



Gender Equality Jurisprudence in Landmark Court Decisions



the doj&cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Mikateko Joyce Maluleke and Thuli Madonsela



ACKNOWLEDGEMENTS

This work was inspired by my realization of the fact that there are many instances where women as justice seekers, their legal representatives and judicial officers often dither in the jungle relying on antiquated statutory, common or customary law to the detriment of women's rights, when superior or equivalent courts have long developed the law progressively resulting in improved understanding and protection of women's rights.

The purpose of this collection of landmark decisions of the Constitutional Court, Supreme Court of Appeal and the High Courts, in the last ten years of democracy is to provide a basic summary of useful jurisprudence that may be used to defend and advance the rights of women.

I hope that women justice seekers, their legal representatives, women's rights advocates and other role players in the justice system will find the collection useful in their quest for gender justice.

The project would not have gotten off the ground without the dedicated research support from Agnes Mabotja to which I express my deepest gratitude. I also wish to thank Thuli Madonsela for helping with additional research, structuring and writing. I am also grateful to Phumzile Mnisi who assisted with research to finalize the project after Agnes Mabotja's departure.

I would also like to extend my sincere gratitude to Bulelwa Madekurozwa and Sharon Brink for their assistance in editing the document in order to ensure that the information contained herein is substantively correct.

Adv. Mikateko Joyce Maluleke
Director Gender Directorate
Department of Justice and Constitutional Development



WOMEN AND THE LAW IN SOUTH AFRICA

Gender Equality Jurisprudence in Landmark Court Decisions¹

CONTENTS

Acknowledgements

1. Introduction	1
2. Violence Against Women	5
3. Family Law.....	23
4. Succession	37
5. Socio-Economic Rights	47
6. Nationality and Immigration	51
7. Positive Measures and Other Areas of the Law	57
8. Overview of Other Noteworthy Cases	59
9. Case Index	63
10. Where to Go For Help	67



1. INTRODUCTION

Although statutes are the main source of the law, sometimes they lag behind the latest judicial developments on rights. This happens when courts have developed the law to adapt it to contemporary situations. Since the introduction of the new Constitution, this has also happened whenever courts have aligned statutory and other laws with the Constitution, giving rise to modified or new rights.

Where this has happened, statutes and the common law no longer provide the definitive statement of the law. In fact they often reflect outdated law that no longer applies. An example in this regard, is customary law of succession after the Constitutional Court decision in the *Bhe* case². What is reflected in the relevant statute, *the Black Administration Act*, is no longer the law.

It is important for women to know the latest developments in law because this usually entails better or more elaborate protection of their rights. However, not every woman has direct access to court decisions or has the time and skills to analyse them and extract the key changes to the law and their rights.

This collection of Constitutional Court, Supreme Court of Appeal and High Court decisions seeks to provide information on the latest interpretation of rights by the courts, using the Constitution as a guide. This will hopefully assist women and persons or organisations who are involved in women's rights advocacy to understand the latest developments in court jurisprudence and related implications for women's rights.

The cases are clustered under topics that are generally used in the teaching of and discussions on the law. These are:

- Violence Against Women
- Family Law
- Succession
- Socio-Economic Rights
- Immigration
- Positive Measures and Other Areas of the Law

² *Bhe and Others v Magistrate, Khayelitsha and Others* (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* 2005 1 (SA) 580 (CC). This case is discussed in detail under succession law below.



The following framework is employed in the discussion of each of the cases in this collection.

- Brief Summary
- Impact on Women's Rights
- Case Overview
- Important Links

Some of the cases are briefly mentioned at the end but not elaborated upon. This is particularly so in respect of cases that do not necessarily deal with equality between women and men (gender equality) but have some indirect positive impact on this matter.

This collection does not deal with cases such as *Mthembu v Letsela*³, *Woolworths v Whitehead*⁴ and *Jordan and Others v the State/ S v Jordan*⁵, where the court missed an opportunity to make a difference in the lives of women.

Included at the end of this collection of cases is an index that simplifies the clustering of the cases. Also included is a list of institutions, with contact details, that may be approached for help by those who wish to vindicate their rights or assist others to do so.

³ *Mthembu v Letsela and Another* 1998 (2) SA 675 (T). This case concerned the constitutionality of African Customary Law of intestate succession regarding the rights of women to inherit.

⁴ *Woolworths (Pty) Ltd v Whitehead (Women's Legal Centre Intervening)* 2000 3 SA 529 (LAC).

⁵ *S v Jordan (Sex Workers Education & Advocacy Task Force as Amicus Curiae)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC). The case concerned whether certain provisions of the Sexual Offences Act 23 of 1957 were constitutionally invalid. The Constitutional Court upheld the order of the High Court that the provisions concerning the keeping of a Brothel were constitutional. With regard to section 20 (1)(Aa), the provisions criminalizing prostitution, the Court in a six to five majority declined to confirm the order of the High Court and held the provisions to be constitutional and valid. The minority found the section was contrary to section 8 and 13 of the Constitution and brought about indirect discrimination against women.



2. VIOLENCE AGAINST WOMEN

*Carmichele v Minister of Safety and Security and Another*⁶

Brief Summary

The Court upheld an application by a woman to have the Minister of Justice and the Minister of Safety and Security held liable for her brutal attack by a man, who at the time, was awaiting trial for having attempted to rape another woman and who had been released on the recommendation of the investigation officer and prosecutor, without bail, despite his history of sexual violence. The Court held that the state is obliged by the Constitution and international law to prevent violence against women which is a form of gender discrimination and to protect the dignity, freedom and security of women. It also held that the courts had the duty to develop the common law to make provision for holding the state accountable. When the matter went back to the High Court, the state was found liable and ordered to pay a specified amount.

