the family household and was the primary caregiver to the children.”<sup>168</sup> The marriage between Mr. and Mrs. Gumede was considered to be irretrievably broken and the two were living separately.<sup>169</sup> Mr. Gumede receives a pension from his past employer, while Mrs. Gumede “is now an old-aged pensioner and lives off a government pension and the occasional financial support which she receives from her children.” She receives no financial support from Mr. Gumede.<sup>170</sup>

After Mr. Gumede “instituted court proceedings to end the marriage” in 2003, Mrs. Gumede approached the High Court in hopes it would invalidate Section 7(1) of the Recognition Act which

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<sup>164</sup>*Gumede (born Shange) v. President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008).

<sup>165</sup> *Id.* at 10.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 5.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 5-6.

<sup>170</sup> *Id.* at 6.

states that the “family head” has ownership over all family property and the family home.<sup>171</sup> She sought to “pre-empt the divorce court from relying on legislation she considers unfairly discriminatory to customary law wives on grounds of gender and race.”<sup>172</sup> In this case, Mr. Gumede agreed to grant Mrs. Gumede “one quarter of the total value of the matrimonial property.”<sup>173</sup>

Mrs. Elizabeth Gumede, the spouse in a customary marriage, seeks for the Constitutional Court of South Africa to confirm the decision of the High Court.<sup>174</sup> The High Court found that section 167(5)<sup>175</sup> of the Constitution “unfairly discriminate[s] on the grounds of gender and race” in violation of “9(3)<sup>176</sup> and (5)<sup>177</sup> of the Constitution.”<sup>178</sup> Additionally, the High Court found several “legislative provisions that regulate the proprietary consequences of a customary marriage as being inconsistent with the Constitution and invalid.”<sup>179</sup> While Mrs. Gumede’s husband did not contest his wife’s equality

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 6.

<sup>173</sup> *Id.* at 7.

<sup>174</sup> *Id.* at 2.

<sup>175</sup> *Id.*; *See* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. “Section 167(5) provides:

“The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”

<sup>176</sup> *Id.*; *See* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. “Section 9(3) provides:

“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

<sup>177</sup> *Id.*; *See* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996. “Section 9(5) provides:

“Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 3-4; *See* Act 120 of 1998; *See* KwaZulu Act on the Code of Zulu Law 16 of 1985; *See* Natal Code of Zulu Law published in Proclamation R151 of 1987, GG No. 10966.

(a) Section 7(1) of the Recognition of Customary Marriages Act (Recognition Act). It provides that the proprietary consequences of a customary marriage entered into before the commencement of the Recognition Act continue to be governed by customary law.

(b) The inclusion of the words “entered into after the commencement of this Act” in section 7(2) of the Recognition Act. The inclusion provides that a customary marriage entered into after the commencement of the Recognition Act is a marriage in community of property subject to a number of exceptions which are not, for present purposes, relevant.

(c) Section 20 of the KwaZulu Act on the Code of Zulu Law (KwaZulu Act). It provides that the family head is the owner of and has control over all family property in the family home.

claim, “certain members of government at the national and provincial levels” challenged the claim and appealed the issue to the Court.<sup>180</sup>

### **Holding:**

Section 7(1) of the Recognition Act, section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code recognized in KwaZulu-Natal customary law are discriminatory against Mrs. Gumede and other women similarly situated.<sup>181</sup> The provisions are “inconsistent with the Constitution and invalid because each of them unfairly discriminates against the applicant on the ground of gender.”<sup>182</sup> Additionally, the Court found that “the government has advanced no justification for the discrimination to be found in the impugned legislation.”<sup>183</sup> The order by the High Court invalidating “sections 7(1) and (2) of the Recognition Act; section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code” on Constitutional grounds was confirmed.<sup>184</sup> First, sections 7(1) and (2) of the Recognition Act states that “‘old’ marriages will continue to be governed by customary law, whilst ‘new’ marriages are to be marriages in community of property and of profit and loss, except where the parties agree otherwise.”<sup>185</sup> The Court determined these “provisions are discriminatory as between wife and husband.”<sup>186</sup> Second, “codified customary law in KwaZulu-Natal subjects a woman married under customary law to the marital power of her husband, who is the exclusive owner and has control of all family property.”<sup>187</sup> The customary law discriminates against a “woman who is a party to an ‘old’ or pre-recognition customary marriage as against a woman who is a party to a ‘new’ or post-recognition customary marriage.”<sup>188</sup> The effect of this “marital property system renders women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent.”<sup>189</sup> The provisions also violate the Constitution, which provides that discrimination based on gender is presumably unfair.<sup>190</sup>

### **Reasoning:**

“This case highlights the dichotomy between the “persistence of patriarchy” and the “vulnerability of many women” who are involved in customary marriages.<sup>191</sup> The Court observed that codified law on customary marriage condone and protects “male domination of the family household

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(d) Section 20 of the Natal Code of Zulu Law (Natal Code). It provides that the family head is the owner of and has control over all family property in the family home.

(e) Section 22 of the Natal Code. It provides that “inmates” of a kraal are in respect of all family matters under the control of and owe obedience to the family head.

<sup>180</sup> *Id.* at 4.

<sup>181</sup> *Id.* at 22.

