

GENERAL INFORMATION ABOUT THE CASE	
Case URL	<a href="http://www.saflii.org/za/cases/ZACC/2008/9.html">http://www.saflii.org/za/cases/ZACC/2008/9.html</a>
Name of case:	Shilubana & Others v Nwamitwa
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:	Importance of customary law and the legal status of customary-law norms
Justice(s)/Judge(s)	Moseneke DCJ, Madala J, Mpati AJ, Ngcobo J, Nkabinde J, Sachs J, Skweyiya J and Yacoob J concur in the judgment of Van der Westhuizen J.
Reference No:	2009 (2) SA 66 (CC)
Filing No:	CCT 03/07
DESCRIPTION	
Facts:	The First Applicant in this matter was Ms Shilubana. Her father, was a Hosi (Chief) of the Valoyi Community in Limpopo. In 1968, the first applicant's father, Hosi Fofeza Nwamitwa, died without a male heir. Because customary law at the time did not permit a woman to become Hosi, the applicant did not succeed him as Hosi although she was his eldest child. Instead, her father, Hosi Fofeza, was succeeded by his brother, Richard Nwamitwa.

	<p>During 1996 and 1997 the traditional authorities of the Valoyi community passed resolutions deciding that Ms Shilubana would succeed Hosi Richard, since in the new constitutional era women were equal to men. Her succession was approved by the provincial government. In 2001, Hosi Richard passed on. Following the death of Hosi Richard, Mr Nwamitwa who is the eldest son of Hosi Richard and the respondent in this matter, interdicted the applicants' installation and challenged her succession, claiming that the tribal authorities had acted unlawfully and that he, as Hosi Richard's eldest son, was entitled to succeed his father. Mr Nwamitwa subsequently sought a declaration in the Pretoria High Court that he is the rightful successor to Hosi Richard. Both the Pretoria High Court and the Supreme Court of Appeal ruled in favour of Mr Nwamitwa.</p> <p>Ms Shilubana appealed against a judgment and order of the Supreme Court of Appeal. The appeal concerned a dispute between Ms Shilubana and Mr Nwamitwa over the right to succeed Mr Nwamitwa's father, Richard Nwamitwa, as Hosi of the Valoyi traditional community in Limpopo. The Constitutional Court held that the Tribal authority has the right to develop customary law. As such, Ms Shilubana was the rightful heir.</p>
<p>DECISION/JUDGMENT</p>	
<p>Decision/Judgment:</p>	<p>The Constitutional Court held that the High Court and the Supreme Court of Appeal, in their decision, failed to acknowledge the power of the traditional authorities to develop customary law. Accordingly, the Court held that in when trying to determine customary law, courts must consider the past practice of the community. Furthermore, Section 211(2) of the Constitution requires courts to respect the right of traditional communities to develop their own law.</p> <p>Finally, the Court held that, courts must balance the need for flexibility and the imperative to facilitate development against the value of legal certainty and respect for vested rights. The court stated relevant factors for this balancing test include:</p> <ol style="list-style-type: none"> <li>1. the nature of the law in question,</li> <li>2. in particular the implications of the change on constitutional and other legal rights,</li> <li>3. the process by which the alleged change occurred or is occurring, and</li> </ol>

4. the vulnerability of parties affected by the law.

After considering these factors in light of evidence received from the parties of the present practice of traditional communities, the court concluded that the traditional authorities had the authority to develop customary law. Furthermore, they court found stated that they did so in accordance with the constitutional right to equality.

Finally, the court stated that value of recognising the development by a traditional community of its own law in accordance with the Constitution was not outweighed by the need for legal certainty or the protection of rights.

REFERENCES	
Reference(s) to other court decision	