



Commission on Gender Equality

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COMMISSION ON GENDER EQUALITY STATEMENT ON BHE CASE

On March 02nd the Constitutional Court will hear three cases one of which is the Bhe case in which the CGE is acting as friend of the court (amicus curiae) This is a matter that was heard in the Cape of Good Hope High Court that decided that

1. Two laws (**Black Administration Act and Intestate law of Succession Act**) explained briefly hereunder should be declared unconstitutional.
2. Further that Intestate Succession Act must apply to Blacks living under Customary law.

As the decision of the Cape of Good Hope High Court was that these laws are unconstitutional and that the Intestate Succession Act should apply to Blacks living under customary law, the Constitutional Court has to confirm that decision if it agrees. Therefore meaning that two minor female children who were excluded from inheriting their father's estate will if Constitutional court confirms the decision be able to inherit their late father's estate instead of the grandfather.

This matter according to the CGE is not as simple as that as there are other serious consequences that may adversely affect a lot more women unless there is further development of the law.

Black Administration Act : provides that estates of Blacks in Customary Law revolve on eldest male son failing him, his own eldest son (grandson of deceased) to the exclusion of all other children. In the Bhe case as the deceased did not have any male children the estate devolved upon his father.

Intestate Succession Act: This Act excludes Black persons living under customary law. Therefore in the Bhe case female children are excluded as the

parents were living under customary law. This will also apply to males other than first born in other circumstances.

Whilst the CGGE supports the first two wishes advanced by the applicants in the Bhe case, there is a need not support the last one and to highlight some of the issues that have impact on plight of poor rural women as regards customary law of succession broadly. In this instance there are several shortcomings inherent in the Intestate Succession Act that preclude it from effectively dealing with all issues of succession and inheritance under Customary law.

The CGE advances the argument that there is a 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.

As it may take time for Living Customary law to be developed, the CGE further supports its Intestate Succession Act application in the area of Customary Law as an interim measure, provided that it is qualified in certain respects so as to ensure that it provides effective interim recourse to women living under Customary Law.

The basis on which the CGE contends that the Intestate Succession Act is ill-suited to meeting the needs of women living under customary law is canvassed through an overview of the principles underpinning intestate succession under African Customary Law.

Living customary law is described as dynamic and adapts to changing social and economic conditions. It is also considered to be less oppressive of traditionally marginalized groups in African societies, including women and children, than official customary law.

The following limitations of the Intestate Succession Act are highlighted in the arguments of CGE in this matter:

1. It fails to reflect the concept of succession under Customary Law;
2. It fails to have regard to polygynous marriages;
3. It is premised on the concept of a western nuclear family model and accordingly does not accommodate customary extended families.

In addition, the application of living customary law has been endorsed by some of the South African courts.

The living customary law in respect of succession and inheritance has been influenced by the following factors: changing socio-economic conditions, in which relatives struggle for resources to maintain themselves and their immediate families, the weakening of the African family as a support group for individuals, the difficulties of enforcing private maintenance orders as well as the lack of public maintenance and support and social security for poor children.¹

It is submitted that there is ample literature available to suggest that the Living Customary Law does not, in fact, endorse the Rule of Primogeniture, and is accordingly not susceptible to constitutional invalidity on the basis that official customary law is, or, that if it does endorse the principle, it does so only to the extent that it is not oppressive to women and children.

The CGE accordingly submit, that the principle of primogeniture is not reflected and does not manifest itself in Living Customary Law. On the contrary, the research to which Counsel for CGE has referred to indicates that women and children inherit under living customary law.