Impact on Women's Rights

- The case constitutes a major breakthrough for victim's rights and the fight to end violence against women;
- Violence against women is a form of gender based discrimination as envisaged in international law and the state has a duty to prevent it;
- Damages may be claimed against the state, in appropriate circumstances, when it fails to honour its duty to protect women against violence; and
- Prosecutors and the police have to think twice before setting dangerous criminals loose on the public.

Case Overview

Carmichele v Minister of Safety and Security dealt with the constitutional obligation of the courts to develop the common law in order to promote the spirit, purport and objects of the Bill of Rights. The main issue in this case was the court's competency to broaden the common law concept of "wrongfulness" in the law of delict in the light of the State's constitutional duty to safeguard the rights of women.

⁶ 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

The applicant sued the Minister of Safety and Security and the Minister of Justice for damages resulting from a brutal attack by one Coetzee who was awaiting trial for having attempted to rape another woman. Coetzee had previously been convicted on charges of housebreaking and indecent assault for which he was sentenced to a fine and suspended periods of imprisonments. At the time of the attack on the applicant, he was facing a charge of rape and had, despite his history of sexual violence, been released on his own recognisance by a magistrate, on the recommendation of the police and prosecutor.

After his release Coetzee lived with his mother who worked for Gosling, a friend of the applicant, at her premises where the applicant, frequently stayed. Upon learning of the charges against Coetzee and of his previous conviction for indecent assault, Gosling tried unsuccessfully to get the police and the prosecutor to lock him up to protect herself and the public. The public prosecutor did not provide assistance even when Gosling reported that the applicant had seen Coetzee snooping around Gosling's house. The prosecutor said/claimed that nothing could be done unless Coetzee committed another offence. Two months later the applicant and Gosling made another request to the public prosecutor for assistance but received the same response. A few days later Coetzee brutally attacked the applicant at Gosling's house.

Relying on the common-law duty of wrongfulness, the applicant brought a delictual action in the High Court against the two Ministers for the injuries she had sustained during the attack. The applicant's case was that the members of the police as well as the public prosecutors involved had owed her a legal duty to act in order to prevent Coetzee from causing her harm and that they had negligently failed to comply with this duty. She alleged that the release of Coetzee without bail had been an omission by the police and prosecutors. She also relied on the duties imposed on the police by the interim Constitution and on the State under the rights to life, equality, dignity, freedom and security of the person and privacy.⁷

The High Court dismissed the claim, finding that she had not established that the police or the prosecutor owed a legal duty of care to her specifically and had wrongfully failed to fulfill that legal duty.

The applicant's appeal to the Supreme Court of Appeal (SCA) was also unsuccessful.⁸ The SCA held that the police and prosecution had no legal duty of care towards the applicant and could not, as a matter of law, be liable for damages to her.

The applicant then sought a special appeal against the order of the SCA in the Constitutional Court, which was granted.

⁷ Sections 11, 9, 10 and 12 of the Constitution, respectively.

⁸ *Carmichele v Minister of Safety & Security & Another* [2000] 4 All SA 537 (A).



In a unanimous decision the Constitutional Court granted the application for leave to appeal and upheld the appeal. The Court held that, although the major engine for law reform should be the legislature, courts are under a general duty to develop the common law when it deviates from the spirit, purport and objects of the Bill of Rights.⁹

The Constitutional Court considered the potential liability of both police and prosecutors. It held that the State is obliged by the Constitution and international law to prevent gender-based discrimination and to protect the dignity, freedom and security of women. In paragraph 62 of the judgment the Court held that the police service:

“is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.”

The Court held that in the particular circumstances of the present case, the police recommendation for the assailant’s release could therefore amount to wrongful conduct giving rise to police liability for the harmful consequences. The Court also held that prosecutors, who are under a general duty to place before a court any information relevant to the refusal or grant of bail, might reasonably be held liable for negligently failing to fulfil that duty.

The appeal was upheld and the matter referred back to the High Court. The effect of the order was to have the case re-opened in the trial court on the basis that the appellant had made out a case which had to be met by the two Ministers.

The trial recommenced in the Cape High Court and the matter was reconsidered in the light of the judgment of the Constitutional Court. The court found in favour of the plaintiff, holding the defendants: the Ministers of Safety and Security and Minister of Justice and Constitutional Development liable. The Court ordered the two defendants to pay the plaintiff R177 000 and to cover all her legal costs. The state took the matter on appeal and lost.

Important Linkages

- *Carmichele v Minister of Safety and Security* 2002 (10) BCLR 1100 (C) (High Court decision).
- *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA).
- *Rail Commuters’ Action Group v Transnet LTD and Others* (2004)
- *Victim’s Charter, 2004*

9 Id para 36.

Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as Amicus Curiae) 2003 (1) SA 389(SCA).

Brief Summary

The Supreme Court of Appeal upheld an appeal by a young woman (appellant) who sought damages from the state (respondent). Her action was based on the state's breach of its duty of care towards her, following her sexual assault, rape and robbery by a known dangerous criminal who had escaped from police custody. The court held that it was the duty of the state to protect people against violent crime and that the police had a duty of care towards the victim. The court further held that the state was obliged to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of the person. The court also held that the state was obliged by international law to protect women against violent crime and that in the light of these imperatives a special relationship between the plaintiff and the defendant was not required for the duty of care to exist. The court declared that the conduct of the police was wrongful and the state (as employer of the police) was liable to the plaintiff for such damages that she was able to prove.

