

Customary law and the promotion of gender equality: An appraisal of the *Shilubana* decision

*Obeng Mireku**

Professor of Law and Executive Dean, Faculty of Management and Law,
University of Limpopo, South Africa

Summary

This case note examines the South African Constitutional Court's recent decision overturning the customary law rule of male primogeniture in a dispute as to whether a woman could succeed her late father as a tribal chief. The Court overruled the hitherto central doctrine of male primogeniture by upholding a woman's right to equality to become the first female chief to inherit a chieftaincy position since the advent of South Africa's new constitutional dispensation in 1994. The article welcomes the decision as it empowers appropriate traditional authorities to effect incremental developments which are necessary to keep customary law in line with the dynamic and evolving fabric of the South African constitutional state.

1 Introduction

Until the South African Constitutional Court's landmark decision in *Shilubana*,¹ the concept of male primogeniture had been utilised by courts as the overarching defining rule in resolving customary law disputes of intestate succession in South Africa. With the entrenchment of the Bill of Rights in the 1996 Constitution, however, the constitutional validity of male primogeniture persistently has been called

* LLB (Hons) (Ghana), LLM (Witwatersrand), Dr Jur (Germany); omireku@usa.net. This contribution is based on a paper delivered at the IALS Conference on Constitutional Law, American University College of Law and Georgetown University Law Center, Washington DC, 11-12 September 2009.

¹ *Shilubana & Others v Nwamitwa* [2008] ZACC 9. The judgment might serve as a useful precedent in a potential litigation by a woman who aspires to become the tribal chief of the Baphiring near Rustenberg in North West Province (see *The Citizen* 1 July 2009 5).

into question in a number of cases that have come before the courts. Male primogeniture has often been challenged because, arguably, it discriminates unfairly on the grounds of age, birth and, most conspicuously, gender.

Thus far, aspects of gender discrimination which have received judicial attention have largely been confined to the intestate succession of a deceased's estate devolving according to the law of persons or family law. Little attention, either judicial or academic, has been given to the issue of sex discrimination as played out by the customary (constitutional) law rule of patrilineal succession in terms of which women may not ordinarily hold political office in the large majority of traditional African communities in the country.

The purpose of this paper is to examine critically the way in which the courts have attempted to harmonise male primogeniture with gender equality, especially in chieftaincy succession disputes. To this end, I seek to appraise recent judicial decisions in order to provoke critical dialogue over the recent Constitutional Court judgment upholding gender equality in chieftaincy succession and outlawing male primogeniture.

Following the first judicial decision in the *Shilubana* case by the Gauteng North High Court, the Supreme Court of Appeal and the Constitutional Court have taken turns to express their views on the subject. The Supreme Court of Appeal largely affirmed the High Court's judgment. However, the Constitutional Court overturned the decisions of these two courts. In view of the Supreme Court of Appeal concurring with the High Court's judgment, the paper considers the High Court's decision as providing an approach that is representative of the two courts, while the Constitutional Court judgment is treated as a conflicting approach to the subject.

2 The High Court decision

In *Nwamitwa v Phillia*,² the High Court was invited to determine whether a woman could succeed her late father, a chief, to become a tribal chief. The first respondent and the applicant in this case respectively are female and male members of the royal family of the 70 000-member Valoyi community that constitutes part of the Tsonga/Shangaan nation of present-day Limpopo in South Africa. The two

² *Nwamitwa v Phillia* 2005 3 SA 536 (T), judgment by Swart J presiding over the Gauteng North High Court (formerly the Pretoria High Court). On 1 December 2006, the Supreme Court of Appeal unanimously dismissed an appeal against the High Court judgment in this case. For more elaborate commentary on this first case, see O Mireku 'Balancing male primogeniture, gender equality and chieftaincy succession: *Nwamitwa v Philia and Others*' (2007) 21 *Speculum Juris* 266-275. The Supreme Court of Appeal judgment, which largely upheld the reasoning of the High Court, is reported as *Shilubana & Others v Nwamitwa* 2007 2 SA 432 (SCA).

parties are cousins, their fathers having been brothers. For over five generations, the appointment and succession to chieftaincy within the Valoyi community have been strictly patriarchal, as determined by the organising principle of male primogeniture which allows succession from father to firstborn son only. The immediate events culminating in this dispute originated in 1948 when *Hosi* (Chief) Fofiza Nwamitwa was enthroned as chief. He reigned for two decades until 1968 when he died without a male heir. *Hosi* Fofiza was the father of the first respondent.

