Judicial Promotion of Gender Equality in Chieftaincy Succession Disputes: An Appraisal of the *Shilubana*[1] decision

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1. Introduction

Until the South African Constitutional Court's landmark decision in *Shilubana*, 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 has been persistently called 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 been largely confined to intestate succession of a deceased's estate devolving according to personal law or family law. Little attention, either judicial or academic, has been given to the issue of gender discrimination as played out by the customary (constitutional) law rule of patrilineal succession in terms of which women may not hold political office in traditional African communities in the country.

The purpose of this paper is to critically examine how the courts have attempted to harmonise male primogeniture with gender equality especially in chieftaincy succession disputed. To this end, the paper seeks to critique and appraise recent judicial decisions in the *Shilubana* cases in order to provoke critical dialogue over the recent Constitutional Court's judgement upholding gender equality in chieftaincy succession and outlawing male primogeniture.
Following the first judicial decision in the *Nwamitwa* case by the Gauteng North High Court, both the Supreme Court of Appeal and the Constitutional Court have also taken turns in expressing their opinions on the subject. The Supreme Court of Appeal largely affirmed the High Court judgment. However, the Constitutional Court overturned the decision of the two courts below. In view of the concurrence of the Supreme Court of Appeal with the High Court judgment, this paper considers the High Court decision as a representative approach of the two courts while the Constitutional Court judgment is treated as a contrary approach to the subject.

[1] *Shilubana and others v Nwamitwa* [2008] ZACC 9. This 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* newspaper 1 July 2009, page 5).

2. The *Nwamitwa* decision[2]

In *Nwamitwa v Phillia*, the High Court was invited to determine whether a woman could succeed her late father, a chief, and become a tribal chief. First respondent and the applicant in this case are respectively female and male members of the royal family of the 70,000-member Valoyi tribe that constitutes part of the Tsonga/Shangaan nation of contemporary Limpopo Province. Both contesting parties are cousins. Their fathers were brothers. For over five generations, the appointment and succession to chieftaincy among the Valoyis 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 into this dispute originated in 1948 when *Hosi* (Chief) Fofoza Nwamitwa was enthroned as the chief. He reigned for two decades until 1968 when he died without a male heir. *Hosi* Fofoza was the father of the first respondent.

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

Based on various resolutions adopted by the Valoyi tribal authorities including the royal family, provincial government (the State) in 2002 appointed first respondent as chief "accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution of the Republic of South Africa Act 108 0f 1996"[3]

That did not go well with *Hosi* Richard's firstborn 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 by reasoning that a female successor could not become a chief in terms of the customs and traditions of the tribal community.[4] In other words, as far as the Valoyis are concerned there was neither precedent nor evidence of a female having been appointed as chief, even if she was the firstborn.[5]

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[2] *Nwamitwa v Phillia* 2005 3 SA 536 (T) a 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. The Supreme Court of appeal judgment, which largely upheld the reasoning of the High Court is reported as *Nwamitwa Shilubana v Nwamitwa* 2007 2 SA 432 (SCA).

[3] 3Ibid 546 D

[4] Ibid 539 I-J

[5] Ibid 5450 E-F

In conclusion, Swart J pointed out that

> 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[6][*sic*]

3. Critique

The *Nwamitwa* decision may be criticised for the court's failure or refusal to develop the primogeniture rule, so as to promote the spirit, purport and objects of the Bill of Rights. Moreover, the decision flies in the face of the transformative agenda of the Traditional Leadership and Governance Framework Act[7] in two main senses. In the first place, the preamble of this legislation 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 *Nwamitwa* decision fails to recognise the statutory obligation imposed on traditional communities to transform and adapt 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 *Nwamitwa* decision does impoverish the emerging gender equality jurisprudence in particular, and in the end 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 the "limited understanding of customary law concepts" among judges, which result 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 an

> uncritical superficial approach of the courts to customary law… has a serious bearing on the extent to which women living under customary law may enjoy human rights under the Constitution and the international human rights instruments that South Africa has ratified. [10]

Male primogeniture, as applied in this case, embodies the blatant injustice arising from the obvious fact that if the applicant were a man, she would have succeeded her father as chief of

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[6] 545G–H.

[7] Act 41 of 2003.