Impact on Women's Rights

- This is yet another victory for the victim's rights;
- Violence against women is a gendered crime and a form of gender based discrimination as envisaged in the Constitution and international law, which the state has a duty to prevent.
- The absence of other practical or effective remedy available to the victim of violent crime is an important consideration in favour of recognizing the state's delictual liability for damages in appropriate circumstances.
- The police have to be vigilant when dealing with dangerous and violent criminals who have the potential to harm women and others.



Case Overview

Van Eeden v Minister of Safety and Security dealt with a claim for damages based on the breach of a duty of care by the state. The appellant was a 19 year old woman who was sexually assaulted, raped and robbed by one M, a known dangerous criminal and serial rapist who had escaped from police custody due to a negligent failure by the police to lock the security gate. At the time of his escape, M was facing more than 22 charges which included indecent assault, rape and armed robbery. Within six days of his escape he resumed his sexual attacks on young women, one of whom was the appellant.

The appellant instituted an action in the High Court for delictual damages against the state. Her case (argument) was that members of the South African Police Service owed her a legal duty to take reasonable steps to prevent M from escaping and causing her harm and that they negligently failed to comply with such a duty. At trial the state conceded negligence/ accepted that the police had acted negligently. The remaining issue to be addressed was whether the police had owed a legal duty to the appellant in particular to prevent M from escaping and causing harm. The Pretoria High Court dismissed the appellant's claim in the light of the decision of the Supreme Court of Appeal in the case of *Carmichele v Minister of Safety and Security 2001 (1) SA 489 (SCA)* on the ground that the police did not owe the appellant a legal duty to act positively in order to prevent harm.

On appeal to the SCA, the court now guided by the decision of the Constitutional Court in *Carmichele v Minister of Safety and Security*, found in the appellant's favour. The court held that the right of freedom and security of the person entrenched in section 12 of the Constitution included the right to be free from all forms of violence from either private or public sources.¹⁰ It further held that the section required the state to protect individuals both by refraining from such invasions and by taking active steps to prevent violation of the right and the state's duty also formed part of its obligations under international law. The court further held that section 205(3) of the Constitution and the *South African Police Service Act, 68 of 1995* makes it clear that the functions of the police include the prevention of crime.¹¹

¹⁰ Section 12(1)(c) of the Constitution reads as follows:

"Everyone has the right to freedom and security of the person, which includes the right - to be free from all forms of violence from either public or private sources".

¹¹ Section 205 of the Constitution deals with police and reads as follows:

"(3) The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law."

The court also held that an important consideration in favour of recognising the state's delictual liability for damages in circumstances such as this was that there was no other practical and effective remedy available to the victim of violent crime as conventional remedies such as review and mandamus or interdict did not afford the victim of crime any relief at all.

Important Linkages

- *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).
- *Rail Commuters' Action Group v Transnet Ltd t/a Metrorail and Others* 2003 (3) BCLR 288 (C) (High Court judgment); 2003 (6) SA 349 (SCA) and 2005 (2) BCLR 359 (CC); 2005 (4) BCLR 301 (CC).
- Victim's Charter, 2004



S v Chapman 1997 (3) SA 341(SCA)

Brief Summary

The Supreme Court of Appeal (SCA) dismissed an appeal against convictions and sentences for three counts of rape. The SCA stated that Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community that Courts are determined to protect the equality, dignity and freedom of all women, and will show no mercy to those who attempt to invade those rights. The court confirmed both the convictions and the sentences of seven years of imprisonment on each of the three counts of rape, with the sentence on the first count running concurrently with sentences imposed on the second and third counts, effectively amounting to 14 years of imprisonment. The court pointed out that violence against women diminishes the quality and enjoyment of women's lives.

Impact on Women's Rights

- Courts should view rape as a serious offence which constitutes a humiliating, degrading and brutal invasion of privacy, the dignity and the person of the victim;
- Women are entitled to dignity, privacy and integrity of the person, which rights were basic to the ethos of the Constitution and to any modern civilization; and
- As Courts view rape seriously they see stiff sentences as a fitting deterrent.

Case Overview

S v Chapman involved an appeal against convictions for three counts of rape by a Magistrates' Court and the resultant sentences of seven years imprisonment in respect of each count. Chapman appealed against the convictions and sentences to a full bench of the Cape Provincial Division which dismissed the appeal. He then proceeded to the SCA where his appeal was also dismissed.

The SCA held that rape constituted a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim and that women were entitled to the protection of these rights which were basic to the ethos of the Constitution and to any defensible civilization. The court went on to categorically

point out that women in this country “have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.”¹²

The Court went on to say, “[t]he Courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect equality, dignity and freedom of all women and we shall show no mercy to those who seek to invade those rights.”

Important Links

- *Victim’s Charter, 2004*

12 Id.



S v Jackson 1998(1) SACR 470 (SCA); *S v J* 1998 (2) SA 984; 1998 (4) BCLR 424).

Brief Summary

The Supreme Court of Appeal (SCA) dismissed an appeal against a conviction of attempted rape, holding that the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. The court proceeded to state that in our system of law, the burden of proof is on the state to prove the guilt of the accused beyond reasonable doubt- no more and no less.

The effect this case was to abolish the cautionary rule as understood under common law.

Impact on Women's Rights

- The evidence of a single witness, the victim, in a rape case no longer needs to be treated with caution purely because it is not corroborated; and.
- It is now easier to prove rape; a violation that is usually experienced by women alone in secluded spaces.

Case Overview

S v Jackson dealt with the cautionary rule in the context of an appeal against an attempted rape conviction and sentence. The complainant was a 17 year old school girl who had alleged that she had been raped by the appellant while the two of them were alone in his car. The appeal was dismissed, with the appeal court holding that the magistrate was correct in not applying the cautionary rule in evaluating the evidence of the complainant.

