CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/07
[2008] ZACC 9

TINYIKO LWANDHLAMUNI PHILLA NWAMITWA SHILUBANA	First Applicant
WALTER MBIZANA MBHALATI	Second Applicant
DISTRICT CONTROL OFFICER	Third Applicant
THE PREMIER: LIMPOPO PROVINCE	Fourth Applicant
MEC FOR LOCAL GOVERNMENT AND HOUSING, LIMPOPO	Fifth Applicant
HOUSE FOR TRADITIONAL LEADERS	Sixth Applicant
CHRISTINA SOMISA NWAMITWA	Seventh Applicant
MATHEWS T N NWAMITWA	Eighth Applicant
BEN SHIPALANA	Ninth Applicant
ERNEST RISABA	Tenth Applicant
STONE NGOBENI	Eleventh Applicant
versus	
SIDWELL NWAMITWA	Respondent
together with	
COMMISSION FOR GENDER EQUALITY	First Amicus Curiae
NATIONAL MOVEMENT OF RURAL WOMEN	Second Amicus Curiae
THE CONGRESS OF TRADITIONAL LEADERS OF SOUTH AFRICA	Third Amicus Curiae

Heard on : 27 November 2007

Decided on : 4 June 2008

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal,[1] substantially confirming a decision of the Pretoria High Court.[2] It raises issues about a traditional community's authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership, in accordance with the Constitution. A woman was appointed to a chieftainship position for which she was previously disqualified by virtue of her gender. This Court is called on to decide whether the community has the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination, even if this discrimination occurred prior to the coming into operation of the Constitution.

[2] The matter also raises issues regarding the relationship between traditional community structures and courts of law envisaged by our constitutional democracy. This Court has to consider how courts of law are to apply customary law as required

[1] *Shilubana and Others v Nwamitwa (Commission for Gender Equality as* Amicus Curiae*)* 2007 (2) SA 432 (SCA).

[2] *Nwamitwa v Phillia and Others* 2005 (3) SA 536 (T).

by the Constitution, while acknowledging and preserving the institution and role of traditional leadership and the functioning of a traditional authority that observes customary law.[3]

Background

[3] This is a dispute about the right to succeed as Hosi (Chief) of the Valoyi traditional community in Limpopo. The dispute is between Ms Shilubana, the first applicant,[4] daughter of Hosi Fofoza Nwamitwa (Hosi Fofoza), and Mr Nwamitwa, the respondent, son of Hosi Malathini Richard Nwamitwa (Hosi Richard). On 24 February 1968 Hosi Fofoza died without a male heir. At that time, succession to Hosi was governed by the principle of male primogeniture. Hosi Fofoza succeeded his father only because his elder sister was ineligible to be Hosi. Therefore, Ms Shilubana, Hosi Fofoza's eldest daughter, was not considered for the position, despite being of age in 1968. Instead, Hosi Fofoza's younger brother, Richard, succeeded

[3] Section 211 of the Constitution states:

> "(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[4] The second applicant, Walter Mbizana Mbhalati, is presently the Acting Hosi of the Valoyi. The third applicant is the District Control Officer for Ritavi, Limpopo province, who acts as the liaison in the Department of Local Government and Housing between Traditional Authorities and the Limpopo Provincial Government. The fourth applicant is the Premier of the Limpopo province who issued letters of appointment to Ms Shilubana as Hosi of the Valoy. The fifth applicant is the MEC for Local Government and Housing, who is responsible for traditional affairs in the Limpopo province. The sixth applicant is the House for Traditional Leaders, the commission responsible for traditional affairs in the Limpopo province. The seventh applicant is Christina Somisa Nwamitwa, second wife to Hosi Richard. The eighth to eleventh applicants – Mathews TN Nwamitwa, Ben Shipalana, Ernest Risaba and Stone Ngobeni – are members of the committee co-ordinating the activities of the Royal Council under the leadership of the Acting Hosi.

him as Hosi of the Valoyi. The current dispute between Ms Shilubana and Mr Nwamitwa arose following the death of Hosi Richard on 1 October 2001.[5]

[4] On 22 December 1996, during the reign and with the participation of Hosi Richard, the Royal Family of the Valoyi met and unanimously resolved to confer chieftainship on Ms Shilubana. The resolution notes:

> "[T]hough in the past it was not permissible by the Valoyis that a female child be heir, in terms of democracy and the new Republic of South African Constitution it is now permissible that a female child be heir since she is also equal to a male child.
>
> . . . .
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> The matter of Chieftainship and regency would be conducted according to the Constitution of the Republic of South Africa".

[5] Ms Shilubana did not want Hosi Richard replaced and as a result the Royal Council resolved that Hosi Richard would continue in his position for an unspecified period of time. The High Court held that this was presumably until Ms Shilubana returned from her service as a member of Parliament. On 17 July 1997, in the presence of the Chief Magistrate and 26 witnesses, Hosi Richard acknowledged that Ms Shilubana was the heiress to the Valoyi chieftainship. The Valoyi Tribal Authority sent a letter to the Commission for Traditional Leaders of the Northern Province (Limpopo), explaining that the Royal Family had selected Ms Shilubana as Hosi. On 5 August 1997 the Royal Council accepted and confirmed that Hosi Richard would transfer his powers to Ms Shilubana. On the same day, a "duly constituted

[5] During this dispute, the second applicant has been serving as Acting Hosi.

meeting of the Valoyi tribe" under Hosi Richard resolved that "in accordance with the usages and customs of the tribe" Ms Shilubana would be appointed Hosi.

[6] On 25 February 1999 Hosi Richard wrote a letter which, though not unequivocal, was accepted by the High Court and the Supreme Court of Appeal as a withdrawal of his support for Ms Shilubana's chieftainship. The Royal Family met again on 4 November 2001, after Hosi Richard had died, and confirmed that Ms Shilubana would become Hosi. On 25 November 2001, at a meeting of the Royal Family, Tribal Council, representatives of local government, civic structures and stakeholders of various organisations, Ms Shilubana was again pronounced Hosi. However, groups of community members at meetings in November and December 2001 and January 2002 voiced support for Mr Nwamitwa to succeed as Hosi.[6] On 3 July 2002 the Provincial Executive Council wrote a letter approving Ms Shilubana's appointment as Hosi, effective 22 May 2002. A Royal Council meeting for the election and installation of the Hosi was scheduled for 13 April 2002, but does not appear to have taken place.[7] An inauguration ceremony scheduled for Ms Shilubana by the provincial Department of Local Government and Housing on 29 November 2002 was interdicted by Mr Nwamitwa.[8]

[6] Whether those groups constituted specific traditional institutions – such as the Royal Family and Royal Council – is contested.

[7] Ms Shilubana stated in her founding affidavit before the High Court that this meeting was "interdicted", but no court order to this effect appears from the record.