<sup>182</sup> *Id.* at 32.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 37.

<sup>185</sup> *Id.* at 21.

<sup>186</sup> *Id.* at 22.

<sup>187</sup> *Id.* at 21-2

<sup>188</sup> *Id.* at 22.

<sup>189</sup> *Id.* at 23.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2.



and its property arrangements.”<sup>192</sup> These “codified rules of customary unions fostered a particularly crude and gendered form of inequality, which left women and children singularly marginalised and vulnerable.”<sup>193</sup> This case also raises “intricate questions about the relative space occupied by pluralist legal systems under the umbrella of one supreme law...”<sup>194</sup>

The Court’s opinion explained South Africa’s legal history on marital property rights. In South Africa’s pre-colonial past, “marriage was always a bond between families” and the “marriage relationship had a collective or communal substance.”<sup>195</sup> Women held influence, pride, and respect within the family.<sup>196</sup> Historian and ethnography Aninka Classens studied the issue and found that there are historical accounts which “indicate that women, as producers, previously had primary rights to arable land, strong rights to the property of their married houses within the extended family, and that women, including single women, could be and were allocated land in their own right.”<sup>197</sup> During colonial times the common law was reformed to reflect spousal equality and marital power was abolished.<sup>198</sup> However, “official’ customary law was left unreformed and stone-walled by static rules and judicial precedent.”<sup>199</sup>

The Court also gave special attention to The Recognition Act and how its provisions affect women in customary marriages. The Recognition Act “defines customary law as ‘customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.’”<sup>200</sup> The Act “abolishes the marital power of the husband over the wife and pronounces them to have equal dignity and capacity in the marriage enterprise.”<sup>201</sup> The Recognition Act is necessitated by South Africa’s “international treaty obligations, which require member states to do away with all laws and practices that discriminate against women” and gives effect to the rule that “courts must apply customary law to the Constitution and legislation that deals with customary law.”<sup>202</sup> The Court disagreed with the government that discrimination is justifiable under

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<sup>192</sup> *Id.* at 11.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* (“Section 11 of the Matrimonial Property Act 88 of 1984 abolished a husband’s marital power over the person and property of his wife under the common law.”); For a discussion of gender equality reforms to previously discriminatory common law rules see *Van Der Merwe v Road Accident Fund and Another* [2006] ZACC 4; 2006 (6) BCLR 682 (CC); 2006 (4) SA 230 (CC) at paras 29-32.”

<sup>199</sup> *Id.* at 13.

<sup>200</sup> *Id.* at 15; See Section 1 of the Recognition Act.

<sup>201</sup> *Id.* at 21.

<sup>202</sup> *Id.* at 14; See also *CEDAW*, *supra* note 24, at art. 2; See also *CEDAW*, *supra* note 24, at art. 16. “which South Africa acceded to on 15 December 1995; article 18(3) of the African Charter on Human and Peoples’ Rights, which South Africa acceded to on 9 July 1996; articles 2, 6 and 7 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, which South Africa ratified on 17 December 2004; and articles 3 and 23(4) of the International Covenant on Civil and Political Rights, which South Africa ratified on 10 December 1998; See section 211(3), above n 12; See also *Alexkor Ltd and Another v The Richtersveld Community and Others* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 51.”

the South African Constitution.<sup>203</sup> The Court found that “section 8(4)(a)<sup>204</sup> of the Recognition Act rightly confers equitable jurisdiction to a divorce court seized with the dissolution of a customary marriage.”<sup>205</sup> In other words, “every divorce court granting a divorce decree relating to a customary marriage has the power to order how the assets of the customary marriage should be divided between the parties, regard being had to what is just and equitable....”<sup>206</sup> The Court found that the government did not provide justification for the unfair discrimination because Mrs. Gumede “might be severely prejudiced because under the codified customary law, all the family property belongs to her husband.”<sup>207</sup>

The Court found that (1) and 7(2) of the Recognition Act, section 20 of the KwaZulu Act; and sections 20 and 22 of the Natal Code were discriminatory against women. In explaining its justification for its holding, the Court accredited the amicus curiae provided by the Women’s Legal Centre Trust for their useful submissions which pointed the court to “international law and regional African human rights law and standards...”<sup>208</sup> Specifically, the discrimination spawned from provisions 7(1) and 7(2) of the Recognition Act “is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation” of the Court’s order.<sup>209</sup> Furthermore, the effect of the Court’s order “is that all customary marriages would become marriages in community of property” because “the recognition of the equal worth and capacity of all partners in customary marriages is well overdue.”<sup>210</sup> Next, the Court looked at the Natal Code and KwaZulu Act and found that the “matrimonial proprietary system of customary law .... as codified in the Natal Code and the KwaZulu Act” condones “patriarchal domination over, and the complete exclusion of, the wife in the owning or dealing with family property.”<sup>211</sup> The provision “patently limits the equality dictates of [the South African] Constitution and of the Recognition Act” and is therefore “discriminatory and unfair.”<sup>212</sup>

## Remedy

The statue was held to be invalid. The government was ordered to pay costs.<sup>213</sup>

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<sup>203</sup> *Id.* at 24.