The first respondent was the only child born of *Hosi* Fofiza's first wife, but it was inconceivable at that time that a woman could become chief. In view of this, when *Hosi* Fofiza died in 1968, his younger brother, Richard, was appointed chief. The applicant is *Hosi* Richard's first-born son from his first wife. It was upon the death of in 2001 *Hosi* Richard, after South Africa's transition to a system of constitutional democracy in 1994, which celebrates gender equality, that the issue arose as to whether the applicant or the first respondent should succeed as chief.

Based on various resolutions adopted by the Valoyi tribal authorities, including the royal family, the provincial government of Limpopo in 2002 appointed the first respondent as chief in 'accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996'.³

This appointment did not sit well with *Hosi* Richard's first-born son, Sidwell Nwamitwa, the applicant in this case. According to the applicant, the tribal authorities had no right to alter the primogeniture rule. The High Court ruled in his favour, reasoning that a female successor could not become chief in terms of the customs and traditions of the community.⁴ In other words, as far as the Valoyi people were concerned, there was neither precedent nor evidence of a female having been appointed chief, even if she was the first-born.⁵ Swart J pointed out that:⁶

A most important consideration in the Tsonga/Shangaan and Valoyi custom is that a chief of the tribe must be fathered by a chief. This has always been the practice. If a female is appointed as chief and also marries, her children would not have been fathered by a Valoyi chief, would bear a different name and would not be members of the royal family. This would lead to confusion and uncertainty in the successorship [sic].

Swart J attempted to provide justification for the conservative approach adopted by the court for its failure to develop the primogeniture rule. The learned judge was unfortunately carried away by the potential consequences of a married woman becoming chief while she and her children bear the surname of their husband and father who is not from

³ *Nwamitwa* case (n 2 above) 546D.

⁴ *Nwamitwa* case (n 2 above) 539I-J.

⁵ *Nwamitwa* case (n 2 above) 5450E-F.

⁶ *Nwamitwa* case (n 2 above) 545G-H.

the Nwamitwa royal family. As events later showed, this fear was totally misplaced as Mrs Shilubana, on being appointed senior traditional leader, dropped her marital name and assumed the official name of *Hosi TLP Nwamitwa II*.

3 Critique

The *Nwamitwa* decision may be criticised for its failure or refusal to develop the primogeniture rule, so as to promote the spirit, purport and objects of the South African Bill of Rights. Moreover, the decision flies in the face of the transformative agenda of the Traditional Leadership and Governance Framework Act⁷ in two important ways. In the first place, the Preamble of the Act unambiguously stipulates that the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that 'gender equality within the institution of traditional leadership may progressively be advanced'. The High Court decision failed to recognise the statutory obligation imposed on traditional communities to transform and adapt their customary law and customs so as to comply with the Bill of Rights, in particular by 'seeking to progressively advance gender representation in the succession to traditional leadership positions'.⁸

In this respect, the High Court decision impoverished the emerging gender equality jurisprudence and retards the progressive judicial development of customary law, which ought to keep pace with human rights norms. As Lehnert explains, this shortcoming may be due to a 'limited understanding of customary law concepts' among judges, which results in the rigid and mechanical 'application of the principle of male primogeniture without even considering the changed practices in the living [customary] law'.⁹ Himonga similarly criticises this kind of disingenuous judicial approach to customary law by charging that such an¹⁰

uncritical superficial approach of the courts to customary law ... has a serious bearing on the extent to which women living under customary law may

⁷ Act 41 of 2003. In terms of sec 22(1) of Act 41, the national government established the Nhlapo Commission on Traditional Leadership Disputes and Claims in 2004 that submitted its final report in July 2010. Although the Commission had a general mandate to investigate and resolve all claims and disputes relating to any traditional leadership, the focus of its final report was mainly on the rightful incumbents of various kingships. Therefore, the Nhlapo Commission did not investigate and report on the position of senior traditional leadership such as the *Shilubana* dispute is about.

⁸ Sec 2(3)(c) Traditional Leadership and Governance Framework Act 41 of 2003.

⁹ W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241 264 266.

¹⁰ C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' (2005) *Acta Juridica* 82 107.

enjoy human rights under the Constitution and the international human rights instruments that South Africa has ratified.

Male primogeniture, as applied in this case, embodies the blatant injustice arising from the obvious fact that if the applicant were male, she would have succeeded her father as chief of the Valoyi tribe in 1968. At that time, however, customary law classified women as minors and this was why her uncle, *Hosi Richard*, succeeded her late father, and ruled until his death in 2001.