[8] Section 2(3)(c) of the Traditional Leadership and Governance Framework Act.

[9] Lehnert "The Role of the Courts in the Conflict between African Customary law and Human Rights" 2005 *SAJHR* 241, 264 and 266.

[10] 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' *Acta Juridica* (2005) 82-107 at 107.

the Valoyi tribe in 1968. But at that time, customary law classified women as minors and that was why her uncle, *Hosi* Richard, replaced her late father, and ruled until his death in 2001.

It is thus submitted that the meaning and relevance of the primogeniture rule should not be left behind in a society whose changing standards of life and ethos are continuously on the move. If the primogeniture rule is always interpreted with reference to the archaic meaning accorded to it by our ancestors, then contemporary people, especially women of the new millennium, may surely 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 that has values and norms, but which values and norms 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 *Shilubana*[11] decision

These observations and criticisms have been rightly reflected in the Constitutional Court judgment in the same matter rejecting the conservative approach of both 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 led the unanimous Constitutional Court in ruling that

> [t]he 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 historical and constitutional context of the decision, more particularly the right of traditional authorities to develop their customary law.[12]

According to the Constitutional Court,

> 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.[13]

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 a welcome decision because it is consistent with the

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[11] *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae)* [2008] ZACC 9.
[12] *Ibid.* para 85
[13] *Ibid.* para 81

grand transformative agenda of the Constitution,[14] the equality jurisprudence progressively developed by the Constitutional Court since its inception[15] as well as the international law obligations in respect of women which South Africa has undertaken since 1994.[16]

Nonetheless, the optimism generated by the erudite creativity of the supreme constitutional tribunal in *Shilubana* has to be tampered with reasonable circumspection. Since, as Albertyn opines, "transformatory change" as exemplified in *Shilubana* is ordinarily "incremental",[17] 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. [18]

In order to overcome the imperfections of the judiciary as the sole roleplayer in driving social transformation and gender equality, Mokgoro argues for a vibrant civil society which can " agitate for change and monitor implementation" [19] especially in traditional communities in the rural areas. Kok takes the issue even further by advocating for the establishment of an "inter-institutional dialogue" between civil society on one hand as well as the executive, legislative and judicial branches of government on the other. [20]

5. Concluding remarks

Like the *Bhe* decision which rejected the male primogeniture rule in intestate succession disputes at family, the *Shilubana* court has again dealt a fatal and decisive blow at the gender-based discriminatory rule of primogeniture in chieftaincy succession disputes at public law. What this means is that 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.

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[14] O'Sullivan and Murray 'Brooms sweeping oceans? Women's Rights in South Africa's first decade of democracy' *Acta Juridica* (2005) 1-41 at 1-2.

[15] e.g. *Prinsloo v Van der Linde and another* 1997(3) S A 1012 (CC); 1997 (6) BCLR 759 (CC), *President of the Republic of South Africa and another v Hugo* 1997 (4) S A 1 (CC); 1997 (BCLR) 708 (CC); *Brink v Kitshoff* 1996 (6) BCLR 752 (CC); 1996 (4) S A 197 (CC).

[16] e.g. The African Protocol on the Rights of Women Resolution AHG/Res 240 (XXXI) adopted on 11 July 2003 by the OAU to supplement the African Charter.

[17] Albertyn " Substantive equality and transformation in South Africa" (2007) 23 *SAJHR* 253-276 at 276.

[18] Mokgoro "Constitutional claims for gender equality in South Africa: a judicial response" (2003) 67 *Albany Law Review,* 565-573 at 573.

[19] *Ibid.*

[20] Kok " The Promotion of equality and promotion of unfair discrimination act of 2000: court-driven or legislature-driven societal transformation?" (2008) *Stell LR,* 122-141 at 139.

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 the egalitarian society as envisioned in 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 BaLete in Botswana appointed *Kgosigadi* Mosadi Sebolo as the first female paramount chief and president of the national House of Chiefs. Indeed the 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 this country, but across the entire African continent[21] and how gender inequality is being addressed at all levels of society.

[21] Besides the Balobedu and Pondomisa ethnic communities in South Africa that have been famous for having female rulers over a long time, the African continent has many 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 Appraponso tribe in Ghana.