<sup>204</sup> Recognition of Customary Marriages Act, 120 Of 1998 (“stating (4) A court granting a decree for the dissolution of a customary marriage- (a) has the powers contemplated in sections 7, 8, 9 and 10 of the Divorce Act, 1979, and section 24 (1) of the Matrimonial Property Act, 1984 (Act 88 of 1984.”).

<sup>205</sup> *Id.* at 29.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 30.

<sup>208</sup> *Id.* at 35.

<sup>209</sup> *Id.* at 34.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 31.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 39.

# Kenya

## *Rono v Rono & Another*<sup>214</sup>

Kenya Court of Appeal

Date: April 29, 2005

Judge Philip Waki

**Key Topics:** Distribution of estate and property inheritance

**Case Synopsis:** The Court in *Rono v Rono & Another* held that two daughters must be granted an equal share of inheritance with their male siblings and are entitled to fair and equitable distribution of their family's estate pursuant to the Kenyan Constitution and international human rights law.

### **Issue:**

The Court addressed whether taking the gender of the beneficiaries into consideration in the distribution of a deceased's estate was discriminatory and contrary to the Kenyan Constitution and international law. Additionally, the Court addressed whether non-discrimination provisions in international and regional law be used to interpret domestic laws and the Kenyan Constitution.

### **Facts:**

Stephen Rono Rongoei Cheronno had two wives, and nine children total. The first wife had three sons and two daughters, and the second wife had four daughters. Upon his death, his estate was submitted to the superior court for division. The house of the first wife and the house of the second wife disagreed on the proper way to divide the 192 acres of land that Rono held. The lower Court judge decided to treat all daughters equally relative to other daughters, regardless of mother. The lower Court also treated all sons equally, but provided them with a larger share of the property than the daughters. The lower Court justified that decision by noting that the daughters had the option to marry and, therefore, did not need as large a share as the sons. She also noted that under tribal customary law, daughters did not inherit at all. The lower Court ultimately awarded each daughter five acres, and each son 30 acres. As a result, the court awarded the house of the first wife much more property due to her having three sons, while the second wife did not have any sons.

### **Holding:**

The lower court erred in granting more land to the sons. The Constitution and international obligations to equality require that the daughters be given equal consideration as the sons and that the land be split equally among all the children. Moreover, the Court held that international and regional law should be used as an aid in interpretation of domestic standards.

### **Reasoning:**

The Kenyan Constitution at the time of this case, which has since been redrafted in 2010, did not fully provide equal protection for women.<sup>215</sup> While the Constitution outlawed discrimination in

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<sup>214</sup> Kenya: *Rono v Rono* (2005) AHRLR 107 (KeCA 2005).

<sup>215</sup> KENYA CONSTITUTION OF 2010 [CONSTITUTION] 2010 (Kenya).

sections 82(1) and 82(3), it included a claw back clause in section 82(4) which exempted from the prohibition against discrimination laws “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable...”<sup>216</sup>

However, the Court applied international and regional human rights law to interpret the Kenyan Constitution and make up for this gap in equal protection for women.<sup>217</sup> Judge Waki, writing for the Court, drew on the UDHR, ICCPR, CEDAW, and the Banjul Charter. The decision particularly notes the non-discrimination provision in Article 1 of CEDAW, which discusses discrimination against women as including “any distinction, exclusion or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in political, economic, social, cultural, civil or any other rights field.”<sup>218</sup> Article 18 of the Banjul Charter, requires States Parties to “ensure the elimination of every discrimination against women and also ensure the protection of rights of the woman and the child as stipulated in international declarations and conventions.”<sup>219</sup> International and regional standards thus enabled the Court to make up for what the Constitution lacked for equal protection of women in all circumstances.

#### **Remedy:**

The Court awarded each widow 30 acres, and each child 14 acres. The sons and daughters inherited equally.

#### **Notes:**

Pleas find additional information on this case from the Southern African Litigation Centre at the following link:

<https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Chapter-1.pdf/>.<sup>220</sup>

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<sup>216</sup> *Id.* at 13

<sup>217</sup> *Rono v. Rono*, WOMEN’S LINK WORLDWIDE, <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/rono-v-rono> (last visited Aug. 21, 2019).

<sup>218</sup> *CEDAW*, *supra* note 24, at art. 1. (“For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”).

<sup>219</sup> African Charter on Human and Peoples’ Rights [Banjul Charter] (Nairobi, Kenya, 27 June 1981), 21 I.L.M. 59 (1981), *entered into force* 21 Oct. 1986.

<sup>220</sup> *Utilising International, Regional and Comparative Law*, SOUTHERN AFRICA LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Chapter-1.pdf> (last visited Nov. 18, 2020).

# Zambia

## ***Mwanamwalye v Mwanamwalye***<sup>221</sup>

Local Court in Zambia

December 2005

Magistrate Mwamba Chanda

**Key Topics:** Customary union and marital property

**Case Synopsis:** The Court in *Mwanamwalye v Mwanamwalye* held that women married under customary Zambian law are entitled to a fair and equitable share of marital property upon the dissolution of marriage or death of the husband.

**Issue:**

The Court addressed whether customary unions give a woman any right to make demands with regards to the division of property.

**Facts:**

This was a divorce case between Martha Kembo Mwanamwalye and Collins Mwanamwalye, where the issue centered on how to divide the marital property and if Martha was entitled to any of it.