[8] Order of Botha J of 25 November 2002 in the Pretoria High Court.

[7] On 16 September 2002 Mr Nwamitwa instituted proceedings in the Pretoria High Court seeking a declarator that he, and not Ms Shilubana, is heir to the chieftainship of the Valoyi and thus entitled to succeed Hosi Richard. He also sought an order that the third to sixth applicants withdraw the letters of appointment regarding Ms Shilubana, and issue letters of appointment to himself. The High Court and thereafter the Supreme Court of Appeal held in Mr Nwamitwa's favour. Both courts reasoned that even if the traditions and customary law of the Valoyi currently permit women to succeed as Hosi, Mr Nwamitwa, as the eldest child of Hosi Richard, is entitled to succeed him. Ms Shilubana applied to this Court for leave to appeal against the decision of the Supreme Court of Appeal.

Preliminary and Procedural Issues

[8] The applicants request condonation for the filing of their application for leave to appeal more than a month later than it was due in terms of the Rules of this Court. This matter raises fundamental questions regarding the interplay between customary law and the Constitution. How these questions are resolved might be of paramount importance not only to the immediate parties, but to the community of which they are a part, as well as the nation. Accordingly, the applicants' request for condonation must be granted.

[9] Mr Nwamitwa filed both his answering affidavit and written submissions late.[9] The answering affidavit was in fact filed some two-and-a-half months late. For the

[9] The application for leave to appeal was filed on 30 January 2007, giving the respondent 10 court days in which to deliver his notice of intention to oppose. The notice was therefore due on 13 February 2007. It was never

above reasons, this late filing has also to be condoned. This Court however expresses its displeasure at the failure of the applicants and the respondent to adhere to its Rules and the Directions of the Chief Justice.

[10] On 28 February 2007 the application for leave to appeal was set down for hearing in this Court on 17 May 2007.[10] Submissions were filed on behalf of the parties. On 16 May 2007 Mr Nwamitwa filed an "Application [for] Postponement and Leave to Dispute the Authority of Legal Practitioners to Act on Behalf of the applicants in Terms of Rule 32 and Rule 9". On 17 May 2007 counsel for the applicants indicated that the application was opposed, whereafter oral submissions on the postponement application were heard by this Court.

[11] The application was granted and the hearing was postponed to 4 September 2007. Reasons for that decision were furnished and criticism of the conduct of Mr

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filed. Under Rule 3(a)(ii) of this Court's Rules, the respondent's opposing affidavit was due 15 days from this date, on 6 March 2007. According to the Directions of the Chief Justice issued on 28 February 2007, the respondent's written argument was to be filed by 12 April 2007.

[10] According to the Directions of the Chief Justice, the parties were instructed to address the following issues:

> "(a) Does the Royal Family have the authority to develop the customs and traditions of the Valoyi community so as to outlaw gender discrimination in the succession to traditional leadership?
> (b) In the course of developing the customs and the traditions of a community, does the Royal Family have the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination even if this discrimination occurred prior to the coming into operation of the Constitution?
> (c) Are the provisions of the Traditional Leadership and Governance Framework Act, 2003 applicable to these proceedings?
> (d) If the provisions of the Traditional Leadership and Governance Framework Act, 2003 are applicable, is the dispute relating to the restoration of traditional leadership the kind of dispute that ought to be dealt with by the Commission as required by section 21(1)(b) read with section [25(2)] of the Traditional Leadership and Governance Framework Act, 2003?"

Nwamitwa's counsel expressed by this Court in a judgment handed down on 8 June 2007.[11]

[12] On 19 June 2007 Mr Nwamitwa filed a notice in terms of Rule 9 of this Court's Rules disputing the authority of the State Attorney to represent all save the fourth and fifth applicants (the Premier of Limpopo and the Member of the Executive Council responsible for traditional affairs in Limpopo). Mr Nwamitwa objected to private parties being represented by the State Attorney at the expense of the tax-payer in a private dispute. Rule 9 required the applicants to respond to this notice within 21 days.[12] They failed to do so.

[13] On 4 September 2007, the day of the hearing, Mr Nwamitwa's counsel objected to the proceedings going ahead because of the State Attorney's failure to file a power of attorney. Counsel for Ms Shilubana argued that Rule 9(3) provided an exception when an attorney was acting on behalf of the state.[13]

[14] In addition to his concerns regarding the State Attorney's representation of a private litigant, Mr Nwamitwa also raised a concern about the incompleteness of the

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[11] *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as* Amici Curiae*)* [2007] ZACC 14; 2007 (5) SA 620 (CC); 2007 (9) BCLR 919 (CC).

[12] Rule 9(1) states:

> "A power of attorney need not be filed, but the authority of a legal practitioner to act on behalf of any party may, within 21 days after it has come to the notice of any party that the legal practitioner is so acting, or with the leave of the Court on good cause shown at any time before judgment, be disputed by notice, whereafter the legal practitioner may no longer so act, unless a power of attorney is lodged with the Registrar within 21 days of such notice."

[13] Rule 9(3) states: "No power of attorney or authorisation to act shall be required to be lodged by anyone acting on behalf of the State."

record and the applicants' failure to respond to this Court's directions dated 28 February 2007.[14] He complained that he had not yet received a complete, properly indexed and paginated record in this matter.

[15] The Court issued further directions on 4 September 2007. The applicants were directed to file a complete, properly indexed and paginated record and to respond to Mr Nwamitwa's notice in terms of Rule 9 of the Rules or produce a power of attorney as required by Rule 9. The office of the State Attorney, Pretoria, was ordered to pay Mr Nwamitwa's wasted costs for the hearing held on 4 September 2007, including costs of two counsel, as well as the out-of-pocket expenses of the amici related to that hearing. The matter was postponed to 27 November 2007.

[16] The State Attorney subsequently withdrew as attorneys of record for the first, second, seventh, eighth, ninth, tenth and eleventh applicants.[15] The record was filed.

Amici Curiae

[17] On 28 February 2007 the Chief Justice issued directions notifying the Commission on Traditional Leadership Disputes and Claims, the Commission for Gender Equality, the Congress of Traditional Leaders of South Africa (CONTRALESA) and the National House for Traditional Leaders of the upcoming

[14] The applicants were directed to—

> "file the record, properly indexed and paginated, on or before 15 March 2007. The record shall consist of the record lodged in the Supreme Court of Appeal which should contain the record of the proceedings in the High Court."

[15] Notice of Withdrawal dated 19 September 2007.

hearing and indicating that any person or institution who wished to be admitted as amicus curiae (friend of the court) in this matter had to apply for admission in terms of Constitutional Court Rule 10.