The court noted that the cautionary rule was based on an ancient notion that women were habitually inclined to lie about being raped. It pointed out that the justification for this rule lacked any factual basis or foundation based on reality and could be exposed as a myth. The court observed:

“Few things may be **more** difficult and humiliating for a woman than to cry rape: she is often, within certain communities, considered to have lost her credibility;

she may be seen as unchaste and unworthy of respect; her community may turn its back on her; she **has to** undergo the most harrowing cross-examination in court, where the intimate details of the crime are traversed ad nauseam; she (**but** not the accused) may be required to reveal her **previous** sexual history; she may disqualify herself in the marriage market, and many husbands turn their backs on a ‘soiled’ wife.”¹³

After citing with approval the case of *P v Rincon-Pineda* (14 Cal 3d 864), where the Californian Supreme Court held that the cautionary rule was unwarranted by law and reason; the cautionary rule in sexual assault cases is based on an irrational and outdated perception. It unjustly stereotypes complainants in assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove guilt beyond reasonable doubt-no more and no less.

The court held that the magistrate was not obliged to apply such rule and dismissed the appeal against the conviction.

Important Links

- Section 5 of the Domestic Violence Act, No.116 of 1998.
- Sexual Offences Bill, 2003.
- *S v Chapman 1997 (3) SA 341(SCA)*.

13 *S v Jackson* (SACR) at 475E-G; *S v J* (BCLR) at 429G- 430A.



S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 CC; 2000 (1) BCLR 86 (CC); 2000 (1) SACR 8 (CC).

Brief Summary

The Constitutional Court declined to confirm a High Court order declaring section 3(5) of the Prevention of Family Violence Act, 133 of 1993 unconstitutional and invalid. The Court rejected the notion that the section places a reverse onus of proving absence of guilt on a person charged with breach of a family violence interdict. The Court further held that the section in question most appropriately balances optimum protection of the complainant and the accused's right to a fair trial. The Court pointed out at 433 that "[t]he non sexist society promised in the foundational clauses of the Constitution and the right to equality and non discrimination guaranteed by section 9, are undermined when spouse-batterers enjoy immunity".

Impact on Women's Rights

- Courts recognize the need to balance the rights of victims and perpetrators while appreciating the unique and illusive nature of domestic violence;
- The United Nations Convention on the Elimination of All Forms of Discrimination Against Women imposes a duty on member states to pass legislation to punish violence against women;
- Domestic violence is viewed seriously by the courts and is no longer seen as a private matter; and
- International human rights norms are important for strengthening the protection of women's rights at the domestic level

Case Overview

S v Baloyi concerns a Constitutional Court application for confirmation of an order of invalidity. Section 3(5) of the Prevention of Family Violence Act, 133 of 1993 had been declared invalid by the Pretoria High Court and referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution. Section 3(5) dealt with the procedure to be followed when a person is accused of breaching the terms of a family violence interdict.

The complainant had laid a charge of assault against the appellant, her husband, and successfully applied for an interdict in terms of the Prevention of Family Violence

Act. The interdict prohibited the appellant from assaulting the complainant and their child and from preventing them from leaving and entering their joint home. A suspended warrant for the arrest of the appellant was simultaneously granted in terms of the Act. In breach of the interdict, the appellant assaulted the complainant again and threatened to kill her. When she reported this to the police, the appellant was arrested and brought before a magistrate for an enquiry. He was convicted of violating the interdict and sentenced to 12 months imprisonment, with six suspended.

He successfully appealed to the Pretoria High Court, contending that section 3(5) of the Family Violence Act imposed an onus on him to prove that he had not wilfully violated the interdict and the provision was therefore unconstitutional. After declaring section 3(5) of the Act invalid, the court referred its decision to the Constitutional Court for confirmation.

The Constitutional Court declined to confirm the order of invalidity and held that the section did not create a reverse onus and did not affect the presumption of innocence of an accused person. The Court noted the ineffectiveness of the criminal justice system in addressing family violence which intensifies the subordination and helplessness of the victims as well as the role of the state in protecting women from private or domestic violence. The matter was referred back to the High Court to be dealt with in accordance with the Constitutional Court's decision.

Important Links

- *Narodien v Andrews 2002 (3) SA 500 (C)*.



Narodien v Andrews 2002 (3) SA 500 (C)

Brief Summary

The Cape High Court held that the magistrate's court was not competent to make an order, under the Domestic Violence Act, 116 of 1998, granting visitation rights to a parent unless such order was ancillary to a domestic violence protection order. The court proceeded to declare invalid an order and a variation order granting a father visitation rights under the Domestic Violence Act. The father had asked a magistrate court to find that a denial of his visitation rights constituted domestic violence as envisaged under the Act and had been granted visitation rights unaccompanied by a protection order.

Impact on Women's Rights

- Courts accept a broad definition of domestic violence
- The best interest of the child remains the major guiding principle in disputes involving parental access and related rights.

Case Overview

Narodien v Andrews dealt with an application for an interim protection order in terms of the Domestic Violence Act 116 of 1998, brought by the applicant, the father of a minor son who was born out of wedlock, against the mother (respondent). In his application the applicant described himself as the “victim of domestic violence” and the respondent as the “person who committed act of domestic violence” while the minor child was described as the “[person] affected by domestic violence”. The relief sought by the applicant was that he be granted access to his son every alternate weekend.