**Holding:**

This was a landmark judgment where the local court in Zambia held that women married under customary law have the right to a share of marital property in the event of divorce or death of the husband, to avoid either of them falling into destitution.

**Reasoning:**

The Magistrate, Chanda, ruled that, “notwithstanding that the parties in this matter were married under customary law, justice demands that when a marriage has broken down, the parties should be put on equal position to avoid any one of them falling into destitution.”<sup>222</sup> Previously, a woman married under customary law would not be entitled to a share of property irrespective of whether she had contributed to its acquisition. Now, women will be given equal consideration in divorce cases.

**Notes:**

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<sup>221</sup> See generally *Landmark judgment for women in customary marriages*, THE NEW HUMANITARIAN <http://www.thenewhumanitarian.org/feature/2005/12/21/landmark-judgment-women-customary-marriages> (last visited July 18, 2019).

<sup>222</sup> *Id.*

Please find additional information on this case, as well as information on customary law in South Africa and Zambia by Save the Children, at the following link:  
<https://resourcecentre.savethechildren.net/sites/default/files/documents/5845.pdf>.<sup>223</sup>

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<sup>223</sup> Patricia Martin, Buyi Mbambo and Bridget Mulenga, *An exploratory study on the interplay between African customary law and practices and children's protection rights*, SAVE THE CHILDREN (2011), <https://resourcecentre.savethechildren.net/sites/default/files/documents/5845.pdf>.

# South Africa

## *Bhe v Magistrate Khayelitsha & Ors*<sup>224</sup>

Constitutional Court of South Africa

October 15, 2004

Justice Pius Langa

**Key Topics:** Customary law, succession, and property inheritance

**Case Synopsis:** The Court in *Bhe v. Magistrate Khayelitsha & Ors* held on the basis of South African constitutional law that daughters are equally entitled to inherit their family's estate and declared that the principle of male primogeniture unfairly discriminates against women. The Court further invalidated a Section 23 of the Black Administration Act because it excluded women and daughters from inheriting property.

**Issue:**

The issues before the court was the constitutionality of both Section 23 of the Black Administration Act, which governs inheritance by Black South Africans, and of the principle of primogeniture in the context of customary law regarding succession.

**Facts:**

The Bhe case concerned two minor girls who sought to inherit their deceased father's estate. The case was brought against their grandfather who, under "black" law and custom, was to inherit his deceased son's estate. The grandfather intended to sell the girls' home. The children, Nonkululeko Bhe and Anelisa Bhe, both of whom were extra-marital daughters,<sup>225</sup> had failed to qualify as heirs in the intestate estate of their deceased father, Vuyu Elius Mgolombane. Both Bhe and Mgolombane's father were in agreement that no marriage or customary union had taken place between Bhe and Mgolombane. The father was appointed representative and sole heir of the Mgolombane's estate, in accordance with Section 23 of the Black Administration Act which specifies the procedure for Black Africans in a customary union for what to do regarding inheritance. It prescribes the manner in which the estates of the deceased is to be administered and distributed, and establishes its legitimacy within its own provision.<sup>226</sup> Mgolombane's father made it clear that he intended to sell the immovable

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<sup>224</sup> *Bhe v. Magistrate Khayelitsha & Ors*. 2005 (1) BCLR 1 (CC), 15 Oct. 2004.

<sup>225</sup> *Id.* The footnote (footnote 15 in the case document) states the expression "illegitimate children" has been used by lawyers in South Africa for many years, and was used by the Cape High Court in the Bhe case and by the lawyers in this case to describe children who are conceived or born at a time when their biological parents are not lawfully married. I choose not to use the term, however. No child can in our constitutional order be considered "illegitimate," in the sense that the term is capable of bearing, that they are "unlawful" or "improper." As this Court has said on many occasions, "our Constitution values all human beings equally, whatever their birth status, whatever their background."

<sup>226</sup> Section 23 of the BLACK ADMINISTRATION ACT states, "(1) All movable property belonging to a Native and allotted to him or accruing under native law or custom to any women with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under

property to defray expenses incurred in connection with the funeral of the deceased. Fearing that Bhe and the two minor children would be rendered homeless, this family approached the Cape High Court and obtained two interdicts pendente lite to prevent (a) the selling of the immovable property for the purposes of off-setting funeral expenses; and (b) further harassment of Bhe by the father of the deceased.

### **Holding:**

Section 23 of the Black Administration Act of 1927 is declared as unconstitutional and invalid. Bhe's case "where legislative provisions are consistent with the intestate customary law principles of male primogeniture, which excluded women and girls from inheriting in the estate of a deceased family head were impugned. Under this Principle, only the eldest surviving male relative inherits the family-head status and property. The Court held that the principle of male primogeniture indeed unfairly discriminated against women and declared it unconstitutional."<sup>227</sup> As a result, the two children, Nonkululeko Bhe and Anelisa Bhe, were the only heirs in the estate of the late Vuyu Elius Mgolombane.

