

Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC) (as an amicus curiae)

The Bhe case concerned a constitutional challenge to the rule of male primogeniture as it applies in the African customary law of succession, as well as constitutional challenges to section 23 of the Black Administration Act, 38 of 1927, regulations promulgated in terms of that section and s. 1(4)(b) of the Intestate Succession Act, 81 of 1987. The Constitutional Court upheld the challenges, struck down the impugned statutory provisions and regulations, and put in place a new interim regime to govern intestate succession for black estates. Bhe and others v The Magistrate, Khayelitsha and others (Bhe) was an application for confirmation of orders of constitutional invalidity made by the Cape High Court. The court found s. 23(10)(a),(c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks to be unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared to be unconstitutional insofar as it excluded from the application of s. 1 of that Act any estate or part of any estate in respect of which s. 23 of the Black Administration Act applied.

The application in Bhe was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. The applicants submitted that the impugned provisions and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the estate of their late father.

The CGE advanced the argument that there is a huge difference between what is termed official customary law of succession that encompasses the rule of primogeniture which unfairly discriminates against women and particular classes of children; and the living customary law. Furthermore, that the shortcomings of the rule under official customary law can be remedied by a proper application of the principles of living Customary Law in respect of succession and inheritance on a case by case basis, thereby ensuring the development of customary law. The Courts has a responsibility to develop laws and not to refer all matters on development of the laws to other arms of government.

The CGE further highlighted the limitations of the Intestate Succession Act that it fails to reflect the concept of succession under Customary Law, that it fails to have regard to polygynous marriages and that it is premised on the concept of a western nuclear family model and accordingly does not accommodate customary extended families.