It is submitted that the meaning and relevance of the primogeniture rule should not be ignored in a society where traditional values are continuously changing. If the primogeniture rule is always interpreted with reference to the archaic meaning accorded to it by our ancestors, then contemporary people, especially women, may lose faith in it, and may not respect it because male primogeniture seems to be unjust and unfairly discriminatory towards women. As a matter of fact, indigenous law is a dynamic system of law with values and norms which continue to change and evolve within the context of the Constitution. For this reason it is important for the rule to develop with the changing expectations of those who look to it as the embodiment of the values and aspirations of the customary law community and its citizens.

4 The Constitutional Court decision

These observations and criticisms were reflected in the Constitutional Court's judgment in the same matter, which rejected the conservative approach of the High Court and the Supreme Court of Appeal which in effect upheld the validity of the male primogeniture rule. Speaking for the Court, Van der Westhuizen J held that:¹¹

The conclusions of the High Court and Supreme Court of Appeal that the traditional authorities lacked the power to act as they did were incorrect. They erred in that their focus was too narrow ... They gave insufficient consideration to [the] historical and constitutional context of the decision, more particularly the right of traditional authorities to develop their customary law.

According to the Constitutional Court:¹²

Customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law.

Ntlama and Ndima have criticised the *Shilubana* judgment because the Court 'abdicated its responsibility to develop customary law, shifting

¹¹ *Shilubana* (n 1 above) para 85.

¹² *Shilubana* (n 1 above) para 81.

it instead to the traditional authority, a party to the case'.¹³ In their critique, Ntlama and Ndima accuse the Court of rejecting customary law principles and values at the expense of Western conceptions of human rights norms.¹⁴ In other words, the Court, by outlawing male primogeniture, disregarded a communal-oriented tenet of customary law in favour of a Western conception of gender equality which promotes individualism.¹⁵ With due respect, their argument seems unjustifiable especially if seen against the reasoning of the unanimous Constitutional Court, the provisions of the Constitution as reinforced by relevant statutory law, as well as pure logic.

Firstly, the Constitutional Court took judicial notice of a transformative initiative by traditional authorities which was later endorsed by the Limpopo provincial government. In the words of the Court:¹⁶

Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the Constitution requires this. The legal status of the customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.

Second, the Constitution in section 2 establishes its supremacy over all law, including customary law, and follows through in section 31(2) by providing that community rights may not be exercised in a manner which is inconsistent with any provision of the Bill of Rights. Besides, courts are enjoined to give effect to the primary responsibility imposed on any traditional community to:¹⁷

transform and adapt customary law and customs relevant to the application of [the Traditional Leadership and Governance Framework Act 41, 2003] so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by –

- ...
- (c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

¹³ N Ntlama & DD Ndima 'The significance of South Africa's Traditional Courts Bill to the challenge of promoting African traditional justice systems' (2009) 4 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 6 15.

¹⁴ As above.

¹⁵ As above.

¹⁶ Shilubana (n 1 above) para 55.

¹⁷ n 9 above.

Lastly, the Ntlama-Ndima argument, based on the supposed imposition of a Western conception of atomistic individualism of human rights contrary to a communitarian emphasis of human rights, misses the point and renders their argument fallacious because of its irrelevant appeal to tradition. Indeed, the patriarchal regulation of intestate succession fulfilled a significant social function as male heirs were *expected* to assume critical social responsibilities by providing care and material support to widows and children left behind by the deceased. Moreover, as long as such traditional practices under patriarchy embody the distilled wisdom of forebears dating from time immemorial, they relieve us from the burden of having to re-invent modern solutions to the problems created by intestate succession.

However, there is also a negative side to male primogeniture and other aspects of patriarchy. Undoubtedly, powerful traditions may perpetuate injustices and preclude the adoption of better ways of doing things. Male primogeniture, for example, regards women as legal minors and unfairly deprives them of equal rights with men to inherit from their deceased fathers or husbands. The question then arises whether such injustices arising from unfair gender discrimination may be permitted to continue in a constitutional democracy where the Constitution expressly enjoins courts, traditional communities, individuals and organs of state to progressively promote and protect women's rights to equality.

Speaking on the role of the Constitutional Court in promoting gender equality, Moseneke poignantly points out:¹⁸

In the terrain of indigenous law, the court has on a good few occasions adapted its rules, tainted by patriarchy, in order to give effect to the gender equality and dignity dictates of the Constitution. Many steeped in the indigenous tradition would not consider the rule that adult male offspring are [exclusively] entitled to all inheritance and status within the family to be offensive. However, mere public clamour for retention of this patriarchal arrangement ought not to weigh heavier than the express dictates of the Constitution to obtain equal worth for all.