### **Reasoning:**

Deputy Chief Justice Langa wrote the majority opinion of the Court. He held that, construed in the light of its history and context, section 23 of the 1927 Black Administration Act is an anachronistic piece of legislation which legitimized problematic customary laws and caused egregious violations of the rights of black African persons.<sup>228</sup> "[P]eople are still treated as 'blacks' rather than as ordinary persons seeking to wind up a deceased estate, and it is in conflict with the establishment of a non-racial society where rights and duties are no longer determined by origin or skin colour."<sup>229</sup> Section 23 created a parallel system of succession for black Africans and did not consider their individual wishes and circumstances. Furthermore, the Court concluded that Section 23 came in conflict with section 9(3) and section 10 of the South African Constitution, and therefore must be struck down. Section 9(3) is about equality and states, "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language

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native law and custom...(2) All land in a location held in individual tenure upon quitrent conditions by a Native shall devolve upon his death upon one male person...(10) The Governor-General may make regulations not inconsistent with this Act—

- (a) prescribing the manner in which the estates of deceased Natives shall be administered and distributed;
- (b) defining the rights of widows or surviving partners in regard to the use and occupation of the quitrent land of deceased Natives;
- (c) Dealing with the disinheritance of natives;
- (d) Prescribing the powers and duties of Native commissioners or magistrates in carrying out the functions assigned to them by this section;
- (e) Prescribing tables of succession in regard to natives;
- (f) Generally for the better carrying out of the provisions of this section.

<sup>227</sup> Justice Yvonne Mokgoro, *The Impact of South Africa's Constitutional Court on Gender Equity: A Case Law Approach*, Presentation at Congressional Breakfast on the Impact of South Africa's Constitutional Court on Gender Equity (Apr. 12, 2005) at 18.

<sup>228</sup> *Bhe*, BCLR 1 (CC) at para 142.

<sup>229</sup> *Id.* at para. 64 (quoting *Mosenke v. The Master*, 2001 (2) SA 18 (CC), at para. 21).



and birth.”<sup>230</sup> Section 10, which deals with human dignity, states, “Everyone has inherent dignity and the right to have their dignity respected and protected.”<sup>231</sup>

Justice Langa 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. In fact, the South African Constitutional Court clarified, “as with all the law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights.”<sup>232</sup> Justice Langa gave the following order, “The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.”<sup>233</sup> The Court also concluded, “[w]e should make it clear in this judgment that a situation whereby a male person will be preferred to a female person for purposes of inheritance can no longer withstand constitutional scrutiny. That constitutes discrimination before the law. To put it plainly, African females, irrespective of age or social status, are entitled to inherit from their parents’ intestate estate like any male person.”<sup>234</sup> Accordingly, the Black Administration Act was declared unconstitutional and invalid.

### **Remedy:**

Bhe’s daughters, Nonkululeko Bhe and Anelisa Bhe, are the sole heirs of the deceased’s estate. The deceased’s father is ordered to sign all documents and to take all steps reasonably required of him to transfer the estate to Bhe and her children.<sup>235</sup>

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<sup>230</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996.

<sup>231</sup> *Id.*

<sup>232</sup> *Bhe*, BCLR 1 (CC) at para 46.

<sup>233</sup> *Bhe*, BCLR 1 (CC) at para 88.

<sup>234</sup> *Tools For Change*, OPEN SOCIETY FOUNDATION, <https://www.opensocietyfoundations.org/uploads/e00d6a25-0b7f-49e9-9ec8-1d0bde94a8d9/tools-for-change-20120416.pdf> (last visited Aug. 21, 2019).

<sup>235</sup> *Id.*

# WORK RIGHTS

## Lesotho

### *Private Lekhetso Mokhele and Others v Commander, Lesotho Defence Force and Others*<sup>236</sup>

Court: High Court of Lesotho

Date: February 14, 2018

Justice Tšelisó Monaphathi, Justice Semapo Peete, and Justice Sakoane Sakoane

**Key Topics:** Reproductive rights, pregnancy, maternity, and marital status

**Case Synopsis:** The Court in *Mokhele and Others v Commander, Lesotho Defence Force and Others* held that three female soldiers were wrongfully discharged on the basis of their marital and pregnancy status and that the Lesotho Defence Force violated international human rights law when it penalized the soldiers for becoming pregnant while enlisted.

**Issue:**

The issue before the Court was whether the decision by the Commander of the Lesotho Defense force to discharge pregnant soldiers was legal.

**Facts:**

Three female soldiers enlisted in the army in October 2013.<sup>237</sup> One applicant was married and had a child prior to enlisting.<sup>238</sup> “The second applicant got married after enlistment” upon receiving permission from the Force.<sup>239</sup> Finally, the third applicant was not married.<sup>240</sup> The women fell pregnant after enlisting in the Lesotho Defence Force.<sup>241</sup> The Commander of the Force discharged the females on the grounds that their pregnancy “contravened the army’s Standing Order No.2 of 2014” which states that female members of the Force “shall not be pregnant before the expiration of five (5) years of service...”<sup>242</sup> The Order also proscribes a woman from becoming pregnant depending on her marital status.<sup>243</sup>

The Commander disseminated Show Cause Notices to each of the women, one of the Notices said “you fell pregnant in reckless disregard of the prohibitory clauses of the Standing Order.”<sup>244</sup> Another notice informed a woman that her “unlicensed pregnancy had detrimentally prejudiced the

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<sup>236</sup> *Mokhele and Others v Commander, Lesotho Defence Force and Others* (CIV/APN/442/16) [2018] LSHC 2 (14 February 2018).

