

GENERAL INFORMATION ABOUT THE CASE	
Case URL	http://www.saflii.org/za/cases/ZACC/2004/17.html
Name of case:	Bhe & Others v Khayelitsha Magistrate & Others 2005
Court name:	Constitutional Court
Type of court:	<input checked="" type="checkbox"/> Constitutional Court <input type="checkbox"/> Supreme Court of Appeal <input type="checkbox"/> High Court <input type="checkbox"/> Other
Issue:	Recognition of Customary Law
Justice(s)/Judge(s)	Langa DCJ Chaskalson CJ, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J Dissent Ngcobo J
Reference No:	[2004] ZACC 17
Filing No:	CCT 49/03
DESCRIPTION	
Facts:	An application was made on behalf of two minor daughters of Mrs Bhe and her deceased partner jointly by the South African Human Rights Commission and the Women's Legal Centre Trust. The application contended that section 23 of the Black Administration Act of 1927 (the Act) read together with the Regulations for the Administration and Distribution of Estates of Deceased Blacks (the regulations) framed under the Act and read further with section 1(4)(b) of the Intestate Succession Act 81 of 1987

	<p>was unconstitutional. 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 deceased estate of their late father. The male primogeniture rule is a customary law which states that only the elder legitimate son can inherit the deceased estate in exclusion of the other siblings. These enactments determine the circumstances under which indigenous law of succession is applicable to African people.</p> <p>The Constitutional court dealt with an application on the constitutional validity of the indigenous law principle of male primogeniture. The court held that this section cannot escape the context in which they were conceived. It is part of an Act which was specifically crafted to fit in with notions of separation and exclusion of Africans from the people of “European” descent.</p> <p>Accordingly, the court stated that the problem with development by the courts on a case-by-case basis is that changes will be very slow; and uncertainty regarding the real rules of customary law. The Court held that, section 23 of the Act and its regulations are manifestly discriminatory and in breach of section 9(3) of our Constitution.</p> <p>The court also held that what is required is a more direct action to safeguard the important rights that have been identified. Therefore, the primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights.</p>
<p>DECISION/JUDGMENT</p>	
<p>Decision/Judgment:</p>	<p>The Constitutional Court considered the context and background of the Black Administration Act in that it ensured that the procedures whereby the estates of black people are treated differently from the estates of white people are inconsistent with the Constitution.</p> <p>The Court held that the Constitution itself envisages a place for customary law in our legal system. Thus, customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.</p>

The Court considered the African customary law rule of male primogeniture, in the form that it has come to be applied in relation to the inheritance of property and held that it discriminates unfairly against women and illegitimate children. Accordingly, the Court declared it to be unconstitutional and invalid.

While it would ordinarily be desirable for courts to develop new rules of African customary law to reflect the living customary law and bring customary law in line with the Constitution, the Court stated that in this instance, it was not a feasible remedy.

Dissent:

In a partially dissenting judgment, Ngcobo J agreed with Langa DCJ that section 23 of the Black Administration Act together with the regulations made under that Act, and section 1(4)(b) of the Intestate Successions Act violate the right to equality and the right to dignity and are therefore unconstitutional. He also agrees that the principle of male primogeniture discriminates unfairly against women.

However, Ngcobo J also held that courts have an obligation under the Constitution to develop indigenous law so as to bring it in line with the rights in the Bill of Rights, in particular, the right to equality. Therefore, that the principle of primogeniture should not be struck down but instead should be developed so as to be brought in line with the right to equality, by allowing women to succeed to the deceased as well.

REFERENCES	
Reference(s) to Court Decision	<i>Dukuza Kaula v John Mtimkulu and Madhlala Mtimkulu Alexkor Ltd and Another v Richtersveld Community and Others,</i>