The magistrate hearing the matter at the Cape Town magistrate's court issued an “interim protection order” against the respondent. The said interim order, however, did not mention any “acts of domestic violence”, but simply ordered the respondent “not to prevent applicant's contact with his son”.

The interim protection order was subsequently confirmed and contained specifics about the father's visitation rights. The respondent applied to the Cape Town magistrate's court for the setting aside of the protection order and the magistrate who heard the application varied the protection order. This variation order was, however, granted in the absence of the applicant, who had left the court before the matter was heard by the magistrate.

For that reason, another magistrate subsequently requested the Cape of Good Hope High Court to set aside the variation order on the grounds that the order had been incorrectly granted in the absence of one of the parties.

The Cape of Good Hope High Court held that the magistrate's court had not been competent to issue any of the three orders made in this matter and that all those orders had to be set aside.

In the application for review the magistrate stated that the definition of “domestic violence” in the Domestic Violence Act included any controlling or abusive behaviour towards the complainant where such conduct harmed or could cause imminent harm to the safety, health and well being of the complainant and that the conduct complained of by the applicant had fallen within this definition.¹⁴

The High Court held, at 508 of the judgment, that this interpretation could not be accepted. It held that while the concept of “domestic violence” was defined broadly in section 1 of the Act, such definition had to be placed within the context of the Act as a whole and not be viewed in isolation. It proceeded to say that as far as possible, statutes had to be interpreted so as not to give rise to absurd, anomalous or unreasonable results.

The court held that section 7(6) of the Domestic Violence Act sought to empower magistrates courts granting domestic violence interdicts to make ancillary orders relating to contact with minor children, so ensuring that children at risk were protected from domestic violence and that the protection of the adult applicant was not compromised by arrangements relating to contact between the respondent and any children living with the applicant. Orders concerning access made in terms of section 7(6) had to be ancillary to a protection order of the kind envisaged in section 7(1) of the Act. A stand alone order of access could not be legitimately regarded as falling within the powers vested in the magistrate's court by section 7(1)(h). The orders made by the magistrate were accordingly set aside.

Important Links

- *S v Baloyi* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC); 2000 (1) SACR 8 (CC).

14 *Narodien v Andrews* at page 508 of the judgment.



Grobler v Naspers BPK en 'n Ander 2004(4) SA 220 (C).

Brief Summary

The court held an employer vicariously liable for damages caused by sexual harassment of the plaintiff, who was a secretary for one S, a manager. S had subjected her to sexual harassment, thus creating a hostile environment which resulted in the plaintiff's emotional breakdown. The court held that when harassment resulted in a tangible employment action such as employment, dismissal, failure to promote, change in working conditions or a material change in benefits for the person harassed, the employer was liable unless the employer could prove that reasonable care had been taken to prevent or stop sexual harassment and to deal with its impact. The court based the employer's liability on the fact that there existed a sufficient connection between S's business activities and the sexual harassment to render the employer liable for the sexual harassment. The court held further, that the old rule of vicarious liability needed to be adapted to protect and develop the fundamental rights to personal dignity, freedom and security of the person and to bodily integrity of women in the workplace.

Impact on Women's Rights

- Employers have a duty to take reasonable action to prevent or eliminate sexual harassment the workplace;
- Employers are vicariously liable for sexual harassment by employees unless they have taken reasonable action to prevent or address such; and
- Victims of harassment may sue both employer and harasser for related damages.

Case Overview

Grobler v Naspers BPK 'n Ander dealt with an application to hold an employer (first defendant) vicariously liable for the sexual harassment of an employee (the plaintiff), committed by one S, a fellow employee and manager of the plaintiff. The court held that the employer was vicariously liable for the sexual harassment. One of the critical considerations the court made in arriving at this decision was the opportunity presented to the harasser to abuse his authority, the ambit of authority given to him and the vulnerability of the potential victim to the harasser's abuse of his authority.

The plaintiff's case was that due to serious and persistent unwanted sexual attention (sexual harassment which at some stage included attempted rape at gun point), by S for whose conduct the respondent was responsible, she had developed Post Traumatic Stress Disorder (PTSD) resulting in her inability to function normally at the workplace, at home and in general life situations.

The court was informed that the sexual harassment took place while the plaintiff was employed as a secretary to the harasser and another manager. After making several complaints a disciplinary inquiry was held and the harasser was dismissed. However, the plaintiff's mental health continued to deteriorate as, according to the plaintiff, the employer had initially agreed to assist with therapy yet had failed to do so.

It is worth noting the fact that, faced with conflicting expert opinions on whether the plaintiff's condition did in fact constitute PTSD, the court chose to prefer the expert opinion of women psychologists on the understanding that being women, they were likely to have better insight into the impact of sexual harassment on women victims.

Important Links

- NEDLAC Code of Good Practice on Sexual Harassment
- Employment Equity Act, No 55 of 1998.



3. FAMILY LAW

Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae) 2003 (2) SA 363 (CC); 2003 (2) BCLR 111(CC).

Brief Summary

The case concerned the role of the judiciary in ensuring that maintenance orders are complied with. The applicant appealed to the Constitutional Court against the judgment and order of the Supreme Court of Appeal. The Constitutional Court held that an application to the High Court for contempt of court proceedings to secure the enforcement of a maintenance debt was appropriate constitutional relief for the enforcement of a claim for the maintenance of children. The Court further held that process-in-aid is the appropriate remedy where a court enforces the judgment of another court which cannot be effectively enforced through its own processes. The Court noted that the effectiveness of the maintenance system was undermined by logistical difficulties which were compounded by the system's gendered nature. The Court stated at paragraph 32 that "courts need to be alive to recalcitrant maintenance defaulters who use legal processes to sidestep their obligations to their children". It held that grounds existed for the Court to commit the respondent for contempt of court for failing to comply with the order of the maintenance court. The appeal against the Supreme Court of Appeal's decision to set aside the High Court order was therefore granted.