[18] The Commission for Gender Equality and the National Movement of Rural Women (Rural Women) complied with Rule 10 and were admitted as amici. CONTRALESA did not initially apply. On 27 November 2007, at the hearing, a representative orally requested the Court to admit CONTRALESA as an amicus and to postpone the matter. In spite of its non-compliance with the Rules of this Court, CONTRALESA was admitted as an amicus, because it was deemed to be in the interests of justice to be informed of the organisation's views on the issues raised in this matter. The application for postponement was refused. CONTRALESA was given the opportunity to file written submissions, which it later did.[16]

High Court

[19] In the High Court Swart J addressed four questions on which oral evidence had been presented:

[16] The Court on 27 November 2007 ordered as follows:

> "(1) Congress of Traditional Leaders of South Africa (CONTRALESA) is admitted as an Amicus Curiae in this matter.
> (2) CONTRALESA is directed to file and serve on all parties, written argument not later than Tuesday, 4 December 2007.
> (3) All other parties are directed to file written arguments in response, if they so choose, not later than Tuesday, 11 December 2007.
> (4) The Application by CONTRALESA for the postponement of the hearing is refused.
> (5) Costs, if any occasioned by this order, to be paid by CONTRALESA."

> "1.1 Whether in terms of the customs and traditions of the Tsonga/Shangaan tribe, more particularly the Valoyi tribe, a female can be appointed as Hosi of the Valoyi tribe?
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> 1.2 Whether [Hosi Richard] was appointed as Hosi or acting Hosi since October 1968?
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> 1.3 Whether when appointing [Ms Shilubana] as a Hosi of the Valoyi tribe the royal family acted in terms of the customs and traditions of the Valoyi tribe i.e. of the Tsonga/Shangaan nation?
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> 1.4 Whether decision No 32/2002 by the Executive Council of Limpopo Provincial Government dated 22 May 2002 appointing [Ms Shilubana] as chief of the Valoyi tribe, is in accordance with the practices and customs of the Valoyi tribe within the meaning of the Constitution of the Republic of South Africa Act 108 of 1996?"[17]

[20] The High Court answered each question in Mr Nwamitwa's favour. It first found that, at least prior to the adoption of the Interim Constitution, a woman could not be appointed Hosi of the Valoyi.[18]

[21] Regarding the second question, the High Court found that Hosi Richard was appointed Hosi. This point was conceded by the applicants.[19]

[22] As to the third issue, the High Court determined that Ms Shilubana had not been appointed in accordance with custom, as the Court found no precedent in custom or tradition for the chieftainship to be transferred from the line of a Hosi to another line, "particularly by appointing a female."[20] The community's decision, the Court

[17] Above n 2 at 539B-E.

[18] Id at 539G-541B.

[19] Id at 541B-E.

[20] Id at 544E-546C.

stated, "was probably a bout of constitutional fervour."[21] The Court rejected any claim that the Royal Family had changed custom, as the Royal Family is only authorised to recognise and confirm a Hosi. The "election" of a Hosi was beyond the Royal Family's authority.[22] Without the benefit of a "general poll", the Court could not conclude that customary law had been changed.[23]

[23] With respect to the fourth issue, the High Court found that the Executive Council's appointment was not in accordance with the practice and custom of the Valoyi.[24] The Court was careful to note that reliance on tradition would not necessarily prevent a woman from being selected as Hosi. If Ms Shilubana's father had died in 1994 when the interim Constitution came into effect, she may have been entitled to be Hosi, rather than her uncle (Hosi Richard). The problem in this case, according to the High Court, was the ultra vires shifting of family lines while Hosi Richard had an eligible heir. In other words, Ms Shilubana was not ineligible to be Hosi on account of her gender; she was ineligible because of her lineage. There was therefore no constitutional problem with Valoyi customary law, the High Court found.[25]

Supreme Court of Appeal

[21] Id at 544G.

[22] Id at 545B-F. Because the High Court found that the acts of the Royal Family, Royal Council and Tribal Authority were beyond their authority, it did not have to grapple with questions regarding when these bodies are properly constituted such that they can make binding decisions. Id at 541E-H.

[23] Id at 545D.

[24] Id at 546D-547D, 548E-H.

[25] Id at 548E-H.

[24] The Supreme Court of Appeal, in a judgment by Farlam JA joined by Mthiyane, Nugent, Mlambo and Maya JJA, addressed the same four questions and largely affirmed the High Court's judgment. The Court found that, at least prior to 1994, a female could not be appointed Hosi.[26] The Supreme Court of Appeal similarly agreed with the High Court that Hosi Richard served as a fully-fledged Hosi from at least 24 October 1968. The Court suggested that the Valoyi were confused as to the status of their own Hosi. The confusion contributed to the decision to select Ms Shilubana as Hosi.[27]

[25] With respect to the third issue, the Court assumed without deciding that the effect of the Royal Family, Royal Council and Tribal Authority decisions, resolutions and statements was to alter the customs and traditions of the Valoyi so as to eliminate gender-based discrimination in customary succession of leadership.[28] Even so, as a result of gender discrimination that existed prior to the Constitution, Hosi Richard was Hosi and, in terms of custom and tradition, succession should have proceeded down his family line. Because the Royal Family had no authority to "select" the Hosi, the choice and subsequent confirmation of Ms Shilubana as Hosi rather than Mr Nwamitwa was not in accordance with the customs and traditions of the Valoyi. Any decision to try to undo the effect of past discrimination could never go back far enough, would always be ad hoc, and therefore would not comply with the customary

[26] Above n 1 at para 46.

[27] Id at para 47.

[28] Id at para 49.

law of succession.[29] The Supreme Court of Appeal agreed with the High Court that its finding was not gender-based. The Court concluded that the facts of the case "do not bring [it] to the gender equality claim which the [applicants seek] to vindicate."[30]

[26] The Supreme Court of Appeal also agreed with the High Court that with respect to the fourth question, the official appointment of Ms Shilubana was not in accordance with the customs and traditions of the Valoyi, and that these customs were not constitutionally problematic.[31] The Court declined, however, to require the third, fourth, fifth and sixth applicants to issue letters of appointment to Mr Nwamitwa. It did not find this case to constitute an exceptional circumstance warranting a substitution of an administrative action, pursuant to section 8(1)(c)(ii) of the Promotion of Administrative Justice Act 3 of 2000.[32] The Court deemed it inappropriate to order the appointment of Mr Nwamitwa as Hosi without the prior ceremonial function performed by the Royal Family.[33]

Submissions of the Parties

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[29] Id at paras 50-1.

[30] Id at para 50.

[31] Id at para 51.

[32] Section 8(1)(c)(ii) states:

> "(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
> . . . .
> (c) setting aside the administrative action and—
> . . . .
> (ii) in exceptional cases—
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
> (bb) directing the administrator or any other party to the proceedings to pay compensation".

[33] Above n 1 at paras 53-4.

[27] The applicants argue that customary law is dynamic and adaptable; the only constraints are those imposed by the Constitution and applicable legislation in terms of section 211(2) of the Constitution.[34] The Valoyi were acting well within their power, under customary law, to amend their customs and traditions to reflect changed circumstances.