<sup>237</sup> *Id.* at 6.

<sup>238</sup> *Id.* at 6-7.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 7.

interests of the Lesotho Defence Force.”<sup>245</sup> The women submitted responses to the Notices denying that their pregnancy was deliberate or done in reckless disregard of the Force’s orders.<sup>246</sup> The single woman attributed her pregnancy to the influence of alcohol and stated that her status as bread winner for the family required that she maintain her position on the force.<sup>247</sup> One woman stated that she could not in good conscience have an abortion and that if she were to have an abortion, she would have broken the law.<sup>248</sup>

In response, the Commander discharged all three women on the grounds that their pregnancies violated the Standing Order.<sup>249</sup> He blamed the women for not considering the high potential contraceptives have for failure before they engaged in sexual activity.<sup>250</sup> In response to the unmarried woman, the Commander said that it “beats imagination” for a soldier with family responsibilities to become “entangled in such irresponsible drinking which lead (sic) to unfortunate influence of alcohol resulting in her peril.”<sup>251</sup>

The applicants asked the Court to hold that the Commander’s decision and the Standing Order were unlawful, that the women be reinstated to their former positions and that monetary awards be provided. Significantly, pursuant to Lesotho law, a challenge brought by litigants cannot be based both on civil and constitutional grounds so the applicants focused on legality and could not bring a constitutional claim. Moreover, soldiers are not included within the ambit of protections afforded to citizens by the constitution, such as the right to equality and non-discrimination.

### **Holding:**

The Standing Order was held to be “not legally authorized” and as a result, “unlawful and condemnable as an illegal trigger for the exercise of the power to discharge ...”<sup>252</sup>

### **Reasoning:**

Justice Sakoane reframed the issue before the court by saying that in effect, “what is being contested is the idea that female soldiers are incapable to bear arms and babies at the same time and, on that account, are not fit for military purpose.”<sup>253</sup> Furthermore, “[the] principles of non-sexism, gender equality and equal opportunities are international standards for protecting and supporting women in their efforts to scale back the tides of patriarchy.”<sup>254</sup> Justice Sakoane reiterated that the international community through the efforts of the United Nations supports the realization of “full citizenship” to women by adopting various international instruments including the 1967 Declaration on the Elimination of Discrimination against Women, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, and the 2000 ILO Maternity Protection Convention no. 183.<sup>255</sup> Specifically, these international legal instruments place responsibility on the State to “prevent

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<sup>245</sup> *Id.* 8.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 11.

<sup>248</sup> *Id.* at 10.

<sup>249</sup> *Id.* at 11.

<sup>250</sup> *Id.* at 12.

<sup>251</sup> *Id.* at 12.

<sup>252</sup> *Id.* at 20.

<sup>253</sup> *Id.* at 6.

<sup>254</sup> *Id.* at 4.

<sup>255</sup> *Id.* at 5.

discrimination against women” in the context of “marriage or maternity” in order to prevent discriminatory “dismissals from employment.”<sup>256</sup>

The Court reasoned that the Commander erroneously relied upon internal Defence Force regulations and that pregnancy could not be considered grounds for discharge when on the contrary, “a female soldier is entitled to paid maternity leave.”<sup>257</sup> Furthermore, the Standing Order’s inflexibility “penalizes soldiers for falling pregnant” despite their use of contraceptives; “cultivates an environment of involuntary sexual abstinence, involuntary birth control, sterilization, and abortion;” contravenes the “right to respect for private and family life by suspending the female soldier’s procreative function for an arbitrary period of five years;” penalizes women for bearing children; and is ultimately “counter-productive” as the army may not attract sufficient females of child bearing capacity.”<sup>258</sup>

Labor laws enshrined in international human rights treaties enjoin employers in public and private sectors “to gender-sensitize the workplace environment by prohibiting dismissals on the grounds of pregnancy, marital status and denial of maternity or paternity leave.”<sup>259</sup> The Court said that “the sexual desires of the applicants to engage in procreative sex dare not outweigh the army’s interests.”<sup>260</sup> Furthermore, the Standing Order violates the Force’s Regulations, as pregnancy cannot be a “ground for discharge or a disciplinary offence.”<sup>261</sup> The Court further reasoned that by any “civilized standards and human decency” the Standing Order is unacceptable. The Court also found that the applicants were not made aware of the requirements of the Standing Order prior to their enlistment or throughout their training.<sup>262</sup> Finally, the Court held that “[in] the 21<sup>st</sup> century there is no justification to fire working women who fall pregnant.”<sup>263</sup>

### **Remedy:**

The Court set aside the decision of the Commander of the Lesotho Defense Force discharging the applicants.<sup>264</sup> The Standing Order No.2 of the Lesotho Defence Force was declared illegal and invalid.<sup>265</sup> The applicants were ordered to be reinstated to their positions and ranks and paid costs of the suit.<sup>266</sup>

### **Notes:**

For additional information on this case by the Southern African Litigation Centre, please see the news release titled, *Lesotho High Court Recognises the Sexual and Reproductive Rights of Female Soldiers* at the following link: <https://www.southernafricalitigationcentre.org/2018/02/15/press-release-lesotho-high-court-recognises-the-sexual-and-reproductive-rights-of-female-soldiers/>.<sup>267</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 14-5.