Impact on Women's Rights

- The High Court may be successfully approached to enforce a maintenance order issued in the maintenance court when there are difficulties in enforcing the order effectively in the court that issued it;
- The Constitutional Court acknowledges that due to logistical problems which are compounded by the gendered nature of the maintenance system, the system is currently ineffective in enforcing maintenance orders; and
- A court will be guided by the best interest of the child in enforcing maintenance responsibilities.

Case Overview

Bannatyne v Bannatyne dealt with the jurisdiction of High Courts to enforce maintenance court orders issued in a lower court by committing maintenance defaulters to prison for contempt of court. The applicant obtained such an order against the respondent for his failure to maintain their two children but the order was set aside by the Supreme Court of Appeal (SCA).

After the respondent defaulted on maintenance payments and the various attempts by the applicant to enforce payment by execution had failed and after repeated postponement, at the respondent's request, of a criminal charge of non-payment, which was subsequently converted into an enquiry into a reduction of the maintenance amount, the applicant successfully approached the High Court for contempt of court proceedings.

On appeal, the Supreme Court of Appeal (SCA) found that the applicant had not fully and diligently pursued the effective remedies provided in the Maintenance Act, 99 of 1998 more so that such remedies were not shown to have been ineffective. The appeal was upheld and the order of the High Court set aside. The applicant then applied to the Constitutional Court for leave to appeal on constitutional grounds against the order of the SCA.

The Constitutional Court approached the case in the light of the provisions of section 28 of the Constitution that the best interests of children are paramount in all cases affecting them; and section 38 of the Constitution, which obliges a court to grant "appropriate relief" where rights have been threatened or infringed. The court found the appropriate relief in this case to be the common-law remedy of process-in-aid whereby a High Court may enforce a judgment of a lower court if that judgment could not be effectively enforced in that court. It emphasized that this was a discretionary remedy, which is granted only where good and sufficient circumstances warrant it.

The Court acknowledged contempt proceedings as a recognized method of putting pressure on a maintenance defaulter to comply with his/her obligation and that an application to the High Court for process-in-aid by way of contempt proceedings to secure the enforcement of a maintenance debt is, in appropriate circumstances, appropriate constitutional relief for the enforcement of a claim for the maintenance of children,



The Court noted amongst other things, the gendered nature of relationship breakdowns and that usually the women are left to care for the children. It noted that this places an additional burden on them and inhibits their ability to obtain remunerative employment. This means women end up being overburdened in terms of responsibilities and under-resourced in terms of financial means, while men enjoy more economic freedom and resources. It noted that this undermined gender equality as envisaged in the Constitution and that maintenance orders were essential to relieve this financial burden. The court upheld the appeal against the SCA's decision.

Important Links

- *Maintenance Act No 99 of 1998*
- *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others* 2004 (5) SA 388 (D); [2003] 2 All SA 279 (D)

Mngadi v Beacon Sweets & Chocolates Provident Fund and Others 2004 (5) SA 388 (D); [2003] 2 All SA 279(D)

Brief Summary

The Durban High Court upheld an application to order a former employer of a father who had previously defaulted on maintenance payment, to retain his provident fund withdrawal benefits as a provision for payment of future maintenance. The court further held that the extension of law principles relating to safeguarding the duty of support was in accordance with the constitutional protection of the rights of women and children. The court granted a declaratory order requiring the provident fund to retain a lump sum to secure future payment of the member's maintenance obligations.

Impact on Women's Rights

- Pension fund benefits may be attached by a court to secure future maintenance; and
- This procedure is only available through the High Court for the moment and the law needs to be changed to enable magistrate's courts to also offer the same relief.

Case Overview

Mngadi v Beacon Sweets & Chocolates Provident Fund and Others dealt with the High Courts competence to order that a lump sum be retained by a provident fund to secure future payment of a member's maintenance obligations. The applicant (the unemployed mother of two minor children) obtained a maintenance order against the third respondent (the children's father) in terms of the Maintenance Act, 99 of 1998. The third respondent subsequently defaulted in maintenance payment, resigned from his job and sought to withdraw funds from his provident policy. He is alleged to have told the applicant that he had resigned primarily to avoid paying maintenance.

As a result of the default, a warrant of arrest was issued and a corresponding amount was attached from the provident fund held by the third respondent's former employer, the first respondent. The applicant's attorney further asked the first respondent to have the third respondent's pension benefit attached to secure the payment of future maintenance to his children. The first respondent consented to payment of the arrear maintenance but declined to set aside an



amount for future maintenance on the grounds that the Maintenance Act did not permit it. The dispute was then referred to the Pension Funds Adjudicator who also dismissed the complaint. The applicant then approached the High Court for relief.

The Durban High Court held that the provisions of the Pension Funds Act, 24 of 1956 do apply to the payment of future maintenance. It based its findings on an interpretation of section 37A(1) of the Pension Funds Act and its proviso, which protects dependants and entitles the fund to pay any such benefit or any benefit in pursuance of such contributions to any one or more of the dependants of the member or beneficiary or to guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

The court stated that this interpretation accords with the Constitution and in particular provisions that deal with/protect the rights of women and children. The first respondent was ordered to retain the third respondent's withdrawal benefits so as to make equitable and proper provision for the support and maintenance of his minor children for such a period as they are in need of support and maintenance. Alternatively, that the second respondent, the Provident Fund, should pay the applicant a specified sum per month per child, as long as the children are in need of support and maintenance.