[28] The applicants note that this Court in *Bhe v Magistrate, Khayelitsha* left open the question of the constitutionality of male primogeniture in contexts such as traditional leadership and status.[35] Looking to foreign jurisdictions, the applicants argue that other communities have adapted their succession laws to move away from male primogeniture.

[29] The process used in appointing Ms Shilubana as Hosi was consistent with the rules and procedures of the community, according to the applicants. The Royal Family, including the Hosi, initiated the change and submitted the decision to the Royal Council, which approved it. The Tribal Council also considered the decision. The applicants contend that there was no evidence that this procedure was not in accordance with custom or that it was deficient in any way. All structures of the community participated in the decision.

[34] Above n 3.

[35] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as* Amicus Curiae*)*; *Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (*Bhe*) at paras 88-94.

[30] On behalf of Mr Nwamitwa it is argued that the question before the Court is not only one of gender, but also of lineage. In addition to the fact that it is not the custom that a woman may be a Hosi, it was not permissible to "elect" Ms Shilubana to the chieftainship, ignoring the traditional family line.

[31] Moreover, any discrimination that may exist in male primogeniture relating to succession is "very fair", since allowing Ms Shilubana to succeed as Hosi would result in the next Hosi not being fathered by a Hosi, which would lead to confusion and chaos in the community. Ms Shilubana was not disqualified from being Hosi simply because she was a woman. Therefore the lower courts' judgments cannot be attacked on the basis of gender discrimination.[36] In the alternative, Mr Nwamitwa argues that any discrimination against Ms Shilubana would not be unconstitutional, being based on a reason that is acceptable, fair, reasonable and justifiable.

[32] Mr Nwamitwa argues further that the Royal Family does not have the authority to develop the customs and traditions of the Valoyi so as to outlaw gender discrimination as it relates to Hosi succession. The Royal Family's role is only to recognise and confirm a Hosi.[37] Similarly, he argues that the Royal Family does not have the authority to restore the position of traditional leadership to the house from which it was removed by reason of pre-constitutional gender discrimination.

[36] Mr Nwamitwa also argues that the lower courts were "correct to hold in favour of the Respondent, that [per] the customs and traditions of the . . . Valoyi tribe, a female cannot be appointed as Hosi".

[37] He submitted that where there is no Hosi, or where the Hosi-to-be is not suitable, the Royal Family may play a more direct role, but neither of these situations arose here.

[33] As the first amicus, the Commission for Gender Equality argues that, where a traditional community has on its own accord developed its customary law to reflect the spirit and purport of the Constitution, courts must as far as possible recognise the development. The evidence demonstrates that the Valoyi developed their rules regarding chieftainship to allow women to inherit and to restore the chieftainship to Hosi Fofoza's house. The community thus sought to bring its customs and traditions in line with the new constitutional order. The decision was not ad hoc, as labelled by the Supreme Court of Appeal, because it was simply the application of a developed rule or custom.[38] The Commission emphasises that customary law should not be assessed through the lens of common law principles.

[34] On behalf of the second amicus, the Rural Women, it is argued that the actions of the Valoyi (as expressed through the Royal Family, Royal Council and traditional community and endorsed by the relevant government authorities) were well within their powers and reflect the spirit and purpose of the Constitution.

[35] The Rural Women emphasise that customary law is a flexible, living system of law, which develops over time to meet the changing needs of the community. It is not rigidly rule-based, and courts must exercise caution in ascertaining the content of customary law from the written records of apartheid-era administrators, legislators and

[38] The Commission for Gender Equality also notes that, to the extent that the decision to appoint Ms Shilubana as Hosi was "ad hoc", any decision to appoint Mr Nwamitwa would similarly be ad hoc as Mr Nwamitwa was also not born a Hosi. Since Hosi Fofoza was still Hosi when Mr Nwamitwa was born, and Hosi Fofoza could have still sired a male heir, Mr Nwamitwa would have had to have been appointed Hosi by the Royal Family.

courts. Accordingly, the choice of Ms Shilubana as Hosi should not be viewed as a "development" of customary law, as customary law is necessarily flexible.

[36] They furthermore argue that the customary law of succession has always been complex, with competing rules that may become more or less important at a given time depending on the needs of the community. The Rural Women claim that the inheritance of the chieftainship was not automatic and prescribed: it involved a process and was dependent upon the support of the councillors and the army whose backing was, in turn, influenced by the power and popularity of the individual competitors for office.[39] They conclude that no change in rule or practice was necessary in order to appoint Ms Shilubana as Hosi.

[37] Alternatively, if the choice of Ms Shilubana as Hosi is viewed as a development of customary law, they argue that it is one that should be encouraged, regardless of whether there is a constitutional imperative that traditional communities abolish male primogeniture in succession decisions. The authority for traditional communities to bring their own customs in line with the Constitution includes the ability for such communities to remedy previous discrimination.

[39] They quote Harries "Exclusion, Classification and Internal Colonialism: The Emergence of Ethnicity Among the Tsonga-Speakers of South Africa" in Vail *The Creation of Tribalism in Southern Africa* (James Currey Ltd, London 1989) 83 at 91.

[38] The Rural Women contend under this alternative argument that, following the test set out by this Court in *Minister of Finance v Van Heerden*,[40] the actions of the Valoyi qualify as a measure taken under section 9(2) of the Constitution.[41] Section 9(2) is designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination. The remedial decision to install Ms Shilubana as Hosi cannot be negated by an otherwise applicable rule that a Hosi has to be the child of an immediately preceding Hosi.

[39] CONTRALESA argues that the Constitution and the new legislation on traditional leadership[42] were not in force when the Royal Family first "purported to outlaw gender discrimination and harangue traditional structures to support its view". A customary leader is there to uphold the people's norms and values and if customs are to be changed, which they can be, it must be done by the whole community. They contend that the "Valoyi Traditional Community" never met to discuss the issue. All discussions were limited to a privileged few, as the attendance numbers reveal.[43]

[40] CONTRALESA also contends that, while gender discrimination is an essential part of the institution of traditional leadership, it is not unfair discrimination. The

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[40] *Minister of Finance and Another v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) at paras 36-44.

[41] Section 9(2) states:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[42] Traditional Leadership and Governance Framework Act 41 of 2003.

[43] CONTRALESA notes that only 15, 26, 20, 29, 89 and 47 people respectively attended the various meetings. They note that there was therefore no people's assembly ("Dipitso/Imbizo") to deliberate on the succession issue.

relevant rules do not only discriminate against women, but also deny younger sons and sons born out of wedlock the right to succeed. Some communities are matrilineal and, there too, younger daughters and daughters born out of wedlock are usually barred.