<sup>258</sup> *Id.* 17-8; *See Crawford v. Cushman* 531 F.2d 1114 (2d Cir. 1976).

<sup>259</sup> *Id.* at 18.

<sup>260</sup> *Id.* at 19.

<sup>261</sup> *Id.* at 24.

<sup>262</sup> *Id.* at 25.

<sup>263</sup> *Id.* at 24.

<sup>264</sup> *Id.* at 26-7.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 27.

<sup>267</sup> *Lesotho High Court Recognises the Sexual and Reproductive Rights of Female Soldiers*, SOUTHERN AFRICA LITIGATION CENTRE (Feb. 15 2018),

# Malawi

## *Republic v Pempho Banda and 18 others*<sup>268</sup>

Court: The High Court of Malawi

Date: September 8, 2016

Justices: Zione Ntaba

**Key Topics:** Sex work and earnings from sex work

**Case Synopsis:** The Court in *Republic v Pempho Banda and Others* held that the arrest and trial of several women for living off earnings from sex work was unconstitutional and discriminatory against women and that the existing Penal Code did not criminalize sex work.

### **Issue:**

The issues before the court concerned the arrest and trial of 19 women accused of living off of earnings from sex work. first issue was whether a guilty plea recorded in the lower Court could be upheld.<sup>269</sup> The second issue was whether the “magistrate had jurisdiction to try the case.”<sup>270</sup> The third issue was whether the 19 offences were correctly joined in the same count.<sup>271</sup> The fourth issue was whether the lower court’s charge “was bad in law.”<sup>272</sup> The fifth issue was whether the section 145 of the Penal Code targeted sex workers.<sup>273</sup> The final issue before the court was whether the arrest and trial of the 19 female sex workers was “unconstitutional as they were arrested and tried for conduct which was not criminal at all.”<sup>274</sup> In other words, the women contended that it “was and is illegal to arrest any prostitute for living on the earnings of her own prostitution.”<sup>275</sup>

### **Facts:**

“Ms. Pempho Banda and eighteen other ladies” were convicted by the Fourth Grade Magistrate for “the offence of living on the earnings of prostitution contrary to section 146 of the Penal Code.”<sup>276</sup> The “circumstances of the offences were committed at various times or places and [did] not form a series of the same or similar offence.”<sup>277</sup> The Court found, “it is manifestly obvious

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<https://www.southernafricalitigationcentre.org/2018/02/15/press-release-lesotho-high-court-recognises-the-sexual-and-reproductive-rights-of-female-soldiers/>

<sup>268</sup> Republic v Banda and Others (Review Order) (Review Case No. 58 of 2016) [2016] MWHC 589 (08 September 2016).

<sup>269</sup> *Id.* at 13.

<sup>270</sup> *Id.* at 14.

<sup>271</sup> *Id.* at 15.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 19.

<sup>274</sup> *Id.* at 8.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 1.

<sup>277</sup> *Id.* at 14.

that the arrests of the 19 emanated from a police raid” where the women were merely found to be inside of a “resthouse.”<sup>278</sup>

On appeal to the High Court of Malawi, the women asserted that challenged their convictions for living on the earnings of prostitution.<sup>279</sup> In response, the State acknowledged that the Fourth Grade Magistrate Court did not have jurisdiction to try the women and the trial was therefore null.<sup>280</sup> The State submitted that the “convictions against the 19 women should be quashed, their sentences set aside,” and a retrial be ordered.<sup>281</sup> The women, however, further claimed that no retrial was necessary. Contrary to the common assumption by the police, no law criminalises women for selling sex and living off their earnings. Rather, the offence of “living on the earnings of prostitution” has historically been aimed at people exploiting sex workers, not the sex workers themselves.

### **Holding:**

The Court ruled in favor of the 19 women. The Court held that the magistrate did not have jurisdiction to try a case for the “offense of living on earnings of prostitution.”<sup>282</sup> Therefore, due to the lack of jurisdiction, the convictions were “blatantly wrong in law and so too the sentences.”<sup>283</sup> The Court also found a misjoinder of the charges.<sup>284</sup> The Court held that the lower court’s charge was bad in law.<sup>285</sup> Additionally, the Court held “section 146 of the Penal Code<sup>286</sup> does not target prostitutes.”<sup>287</sup> The Court did not “find any evidence to support that the convicts indeed lived off earnings from prostitution.”<sup>288</sup> Finally, the Court held that the “arrest and trial was unconstitutional.”<sup>289</sup>

### **Reasoning:**

The first issue the Court decided was whether the guilty plea was justly recorded by the lower court.<sup>290</sup> The Court stated “an accused person must” be aware of the consequences of making a plea of guilty before a court can accept that plea.<sup>291</sup> A plea of guilty “waives substantially all the fundamental procedural rights afforded an accused in a criminal proceeding, such as his rights to the assistance of counsel, confrontation of witnesses, and trial.”<sup>292</sup> Additionally, a guilty plea “relieves the prosecution

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<sup>278</sup> *Id.* at 17-8.