Important Links

- Maintenance Act No 99 of 1998.
- *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC); 2003 (2) BCLR 111(CC).*
- *Mngadi and Beacon Sweets & Chocolates and Others 2004 (5) SA 388 (D).*
- *Visser v the State (SCA Case No. 361/2003- December 2003).*

Visser v The State (SCA Case No. 361/2003- December 2003)

Brief Summary

The court held that periodic imprisonment to be served on weekends and payment of arrears in instalments over a specified period was an appropriate order for a maintenance defaulter. The greater portion of the sentence was suspended on condition that he should not be convicted of any failure to pay maintenance during the period of suspension. Although the Supreme Court of Appeal reduced the sentence, the essence of the lower court judgment i.e. partially suspended periodic imprisonment served over weekends plus payment of arrears, was retained.

Impact on Women's Rights

- Women need not fear that the defaulter will lose income during imprisonment;
- Punishment in the form of periodic imprisonment may still be imposed, notwithstanding the defaulter's obligation to pay the arrear maintenance in full; and
- Courts view maintenance default in a serious light.

Case Overview

Visser v The State involved an appeal against a conviction in the magistrates court upheld by the Cape High Court for contravening section 11(1) of the Maintenance Act 23 of 1963 (which was subsequently repealed in its entirety by the Maintenance Act 99 of 1998 that came into operation on 26 November 1999), involving failure to comply with a maintenance order resulting in arrears to the amount of R38 500.

In terms of the deed of settlement entered into by the parties and made an order of court on that date, the appellant, who was the plaintiff in the divorce action, undertook to pay maintenance for the two minor children in the amount of R2500 per month per child, to be increased annually in accordance with the increase in the Consumer Price Index. The appellant, in addition, undertook to pay maintenance for the complainant in the sum of R500 per month until her death or remarriage. The appellant made only two payments of maintenance and was in arrears for R 44 500.



The appellant subsequently resigned from his employment at an architectural firm and received a payment of R400 000 from his employer on the day before his divorce. He allegedly used about R100 000 of this money to pay legal costs and also incurred certain other expenses, but was unable or unwilling to explain to the magistrate what he had done with the balance of the amount of R300 000.

He was subsequently convicted as charged and was sentenced to 1 440 hours of periodical imprisonment in terms of s 285(1) of the Criminal Procedure Act 51 of 1977. The magistrate recommended to the Department of Correctional Services, that the periodical imprisonment be served over weekends.

An appeal against both conviction and sentence to the Cape Provincial Division was dismissed. The Supreme Court of Appeal was then approached. The appellant's main argument on appeal was that although the imposition of 1440 hours of periodical imprisonment was an appropriate sentence in the circumstances of this case, the magistrate, however, erred by not suspending the whole period of such imprisonment on condition that he pay off the arrears in fixed monthly instalments. The Judge, however, reasoned that, while it is true that not suspending any portion of the period of imprisonment imposed would result in an unduly harsh punishment for the appellant, particularly in view of the fact that he was a first offender, a suspension of the whole period would, on the other hand, on the facts of this case, fail to give proper effect to several of the purposes of sentencing.

According to the magistrate, the appellant's failure to pay maintenance to the complainant and the minor children appeared to be both deliberate and recalcitrant.

The court found that a suspension of the entire period of periodical imprisonment would not serve as adequate punishment for the appellant nor would it serve the deterrent purpose of sentencing, either in respect of both the appellant and potential maintenance defaulters.

The court cited with approval the recent judgment of the Constitutional Court in *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae)* in which the Commission for Gender Equality in its capacity as amicus curiae illustrated the difficulties with the operation of the maintenance system in South Africa, showing that the system imposes disproportionately heavy burdens on mothers and undermines the achievement of the foundational value of gender equality in South Africa. For that reason, effective enforcement of maintenance payments is

necessary not only to secure the rights of children, but also to uphold the dignity of women and promote the constitutional ideals of achieving substantive gender equality. Writing for a unanimous Court, Mokgoro J pointed out how important it is for courts to regard as serious and punish accordingly, the deliberate failure to comply with maintenance orders.

The sentence was set aside and replaced with 1440 hours of periodical imprisonment, 1160 hours of which was suspended for 5 years on condition that the appellant not be convicted of failure to comply with any maintenance order against him during the period of suspension. The appellant was ordered to pay the arrear maintenance in monthly payments and to serve imprisonment over weekends.

Important Links

- *Mngadi v Beacon Sweets & Chocolates Provident Fund and Others SALR (2) 2003 2 All SA 279(D)*
- *Bannatyne v Bannatyne (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC); 2003 (2) BCLR 111(CC).*
- Maintenance Act 99 of 1998



Peterson v Maintenance Office, Simon's Town's Maintenance Court, and Others 2004 (2) SA 56 (C)

Brief Summary

The Cape High Court developed the common law relating to the duty of support, resulting in an order declaring that paternal grandparents owe a duty of support to their extramarital grandchildren and are accordingly liable for maintenance in instances where the father is unable to fulfil his duty to support or maintain his children.

The court held that the common-law rule, which differentiates between children born in wedlock and extra-marital children, limiting the duty of support for paternal grand parents to the former, not only denies extra-marital children an equal right to be maintained by their paternal grandparents, but conveys the notion that extramarital children do not have the same inherent worth and dignity as children who are born in wedlock. The court held that the said common law rule constitutes unfair discrimination in violation of section 9 of the Constitution and also violates the right to dignity as enshrined in section 10 and children's rights as enshrined in section 28(2) of the Constitution.