The Issues

[41] The starting point has to be the proceedings before the High Court, where Mr Nwamitwa sought a declaration of his right to succeed his father as Chief of the Valoyi. In order to evaluate this claim, a preliminary question not considered by the High Court or the Supreme Court of Appeal has to be addressed: what is the proper approach to adopt when seeking to determine a rule of customary law? Thereafter I examine, in light of the past and present practice of the Valoyi community, the arguments relating to the existence of the right Mr Nwamitwa claims to have.

Determining customary law

[42] The status of customary law in South Africa is constitutionally entrenched. Section 211 of the Constitution provides that the institution, status and role of traditional leadership are recognised subject to the Constitution.[44] It further states that a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs, and that courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation.

[44] See above n 3.

[43] The import of this section, in the words of Langa DCJ in *Bhe*, is that customary law "is protected by and subject to the Constitution in its own right."[45] Customary law, like any other law, must accord with the Constitution. Like any other law, customary law has a status that requires respect. As this Court held in *Alexkor v Richtersveld Community*, customary law must be recognised as "an integral part of our law" and "an independent source of norms within the legal system."[46] It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly.

[44] As a result, the process of determining the content of a particular customary law norm must be one informed by several factors. First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries.[47] An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*.[48] Equally, as this Court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of

[45] Above n 35 at para 41.

[46] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Richtersveld*) at para 51.

[47] Id at para 53.

[48] Above n 35 at para 43.

the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.[49]

[45] It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.[50]

[46] It follows that the practice of a particular community is relevant when determining the content of a customary law norm. As this court held in *Richtersveld*,[51] the content of customary law must be determined with reference to both the history and the usage of the community concerned. "Living" customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that

[49] Above n 46 at para 54.

[50] See *Bhe* above n 35 at 82-7, 90 (Langa DCJ) and 152-3 (Ngcobo J, dissenting); *Richtersveld* above n 46 at paras 52-3; *Du Plessis and Others v De Klerk and Another* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) (*Du Plessis*) at para 172 (Mokgoro J, concurring); *Mabuza v Mbatha* 2003 (4) SA 218 (C); 2003 (7) BCLR 743 (C) (*Mabuza*) at paras 26, 28; *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1075B-C.

[51] Above n 46 at paras 56-7, referring to *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 404.

community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.[52]

[47] Thirdly, courts must be cognisant of the fact that customary law, like any other law, regulates the lives of people. The need for flexibility and the imperative to facilitate development must be balanced against the value of legal certainty, respect for vested rights, and the protection of constitutional rights. In *Bhe* the majority of this Court held that it could not leave the customary law of succession to develop in a piecemeal and sometimes slow fashion, since this would provide inadequate protection to women and children.[53] The possibility for parties to reach agreement on the devolution of an estate was explicitly left open in order to facilitate the development of customary law so far as possible, consistent with protecting rights.[54] The outcome of this balancing act will depend on the facts of each case. Relevant factors in this enquiry will include, but are not limited to, the nature of the law in question, in particular the implications of change for constitutional and other legal rights; the process by which the alleged change has occurred or is occurring; and the vulnerability of parties affected by the law.

[48] Furthermore, while development of customary law by the courts is distinct from its development by a customary community, a court engaged in the adjudication of a customary law matter must remain mindful of its obligations under section 39(2) of

[52] *Bhe* above note 35 at paras 86, 107 (Langa DCJ) and paras 152-4 (Ngcobo J, dissenting).

[53] Id at paras 110-3.

[54] Id at para 130.

the Constitution to promote the spirit, purport and objects of the Bill of Rights.[55] This Court held in *Carmichele v Minister of Safety and Security* that the section imposes an obligation on courts to consider whether there is a need to develop the common law to bring it into line with the Constitution, and to develop it if so.[56] The same is true of customary law.[57]

[49] To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law. With that, I turn to the enquiry into the legal position in the present case.

Does Mr Nwamitwa have a right to succeed under customary law?

[50] In essence, Mr Nwamitwa makes two arguments in support of his claim that customary law entitles him to succeed his father as of right. First, he is the eldest son of the previous Hosi, and according to the laws of the Valoyi, the eldest son of the

[55] Section 39(2) states: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[56] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*) at paras 34-6.

[57] See the dissenting judgment of Ngcobo J in *Bhe* above n 35 at para 215 and also the majority judgment of Langa DCJ at para 44.

previous Hosi is Chief. That, on his argument, is the end of the question. Confirmation of his status by the traditional authorities is simply a formality. Secondly, the actions taken by the traditional authorities in purporting to install Ms Shilubana were grossly irregular and of no legal force and effect. The traditional authorities had no legal power to appoint someone other than the heir, and their actions did not amount to a change of the law entitling them to do so.

[51] I begin with the first argument, namely that there is a customary law rule in the Valoyi community that chieftainship is passed down to the eldest son of the previous Hosi, unless the Chief has no sons. The High Court found that this has been the practice of the community for at least five generations.[58] The issue of whether the practice does indeed reflect the rule Mr Nwamitwa contends it does was disputed before this Court, particularly by the Rural Women. This issue is considered below. First, I am concerned with the prior question of whether, as this argument assumes, reliance on past practice can establish a customary rule with certainty.

[52] The classical test for the existence of custom as a source of law is that set out in *Van Breda v Jacobs*, in which it was held that to be recognised as law, a practice must be certain, uniformly observed for a long period of time and reasonable.[59] The requirement of reasonableness would now, of course, be applied in a way compliant with the Constitution. The appropriateness of this test to determine the existence of a

[58] Above n 2 at 540F.

[59] *Van Breda and Others v Jacobs and Others* 1921 AD 330 (*Van Breda*) at 334.

norm of indigenous customary law must be examined. (The appropriateness of the test in other kinds of cases is not here at issue and no opinion is expressed on it.)

[53] The *Van Breda* test was applied by the Supreme Court of Appeal in the *Richtersveld* case.[60] In its decision in that case, this Court noted that the *Van Breda* test might not be appropriate to indigenous customary law, but did not decide the point.[61] The argument raised in this case that five generations of practice in the Valoyi community establish Mr Nwamitwa's right to succeed requires decision on this point.

[54] *Van Breda* dealt with proving custom as a source of law. It envisaged custom as an immemorial practice that could be regarded as filling in normative gaps in the common law. In that sense, custom no longer serves as an original source of law capable of independent development, but survives merely as a useful accessory. Its continued validity is rooted in and depends on its unbroken antiquity. By contrast, customary law is an independent and original source of law. Like the common law it is adaptive by its very nature. By definition, then, while change annihilates custom as a source of law, change is intrinsic to and can be invigorating of customary law.

[55] Customary law must be permitted to develop, and the enquiry must be rooted in the contemporary practice of the community in question. Section 211(2) of the

[60] *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA); 2003 (6) BCLR 583 (SCA) at para 27.

[61] Above n 46 at fn 56 and fn 65.

