

6. Gender, culture and the law: the South African experience

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A body of case law has come into being over the past 14 years which demonstrates the extent to which the South African judiciary has shown respect for gender and cultural rights, and its ability to deal with the tensions between them.

Section 8(1) of the Bill of Rights in the South African Constitution provides that the Bill of Rights applies to all law and binds 'the legislature; the executive; the judiciary and all/organs of state'. Specific provisions in the area of gender, culture and the law are:

- Section 9 of the Bill of Rights in the Constitution of the Republic of South Africa Act, 108 of 1996 ('the Constitution') deals with matters of gender and culture and prohibits unfair discrimination on the basis of various differences. The section embraces a plethora of differences so as to cater for the diversity of people who inhabit the country.
- Section 9 provides that neither the state nor any person may unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- Section 31 of the Constitution was enacted to entrench respect for diverse cultures, religions and languages in South African society. It provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practice their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

In briefly highlighting the following cases, I demonstrate the judiciary's aspiration and intent to advance women's rights in the context of gender, culture and the law.

Women as mothers: recognition of their current socio-economic disadvantages

- In *President of the Republic of South Africa and Another v. Hugo*,¹ the social and economic disadvantages to black people and women in South Africa were

1. 1997(6) BCLR (Butterworths Constitutional Law Reports) 708 (CC).

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highlighted. The court addressed the position of women in society – with emphasis on their roles as mothers and primary caregivers. It noted how this role has been one of the root causes of women's inequality in employment and in society. The fact that fathers were not similarly disadvantaged weighed with the court in arriving at its decision. It held that a presidential order that mothers, but not fathers, of young children, should receive a special remission of sentence was not unfairly discriminatory against gender.

Comment: Ultimately, however, one would discourage this type of decision, because we need to encourage co-parenting and the assumption by both parents of a child of parental responsibilities. And this is precisely why the Children's Act 38 of 2005 was enacted from 1 July 2007. From this date, married fathers of minor children have automatic equal rights and responsibilities towards them, and unmarried fathers have the right to go to court to secure the same joint rights and responsibilities. Co-parenting is one of the fundamental premises of this piece of legislation. What is being recognised is the need for a father to become more involved in the welfare of his child, and the need for the mother to be freed up so that, if she so chooses, she can pursue economic opportunities which will empower her and allow her to become financially independent from her husband or partner.

Women in civil marriages: property and maintenance claims

- The equality principle was applied in the case of *Cary v. Cary*.² In a civil case, the applicant, a wife in the throes of a divorce from her husband, had applied for a contribution from him towards her legal costs in the divorce action. The court found that its discretion was subject to the right of equality before the law among genders, which in turn required equality of arms, or finances, in the divorce action. A contribution to costs beyond the norm was awarded, and effectively empowered the wife to litigate her case on a more equal and fair basis. This case had admirable objectives. However, there is still some way to go, because such costs contributions are often insufficient.

Comment: The marital power that previously vested in a husband, to the exclusion of his wife, has been abolished by the Matrimonial Property Act 69 of 1984. A wife married by antenuptial contract has the power to enter into transactions without the assistance of her husband. Where the parties are married in community of property, they participate equally in the conclusion of major transactions. Unless these claims are excluded by agreement in an antenuptial contract, a married woman generally enjoys proprietary claims against her husband in the event of death or divorce. Maintenance claims also arise, irrespective of how the parties were married. Nonetheless, historically, because the woman has frequently stayed at home to look after the children, she has

2. 1999(8) BCLR 877 (C).

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not been able to financially empower herself during the marriage, so that, on divorce, she lacks the wherewithal to prosecute legal proceedings against her husband.

Women and customary law or religious marriages: property and maintenance claims

- Discrimination on the ground of religion, but impacting upon the female gender in effect, came to the fore in *Amod (born Peer) and Another v. Multilateral Motor Vehicle Accidents Fund*.³ In this case, the beneficiaries of loss of support claims flowing from motor vehicle accidents were held to include spouses married according to Muslim rites.
- In *Daniels v. Campbell NO and Others*,⁴ the exclusion of spouses married according to Muslim rites from maintenance claims under the Maintenance of Surviving Spouses Act 27 of 1990 was found to unfairly discriminate on the basis of religion. In the latter case, the court also took account of the importance of tolerance and respect for diversity. In affording a wide interpretation to the meaning of the word 'spouse', any unfair discrimination on the ground of religion, culture and belief was obviated.

Comment: The result of the findings in *Amod* and *Daniels* was that those most affected by this legislation, namely, women who were normally not the breadwinners in the family, would benefit from its failure to pass constitutional muster. Historically, our law did not recognise maintenance and proprietary claims for women in marriages that were not civilly formalised and registered as such. This had the result that wives in Muslim marriages and customary law marriages, the established norm among a vast number of the black population, were left destitute when their marriage failed. With the Constitution, things have begun to change. The Recognition of Customary Marriages Act 1998 has had the effect that customary law marriages now have the same status as civil marriages. However, marriages according to Muslim rites have not received the same recognition. So, for example, where a husband dies intestate, the children born of the marriage will inherit, to the exclusion of the wife. There is currently case pending on the subject in the Cape High Court.