Violations of gender equality in a modern egalitarian South African society cannot be rationalised by appeals to an aspect of African traditional value systems based on patriarchal values. Instead, devising a new value system which, while being responsive to the imperatives of the constitutional value of human dignity, equality and freedom underlying South African society, reflects the best traditional thinking about human rights and other values, represents one of the most

¹⁸ D Moseneke 'The burden of history: The legacy of apartheid judiciary; the legitimacy of the present judiciary' public address delivered at the University of Cape Town Summer School, January 2010 <http://www.mg.co.za/moseneke> (accessed 25 March 2010).

profound challenges facing us today. Reilly captures this challenge when she states that:¹⁹

In an age of globalisation, it is imperative to find ways of negotiating the relationship between context and cultural particularity on the one side, and a cosmopolitan commitment to human rights on the other, without invoking crude dichotomies or untenable notions of cultural authenticity. In practice, the value and meaning of human rights ideals have always been and will continue to be the subject of contestation and reinterpretation, across different regions and cultural contexts.

It is submitted that the *Shilubana* decision is not only revolutionary but, more importantly, a quintessentially transformational judgment celebrating gender equality in chieftaincy succession disputes. *Shilubana* is also welcomed because it is consistent with the grand transformative agenda of the Constitution,²⁰ the equality jurisprudence progressively developed by the Constitutional Court since its inception²¹ as well as international law obligations in respect of women that South Africa has undertaken after its transition from apartheid in 1994.²²

Nonetheless, the optimism generated by the creativity of the Constitutional Court in *Shilubana* has to be tampered by circumspection. Since, as Albertyn writes, ‘transformatory change’ as exemplified in *Shilubana* is ordinarily ‘incremental’,²³ the ‘struggle for gender equality’ should not, in the words of Mokgoro, ‘be confined to the court rooms. Litigation has its limitations as it tends to be the privilege of the economically empowered.’²⁴

In order to overcome the imperfections of the judiciary as the sole role player in driving social transformation and gender equality, Mokgoro argues for a vibrant civil society which may ‘agitate for change and monitor implementation’,²⁵ especially in traditional communities in the rural areas. Kok takes the issue even further by advocating the establishment of an ‘inter-institutional dialogue’ between civil society, on the one hand, as well as the executive, legislative and judicial branches of government on the other.²⁶

¹⁹ N Reilly *Women's human rights* (2009) 37.

²⁰ M O'Sullivan & C Murray ‘Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy’ (2005) *Acta Juridica* 1-2.

²¹ Eg *Prinsloo v Van der Linde & Another* 1997 3 SA 1012 (CC); 1997 6 BCLR 759 (CC), *President of the Republic of South Africa & Another v Hugo* 1997 4 SA 1 (CC); 1997 BCLR 708 (CC); *Brink v Kitshoff* 1996 6 BCLR 752 (CC); 1996 4 SA 197 (CC).

²² Eg Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

²³ C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *South African Journal on Human Rights* 253 276.

²⁴ Y Mokgoro ‘Constitutional claims for gender equality in South Africa: A judicial response’ (2003) 67 *Albany Law Review* 565 573.

²⁵ As above.

²⁶ A Kok ‘The promotion of equality and the Promotion of Unfair Discrimination Act of 2000: Court-driven or legislature-driven societal transformation?’ (2008) 19 *Stellenbosch Law Review* 122 139.

5 Concluding remarks

Like the *Bhe*²⁷ decision, which rejected the male primogeniture rule in intestate succession in family law, *Shilubana* has again dealt a fatal and decisive blow at the gender-based discrimination. Where a traditional community is confronted with a chieftaincy succession dispute based on gender discrimination, the *Shilubana* judgment of the Constitutional Court serves as an authoritative and binding precedent if similar facts arise. In other words, *Shilubana* empowers appropriate traditional authorities to effect incremental developments which are necessary to keep customary law in line with the dynamic and evolving fabric of an egalitarian society as envisioned by the South African Constitution.

Undoubtedly, the *Shilubana* decision promotes gender equality by recognising the right of a woman to be appointed chief of a traditional community in the same way as the largest ethnic community of the BaTswana appointed *Kgosigadi Mosadi Sebolo* as the first female paramount chief and president of the national house of chiefs. Indeed, judicial recognition for the appointment of a female chief in any traditional community should be understood within the context of the tremendous socio-economic changes taking place, not only in South Africa, but across the African continent²⁸ and ways in which gender inequality is addressed at all levels of society.

²⁷ *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC)

²⁸ Besides the Balobedu and Pondo ethnic communities in South Africa that have been famous for having female rulers, the African continent has isolated cases of female chiefs, such as among the Amarharbe, Nkoya and Barotse in Zambia, two paramount chiefs in Sierra Leone, the Deji in Nigeria as well as the Apprapponso tribe in Ghana.