Constitution requires this. The legal status of customary law norms cannot depend simply on their having been consistently applied in the past, because that is a test which any new development must necessarily fail. Development implies some departure from past practice. A rule that requires absolute consistency with past practice before a court will recognise the existence of a customary norm would therefore prevent the recognition of new developments as customary law. This would result in the courts applying laws which communities themselves no longer follow, and would stifle the recognition of the new rules adopted by the communities in response to the changing face of South African society. This result would be contrary to the Constitution and cannot be accepted.

[56] It follows that the *Van Breda* test cannot be applied to customary law, where the development of living law is at issue. This is not to say that past practice is not relevant. Past practice and tradition may well be of considerable importance in customary law, but as one important factor to be considered with other important factors. It is also not to say that customary law must in the ordinary course be proven before a court before it can be relied upon. The time when customary law had to be proved as foreign law in its own land is behind us.[62] Where a norm appears from tradition, and there is no indication that a contemporary development had occurred or is occurring, past practice will be sufficient to establish a rule. But where the contemporary practice of the community suggests that change has occurred, past practice alone is not enough and does not on its own establish a right with certainty, as

[62] See *Mabuza* above n 50 at para 30.

the three-factor test set out above makes clear.[63] Past practice will also not be decisive where the Constitution requires the development of the customary law in line with constitutional values.

[57] The past practice of the Valoyi is accordingly important but not decisive in determining whether Mr Nwamitwa has the right he claims. The question of development, by the community or as mandated by the Constitution, must also be addressed. I therefore turn to consider the past and present practice of the community.

The actions of the Valoyi in this case

[58] It is alleged in the founding affidavit of the applicants that the Royal Family, Royal Council and Tribal Council acted to install Ms Shilubana as Chief of the Valoyi and resolved that henceforth the matter of chieftainship and regency would be conducted in accordance with the Constitution. Mr Nwamitwa argues that these bodies had no power to act in this way and that the meetings were accordingly irregular and the resolutions void.

[59] The High Court and the Supreme Court of Appeal found that the traditional authorities had acted unlawfully. The question of whether these findings were correct takes one to the first and second of the four questions on which this Court directed that further argument be presented.[64] The first issue concerned the authority of the Royal Family to develop the laws of the Valoyi community to outlaw gender discrimination

[63] See above [44]-[49].

[64] See above n 10.

in the succession of traditional leadership. The second issue concerned the authority of the Royal Family, in so doing, to restore the chieftainship to the house from which it was removed for reason of pre-constitutional gender discrimination. It is convenient to address these two questions together.

[60] Several possible interpretations of the actions of the traditional authorities have been presented. The first is that the traditional authorities are entitled, under customary law, to take the steps they did. The second is that, even if such action has not hitherto been lawful under customary law, the authorities effected a development to the law to bring it in line with the Constitution.

[61] Counsel for the Rural Women submit that it is incorrect to think of the actions of the traditional authorities as amounting to a change or development of customary law. Customary law as it stands is inherently flexible. Relying on academic authorities, they argue that the process of traditional succession has always been adaptable so as to enable the appointment of a person who meets the needs of a community at a particular time. Comaroff, in his 1978 study of the politics of succession in the Tshidi chiefdom, states:

> "The rules . . . cannot be assumed to determine the outcome of indigenous political processes. If they are read literally, and examined in the context of the history of the office, 80 per cent of all cases of accession to the chiefship represent 'anomalies'. Under such circumstances, the jural determinist assumption simply cannot be entertained: stated prescriptions do *not*, in general, decide who is to succeed. Hence it becomes necessary to make a rather different assumption about the nature of Tshidi

> rules and processes. I shall argue, then, that the transmission of office in this system is determined by factors *extrinsic* to the stated prescription".[65]

[62] The Rural Women also contend on the basis of examples in academic writing that, while rare, there is precedent for the appointment of women in other Tsonga clans. On this argument, the traditional authorities did have the authority to install Ms Shilubana without any change to the customary law of succession being necessary.

[63] Against this, as has been seen, Mr Nwamitwa argues that the chieftainship in the Valoyi community is a matter of birth and that the role of traditional authorities is purely formal. That these arguments based on past practice have been held not to be decisive, does not mean that they are without weight and they stand to challenge the submissions of the Rural Women.

[64] The High Court accepted Mr Nwamitwa's evidence that the practice in the Valoyi community has for five generations been that "a Hosi is born not democratically elected". The Court also held:

> "I accept that the royal family plays an important role. I have not heard evidence as to its position generally. As far as the successor to the Hosi is concerned it is the repository (and I say this without disrespect), it really plays a formal role in that it does not elect a Hosi, it recognises and confirms a Hosi. Where there is not a Hosi or the candidate is not suitable, it may play a more direct role (but that was not the case here)."[66]

[65] Comaroff "Rules and Rulers: Political Processes in a Tswana Chiefdom" (1978) 13 *MAN – The Journal of the Royal Anthropological Institute* 1 at 2.

[66] Above n 2 at 545D-E.

[65] The evidence and arguments presented by the Rural Women are attractive and persuasive. However, they were not before the High Court or the Supreme Court of Appeal. Nor is the evidence before this Court on this point clear. The submission on behalf of Ms Shilubana has indeed been that the Valoyi *did* amend their customs and traditions to reflect changed circumstances and to meet constitutional demands. This was also the view of the Royal Council in its resolution on Ms Shilubana's appointment.[67]

[66] I cannot conclude that the customary law of the Valoyi community, without amendment, permitted the installation of Ms Shilubana. It is certainly possible that customary law permits this sort of action by the Royal Family or other traditional authorities and this judgment in no way rules out this possibility. However, it has not been established in respect of the present community on the evidence in this case. The arguments suggesting that the traditional authorities were acting in order to bring their customary law in line with the Constitution must therefore be addressed.

Did the traditional authorities develop their law in terms of the Constitution?

[67] As stated earlier, when the Royal Family confirmed the appointment of Ms Shilubana as Hosi, its members noted that, in view of the new democratic dispensation under the Constitution, it is permissible for a female child to become a Hosi "since she

[67] See above [4].

is also equal to a male child."[68] It must be emphasised that Hosi Richard agreed with and approved of this decision.

[68] The Valoyi authorities intended to bring an important aspect of their customs and traditions into line with the values and rights of the Constitution. Several provisions of the Constitution require the application of the common law and customary law, as well as the practice of culture or religion, to comply with the Constitution. Sections 1(c) and 2 establish the supremacy of the Constitution over all law.[69] Section 30 recognises the right to participate in the cultural life of one's choice, but only in a manner consistent with the Bill of Rights.[70] Similarly, section 31 recognises the right of cultural and religious communities to enjoy their culture and practice their religion in a manner consistent with the Bill of Rights.[71] Section 39(2) has been mentioned above. And last, but certainly not least in this context, the above-

[68] See above [4].