Women who do not marry, but live with a partner

Comment: Historically, women who did not marry their partners have had no legal recourse against them when their relationships came to an end. In other words, what were termed 'common law wives' would also have no rights of a maintenance or proprietary nature against their partners. A woman who had never married and had instead lived with a man for 25 years, often bearing his children, would have no

3. (1999) 4 All SA 421 fA.

4. 2004(7) BCLR 735.

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personal claim against him other than for maintenance for the children. Once enacted, the Domestic Partnership Bill, which was drawn up in 2005, will effectively address the hardship which flowed from these relationships. This legislation will have the effect that both parties to a domestic partnership will have the same proprietary and maintenance rights as women who marry. These rights are reciprocal, in the sense that men will also be able to enjoy claims against their female partners.

When the Domestic Partnerships Bill comes into law, surviving partners, whether married or unmarried, will enjoy maintenance and property claims against their deceased partners, which constitute first charges against the partner's estate before the will is implemented. On death, minor children, irrespective of sex, enjoy claims for support against their deceased parent. This applies whether or not the child was born of a legal marriage.

Domestic violence against women, both married and unmarried

Comment: Domestic violence against women in South Africa took centre stage with the introduction in 1993 of the Prevention of Family Violence Act, 133 of 1993, succeeded by the Domestic Violence Act (DVA) 116 of 1998, which came into operation on 15 December 1999. In the preamble to the DVA, cognisance is taken of the high incidence of domestic violence in South Africa, that victims of such violence are among the most vulnerable members of society, that domestic violence takes on many forms and that it may be committed in a wide range of relationships. The legislature goes on to state that, in wishing to honour the obligation of the state towards ending violence against women and children, it has had regard to the constitution and the UN Conventions on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Rights of the Child.

Thus, in terms of the DVA, people who have simply lived with one another in a common law relationship are entitled to secure protection orders against each other of an interdictory nature to prevent the continuation of conduct amounting to domestic violence.

The definition of 'domestic violence' is far-reaching. It includes physical, sexual emotional, verbal, psychological and economic abuse – intimidation, harassment, stalking, damage to property, entry into the complainant's residence without consent and any other form of controlling behaviour. The 'battered woman' syndrome, in the sense that women can be victims of a severe form of domestic violence, has been recognised by our law. However, there are two cases that, while recognising this fact, had entirely different outcomes.

The case of *S v. Kgafela*,⁵ a black woman had hired an assassin to murder her husband, a senior magistrate. Her husband had taken to drinking in excess over

5. 2003(5) SA 339 SCA (Supreme Court of Appeal).

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weekends and to subjecting her to abuse when inebriated. He had hit her with a *sjambok* (whip) on one occasion and had pointed a firearm at her on another. The accused was 37 years of age and a first offender. The Supreme Court of Appeal was unable to find substantial and compelling circumstances that would have justified a reduction in the life sentence imposed upon the accused by the court of first instance.

Yet, two years later, in the case of *S v. Engelbrecht*,⁶ the court was enjoined to enquire into the reasonableness of the accused's (a white woman) actions to establish whether her defence of justification was sustainable. The court found the accused wife guilty of the murder of her husband. In sentencing, however, the court took account of a long line of cases that had established certain principles applicable to crime committed in circumstances of family violence. The accused was sentenced to detention until the rising of the court. This meant that all she had to do was to wait until the judge adjourned proceedings and then walk out of court. She was free to go.

Comment: A comparison of these two cases reveals some interesting contrasts. Both women were found guilty of murdering their husbands. The court in the first case found domestic violence an inexcusable defence for a black woman. The court in the second case found domestic violence to be a substantial mitigating factor in a case against a white woman. It appears that the black woman came from a poor background, and was not afforded the resources that the white woman had with which to advance expert evidence through psychologists' reports detailing the affects of battery on the wife. The question arises as to why the court in the black woman's case did not take account her socio-economic position and take proactive steps, as it could and should have, to gather the information required to come to a reasoned decision.

Women and succession and the tension between gender and culture

In *Mthembu v. Letsela and Another*,⁷ the issue of gender discrimination within a black culture was aired. Because there had been no customary union between the mother and father of one T, she was illegitimate. In terms of customary law, the house of her deceased father devolved to the father of the deceased. However, according to the same law, even legitimate daughters could not succeed whereas, in the absence of legitimate sons, illegitimate sons could. The Supreme Court of Appeal recognised this rule, holding that, to strike it down would be to 'dismiss an African institution without examining its essential purpose and content'.

The case of *Bhe and Others v. Magistrate, Khayalitsha and Others*⁸ may be contrasted with the finding in *Mthembu*. The Cape High Court found the principle of primogeniture

6. 2005(2) SACR (South African Criminal Law Reports) 41 WLD at p130, para 333.

7. 2000(3) SA 867 SCA.

8. 2004(2) SA 544 (C).

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as set out in the Black Administration Act 38 of 1927 ('the BAA') to discriminate against black women on the basis of race and gender. This was confirmed by the Constitutional Court in its groundbreaking decision in *Bhe and Others v. Magistrate, Khayalitsha and Others*.⁹ In this latter judgment, Langa DCJ as he then was, stated:

'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. As the centerpiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extramarital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom.'

The *Bhe* case has ramifications which reach beyond the facts of the case, in the sense that, here, the court was required to weigh a long-established cultural norm against a gender issue. And the gender issue prevailed because the court accepted that, otherwise, there would be unfair discrimination. I would call this a successful negotiation of culture.

9. 2005(1) BCLR 1 (CC).