<sup>279</sup> *Id.* at 8.

<sup>280</sup> *Id.* at 9.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 14.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 15.

<sup>286</sup> Section 146 of the Penal Code: “Every woman who knowingly lives wholly or in part on the earnings of prostitution, or who is proved to have, for the purpose of gain, exercised control, direction or influence over the movements of a prostitute in such a manner as to show that she is aiding, abetting or compelling her prostitution with any person, or generally, shall be guilty of a misdemeanour.”

<sup>287</sup> *Id.* at 19.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 13.

<sup>291</sup> *Id.* at 7.

<sup>292</sup> *Id.*

of the burden to prove the case” and results in an immediate conviction.<sup>293</sup> The Court stated “it is necessary that the court state the substance of each offence to the accused and take separate pleas for each” person.<sup>294</sup> The Court found that the lower court did not sufficiently explain the offense to each individual woman before she made her plea.<sup>295</sup> “Furthermore, the record further shows that the facts narrated by the State were grossly inaccurate and not applicable to all the convicted persons due to the various places they were arrested.”<sup>296</sup>

The second issue the Court decided was whether the “magistrate had jurisdiction to try the case.”<sup>297</sup> The Court noted “under section 14 (3) of the Criminal Procedure and Evidence Code, a court of a magistrate of the fourth grade cannot try an offence whose maximum sentence exceeds 24 months’ imprisonment.”<sup>298</sup>

Third, the Court determined that offenses were incorrectly joined.<sup>299</sup> The Court reasoned that, “somehow these 19 individuals arrested at different places and time as indicated in their caution statements were tried and convicted in one case.”<sup>300</sup> The Court found it clear that the “charges in this case regarding the 19 were neither founded on the same facts nor formed or were part of a series of offences of the same or a similar character.”<sup>301</sup>

Fourth, the Court determined that the charge was bad in law because the charge sheet or indictment did not “contain a statement of the specific offence or offences with which the accused person is charge[d].”<sup>302</sup> The accused were not charged individually nor were they clearly provided with a specific statement of the offence.<sup>303</sup>

In addressing the fifth issue, the Court acknowledged that the “issue of prostitution in Malawi continues to be a sensitive subject however the law has since the passing of the Penal Code not criminalized the actual act of prostitution.”<sup>304</sup> Sex work raises several issues including:

legislating people’s sexuality, high levels of organized crime especially trafficking, public health concerns due to the HIV/AIDS pandemic or rise in sexually transmitted illnesses, public safety, the exploitation of vulnerable people like women, persons with disabilities or children, continued inequality between men and women and human rights concerns to mention a few.<sup>305</sup>

The Court held that the “offence of living on the earnings of prostitution in Malawi was not aimed at prostitutes or sex workers, but rather at those who exploited them.”<sup>306</sup> Furthermore, Section 146 is “overbroad and it can catch within its web many innocent women including the dependents of

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<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 13.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 14.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 15.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 16.

<sup>305</sup> *Id.* at 16-7.

<sup>306</sup> *Id.* at 17.

the prostitute.”<sup>307</sup> The Court determined that there was not sufficient evidence “showing that the convicts lived off earnings from prostitution” and that the women were therefore “wrongly charged.”<sup>308</sup> The Court concluded that prostitution is a “tenacious and ancient institution which has survived centuries of attack and criticism and condemnation.”<sup>309</sup> In Malawi, female prostitutes “will continue to face discrimination and abuse at the hands of law enforcement because despite having sections in the Penal Code that apply to both men and women.”<sup>310</sup> The Court added that “prostitution related offences in Malawi shall remain an area of blatant discrimination, unfairness, inequality, abuse as well as bias from law enforcement” and the court system.<sup>311</sup> The Court cautioned that Malawi needs to have a “frank discussion” on the issue.<sup>312</sup>

Finally, in addressing the sixth issue, the Court held that the arrest and trial of the women was unconstitutional because it was “based on a biased and discriminatory reasoning by the police as well as a clear lack of evidence to support” the charge.<sup>313</sup> Such “an unlawful interference with a person’s right to personal freedom amounts to a violation of their right to liberty and can be an affront to their dignity.”<sup>314</sup>

### **Remedy:**

The Court ordered that the “conviction and the sentence imposed” be set aside.<sup>315</sup> The Court determined that the “fines ordered by the lower court” were wrong and must be “returned to the 19 women.”<sup>316</sup>

### **Notes:**

Please find additional information on this case, as well as other recent cases decided by the Malawi High Court the Southern Africa Litigation Centre, at the following link:

<https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/SALC-Sex-work-case-study-booklet-revised-Re-print-29-June-2017-2.pdf>.<sup>317</sup>

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<sup>307</sup> *Id.*

<sup>308</sup> *Id.* at 19.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 20.

<sup>314</sup> *Id.* at 19-20.

<sup>315</sup> *Id.* at 20.

<sup>316</sup> *Id.*

<sup>317</sup> *Recent Cases from the Malawi High Court*, SOUTHERN AFRICA LITIGATION CENTRE, <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/SALC-Sex-work-case-study-booklet-revised-Re-print-29-June-2017-2.pdf> (last visited Nov. 18 2020).