[69] Section 1(c) states: "The Republic of South Africa is one, sovereign, democratic state founded on the following values: …. Supremacy of the constitution and the rule of law."

Section 2 states: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[70] Section 30 states:

> "Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights."

[71] Section 31 states:

> "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
> (a) to enjoy their culture, practise their religion and use their language; and
> (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

mentioned section 211(3) demands that courts apply customary law where it is applicable, subject to the Constitution.[72]

[69] The importance of equality in our society has been repeatedly emphasised by this Court. The remarks of Ngcobo J in his concurring judgment in *Bato Star*[73] sum up the position:

> "South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the Interim Constitution, which was designed to 'create a new order . . . in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental human rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms. The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'." (Footnotes omitted.)[74]

[70] In deciding as they did, the Valoyi authorities restored the chieftainship to a woman who would have been appointed Hosi in 1968, were it not for the fact that she is a woman. As far as lineage is relevant, the chieftainship was also restored to the

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[72] See above n 3.

[73] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[74] Id at paras 73-4.

line of Hosi Fofoza from which it was taken away on the basis that he only had a female and not a male heir.

[71] If that was what the authorities purported to do, it must next be asked whether they had the authority to act as they did. It was held above that the evidence did not permit this Court to rule on the question of whether traditional authorities have a broad discretion in appointing the Chief and are not bound simply to appoint the heir by birth. Accordingly, this Court has no basis on which to overturn the High Court's finding that, in terms of the existing customary law, the role of the Royal Family is more than formal only where there is no candidate for the chieftainship or where the candidate is not suitable, which is not alleged to be the case in the present matter. However, even if the High Court was correct on this point, it must be true that the traditional authorities had the power to act as they did, for the reasons that follow.

[72] It must be noted that the traditional authorities' power is the high water mark of any power within the traditional community on matters of succession. If the authorities have only the narrow discretion the High Court found them to have had, it follows that no other body in the community has more power in this regard, since no other body has more power here than those authorities. This would mean that no body in the customary community would have the power to make constitutionally-driven changes in traditional leadership. This result can be seen if we consider what would have happened, on the narrow view, if the traditional authorities in the present case had sought simply to install a woman as Hosi. Even if she were the eldest child of the

previous Chief, it would follow on the narrow view that the traditional authorities would have no power to appoint her, unless there was no other heir or the male heir was unfit to rule. It would be necessary, on this view, to approach the courts before a woman could be installed as Chief.

[73] This is not only undesirable; it is contrary to the Constitution. Section 211(2) specifically provides for the right of traditional communities to function subject to their own system of customary law, including amendment or repeal of laws. A community must be empowered to itself act so as to bring its customs into line with the norms and values of the Constitution. Any other result would be contrary to section 211(2) and would be disrespectful of the close bonds between a customary community, its leaders and its laws.

[74] It follows that if the traditional authority has only those powers accorded it by the narrow view, it would be contrary to the Constitution and frustrate the achievement of the values in the Bill of Rights. Section 39(2) of the Constitution obliges this Court to develop the customary law in accordance with the spirit, purport and aims of the Bill of Rights. This power should be exercised judiciously and sensitively, in an incremental fashion.[75] As the Supreme Court of Canada has held in relation to the common law, "[t]he judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and

[75] See the comments of Mokgoro J and Sachs J in *Du Plessis* above n 50 at paras 167-74 and 189, respectively.

evolving fabric of our society."[76] The same remarks apply to customary law. It is appropriate for the Court to exercise its section 39(2) powers in a manner that will empower the community itself to continue the development.

[75] Accordingly, if it is true that the authorities presently have no power to bring the law and practice of customary leadership into line with the Constitution, their power must be expanded. It must be held that they have the authority to act on constitutional considerations in fulfilling their role in matters of traditional leadership. Their actions, reflected in the appointment of Ms Shilubana, accordingly represent a development of customary law. The only remaining question is that posed by the third factor of the test set out above: are there considerations which outweigh the recognition of this development as determinative of the legal position?[77]

Should this contemporary development be recognised as law?

[76] As noted above, the importance of respecting community-led change has to be balanced with the value of legal certainty and the need to protect rights. In *Bhe* these considerations led this Court to install interim measures pending legislation in order to protect vulnerable parties affected by intestate succession. *Bhe* concerned intestate succession laws affecting the many families across South Africa whose estates devolve according to customary law. In that case certainty was vital and leaving the

[76] *R v Salituro* (1992) 8 CRR (2d) 173 at 189. This statement, in the South African context, should not be seen to detract from the obligation of courts to uphold the dramatically new values with which our legal system has been infused. See above n 55 at para 36.

[77] Above [47].

matter for gradual community development would have resulted in considerable uncertainty and a resultant failure to protect rights.

[77] The actions of the authorities of a single traditional community in respect of their leadership do not in themselves raise the concerns present in *Bhe*. The legal effects of the change – the installation of a particular leader – are clear. The change is not one that must be inferred from uneven changes in practice across the country, but appears from written resolutions. Vulnerable persons are not denied the protection of the law as a result of the measure.

[78] A decision of this kind must also be weighed against the possible violation of vested rights. This might have been an issue if the decision affected the position of a reigning Hosi. However, it is not necessary to make a finding in this regard, because Mr Nwamitwa is not a Hosi. At most, he has an expectation to be appointed Hosi as a result of the 1968 decision and on the basis of past practice. His expectation cannot override the decision of the traditional authorities to adapt their customs in accordance with the values and rights of our democracy as embodied in the Constitution.

[79] Mr Nwamitwa submits that the effect of upholding the installation of Ms Shilubana would be chaos. It is argued that if she is recognised as Chief, then in the next generation, for the first time, the Valoyi will have a Hosi who is not fathered by a Chief. This argument is not convincing. It involves the same inappropriate reasoning

as that underlying the *Van Breda* test.[78] If women are to be Chiefs, the practice that a Hosi always has to be fathered by the previous Hosi must necessarily change. The actions of a traditional authority cannot be illegitimate just because they involve a departure from past practice.

[80] It is also argued that, if the chieftainship is restored to the previous line in this case, the same must be done in respect of all previous generations, with the result that the entire Nwamitwa chieftainship will be "obliterated". It is not clear why this should be thought to follow. The right to amend and repeal laws under section 211(2) includes the right to decide how to do so. The Valoyi authorities have chosen to restore the line of Hosi Fofoza going back one generation. The argument that the entire family line will be obliterated is not persuasive.

[81] It is true that Ms Shilubana's installation leaves unanswered some questions relating to how the Valoyi succession will operate in the future. However, 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. It therefore suffices to say two things.

[78] See above [52]-[56].

[82] First, whereas the Valoyi people moved away from any previously existing rule that a woman could never be appointed as a Hosi, other aspects of the customs and traditions governing chieftainship are not necessarily affected. For example, to the extent that the principle that a Hosi is born and not elected indeed exists, it is not necessarily changed by this ruling. Ms Shilubana was born as the child of a Hosi. She was not elected from a number of candidates who campaigned for the position. Her birth was crucial to the decision of the Royal Family.

[83] Second, such additional developments of the law as Ms Shilubana's installation may necessitate are in the first instance a matter for the relevant traditional authorities, acting in accordance with custom, practical needs and the Constitution. These future decisions are not before this Court, and nothing further need be said about them.

[84] The value of recognising the development by a traditional community of its own law is not here outweighed by factors relating to legal certainty or the protection of rights. The Royal Family intended to act to affirm constitutional values in traditional leadership in its community. It had the authority to do so. A balancing of the effects of its action reveals no consideration that should prevent this Court from recognising its actions as such.

[85] The 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, tied to the statement that a Hosi is never appointed,

but born, and unable to countenance that the lineage would change from that of Hosi Richard to that of Hosi Fofoza. They gave insufficient consideration to the historical and constitutional context of the decision, more particularly the right of traditional authorities to develop their customary law.

[86] Accordingly, Mr Nwamitwa has no vested right to the chieftainship of the Valoyi. He has, at most, an expectation that as the eldest son of Hosi Richard, he would have been heir. However, the past practice of the Valoyi community is not determinative and does not itself guarantee that Mr Nwamitwa's possible expectation must be fulfilled. The contemporary practice of the Valoyi reflects a valid legal change, resulting in the succession of Ms Shilubana to the chieftainship. Mr Nwamitwa does not have a right to the chieftainship under this altered position. He cannot be declared the Chief in terms of the current customary law of the Valoyi traditional community.

[87] It was argued on behalf of the Rural Women that the decision should be seen as a step to address the consequences of past discrimination under section 9(2) of the Constitution.[79] It was also suggested that the traditional authorities had developed their law to permit both the succession of women and the installation of Ms Shilubana as a person of royal blood but who is not the direct descendant of the previous Chief. In view of the conclusion reached above, it is not necessary to rule on this submission. It is also not necessary to consider the third and fourth questions posed by this Court

[79] See above n 41.

in its Directions of 28 February 2007,[80] relating to the Traditional Leadership and Governance Framework Act.[81]

The argument that the applicants' reliance on the Constitution is inconsistent

[88] It is necessary to briefly address one other argument raised on behalf of Mr Nwamitwa. This was that the applicants' reliance on the Constitution was misplaced on the grounds that their support for the legal change here at issue shows that they themselves support gender discrimination. Two points are advanced in support of this rather startling claim.

[89] The first is that the traditional authorities seek to undo gender discrimination only as far back as 1968. They do not wish to undo gender discrimination that may have led to other eldest daughters being passed over for the chieftainship in cases before 1968. However, if the authorities are indeed empowered to take steps under section 211(2), then there is nothing to prevent them from doing so in a way of their own choosing. Of course, traditional authorities are not permitted to act contrary to the Constitution, but it is not argued that the particular measure adopted here is unconstitutional.

[90] The second point is that Ms Shilubana does not apparently intend that her own daughter shall succeed her. It has been indicated that a "sociological" child, born of the male Nwamitwa bloodline, will succeed her instead. If this will be the position,

[80] Above n 10.

[81] Above n 42.

however, it does not amount to gender discrimination. For one thing, it would follow equally from this decision that sons of Ms Shilubana would not succeed her either. For another, there is nothing to show that Ms Shilubana could not be succeeded by a woman, albeit not her own daughter. That a decision might have been made to keep the chieftainship in a certain family line reflects, not gender discrimination, but an attempt to combine the preservation of royal bloodlines with measures designed to oppose gender discrimination.

[91] There is no merit in the submission that the traditional authorities have acted unconstitutionally in this case.

Costs

[92] This case raised constitutional issues of considerable importance. It was contested by two cousins, both leading figures in the Valoyi traditional community. The case served to clarify several important points of customary law in the interests of that community and to its ultimate benefit. Furthermore, although Ms Shilubana has been substantially successful before this Court, she was represented by the State Attorney for part of this litigation and her costs were borne in large measure by the state. Accordingly, it is appropriate that no order be made as to costs before this Court, save in respect of the interlocutory matters considered below. For similar reasons the order of costs by the Supreme Court of Appeal must be replaced by one making no order as to costs. No order as to costs was made by the High Court and there is accordingly no need to make a further order in that regard.

[93] It remains to deal with the costs arising from the postponements in this matter. The first postponement, ordered on 17 May 2007, was the subject of the previous judgment of this Court in this matter. The order reserved the question of costs.[82] The postponement was at the instance of Mr Nwamitwa and was substantially due to the conduct of his legal representatives. However, in view of the state's assistance to Ms Shilubana – mentioned above – no costs order is made. The second postponement, ordered on 4 September 2007, was a result of the conduct of the applicant's attorneys. The State Attorney has already been ordered to pay the costs of the respondent arising from that postponement, including the costs of two counsel, as well as the out-of-pocket expenses of the two amici at that stage involved in the case.[83] Finally, an application for a postponement was made on behalf of CONTRALESA on 27 November 2007. The application was refused, but CONTRALESA was invited to file written argument. CONTRALESA has already been ordered to pay any costs arising out the order.[84]

Order

[94] The following order is made:

(1) Condonation for the late filing of papers is granted.

(2) The application for leave to appeal is granted.

[82] See above n 11 at para 1 for the text of the order.

[83] See above [15].

[84] The order is reproduced above at n 16.

(3) The appeal against the decision of the Supreme Court of Appeal is upheld.

(4) The orders of the High Court and Supreme Court of Appeal are set aside.

(5) The application for a declarator is dismissed.

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.

For the First, Second, Seventh, Eighth, Ninth, Tenth, and Eleventh Applicants:	Advocate IAM Semenya SC and Advocate SBS Dlwathi instructed by the State Attorney, Pretoria; subsequently Advocate SBS Dlwathi instructed by VM Mashele Attorneys.
For the Third, Fourth, Fifth, Sixth, Applicants:	Advocate IAM Semenya SC and Advocate SBS Dlwathi instructed by the State Attorney, Pretoria; subsequently Advocate IAM Semenya instructed by the State Attorney, Pretoria.
For the Respondent:	Advocate MC Motimele SC and Advocate BLM Bokaba instructed by Mashobane Attorneys.
For the First Amicus Curiae:	Advocate K Pillay and Advocate A Govender instructed by the Legal Resources Centre.
For the Second Amicus Curiae:	Advocate G Budlender and Advocate R Moultrie instructed by the Legal Resources Centre.
For the Third Amicus Curiae:	Advocate Nkosi Mwelo Nonkonyana, General Secretary, Congress of Traditional Leaders of South Africa.