Impact on Women's Rights

- A major break-through, particularly for young women as they tend to be impregnated by young men who themselves are still under parental support.
- Women who are mothers of children born out of wedlock now have an additional option of claiming maintenance from the paternal grandparents of the children in instances where there is no point in claiming from the father.
- Children born out of wedlock may also claim maintenance and support, in addition to their succession rights, in respect of deceased estates of paternal grandparents.
- Maternal grandparents also have a legal duty of support

Case Overview

Peterson v Maintenance Office, Simon's Town's Maintenance Court, and Others 2004 (2) SA 56 (C) dealt with an application by an 18 year old single mother for an order compelling a Maintenance Officer, the first respondent, to summons the paternal grandparents of her child to a maintenance inquiry in terms of s 10 of the Maintenance Act, with a view to inquiring into the provision of maintenance by the paternal grandparents of the child, following the refusal by the respondent to do so. The respondent explained that her refusal to summons the paternal grandparents to a maintenance inquiry was based on the understanding that according to the law paternal grandparents have no legal duty of support towards their extra marital grandchildren and cited the case of *Motan v Joosub* 1930 AD 61, as authority for this legal position.

The applicant also joined the paternal grandparents as fourth and fifth respondents. The application was unopposed.

The applicant's case was that by treating extramarital children differently, denying them the duty of support from paternal grandparents, the said common law rule as interpreted in *Motan*, violated the extramarital child's right to equality and dignity enshrined in sections 9 and 10 of the Constitution and is contrary to the best interest of the child as provided for in section 28(2) of the Constitution.

The court held that although it was bound by *Motan* with regard to the interpretation of the common law on this matter, it had a constitutional duty to develop the common law, to bring it in line with the Constitution with a view of promoting the spirit, purport and objects of the Constitution. The court held that in the present case the common law principle in terms of which paternal grandparents owed no duty of support towards extramarital grandchildren violated constitutional rights of such children, particularly rights enshrined in sections 9, 10 and 28(2) of the Constitution, that such limitation of rights was not justified in terms of section 36 of the Constitution and that the common law needed to be developed to be brought in line with the Constitution by imposing the duty of support on the paternal grandparents as equivalent to that applicable to maternal grandparents.

The court specifically held that the impugned common law principle was unconstitutional and invalid as it constituted unfair discrimination on the ground of birth thus violating the right to equality while also violating the right to human dignity and the principle of the best interest of the child which is paramount in our law. The court noted that the impugned common law principle:



“Not only denies extra-marital children an equal right to be maintained by their paternal grand parents, but conveys the notion that extramarital children do not have the same inherent worth and dignity as children who are born in wedlock.”

The court proceeded to state that:

“Extra-marital children are a group who are extremely vulnerable and their constitutional rights should be jealously protected. That would not only be in line with our constitutional principles but also in accordance with public international law, which dictates that children should not be allowed to suffer on account of their birth.”

The court declared that the second and third respondents, the paternal grandparents, had a legal duty to support the extramarital child of the applicant to the same extent as the fourth and fifth respondents

The court ordered the first respondent to take the necessary steps for an inquiry to be held in terms of section 10 of the Maintenance Act, with a view of enquiring into the provision of maintenance to the applicant’s child by the child’s paternal grandparents.

Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T)*Brief Summary**

The court upheld an application by a customary law wife to bury her husband, who at the time of death, was living with a second wife whom he had married under civil law followed by customary rites. The court rejected the second wife's allegation that the customary marriage had been dissolved.

Impact on Women's Rights

- Civil marriages are no longer given precedence over customary marriages
- A civil marriage that follows a valid customary marriage does not constitute a valid marriage
- Failure to register a customary marriage does not affect its validity. (However, parties are still encouraged to register their customary marriages.)

Case Overview

Thembisile and Another v Thembisile and Another dealt with an application by the deceased's first wife who was married to him in a properly conducted customary union in June 1979 and the applicant's eldest male son born out of the union between the deceased and the first applicant, applied to the Pretoria High Court for a declaratory order that they were entitled to bury the deceased who died in May 2001, at his ancestral home at the locality of their choice.

The deceased's second wife opposed the application. She entered into what purported to be a civil marriage with the deceased in May 1996, duly documented by a marriage certificate, followed by a customary union in October 1999. She alleged that the deceased had divorced the first applicant prior to entering into the civil union with her. The first applicant disputed this. She denied that she was divorced from the deceased. A male family member, who was also a member of the elders, confirmed her allegations. He pointed out that there had never been a meeting of the elders to discuss a divorce (as such a meeting was a precondition for a valid divorce).

The court found that it was not disputed that the deceased had entered into a valid customary union with the first applicant. The court found it unnecessary to



consider whether the customary marriage had been properly registered since the Recognition of Customary Marriages Act 120 of 1998 provided that the failure to register a customary marriage did not affect the validity of that marriage. The court held that since the customary union between the deceased and the first applicant was common cause, the first respondent bore the onus of persuading the court that the union between the first applicant and the deceased had been dissolved.

The Court concluded that the dissolution of the customary union between the deceased and the first applicant was not established.

The Court further held that as the customary union between the first applicant and the deceased had not been dissolved, the alleged civil marriage between the deceased and the first respondent had been a nullity. It proceeded to note that even if the deceased had entered into a customary union with the first respondent, the first and second applicant's right, as the first wife and the son, to bury the deceased was stronger than any claim which the first respondent might have. The application was granted.

Important Links

- Recognition of Customary Marriages Act 120 of 1998
- *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 SCA



4. SUCCESSION

Moseneke and Others v Master of the High Court 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC)

Brief Summary

The Constitutional Court declared unconstitutional and invalid provisions of section 23(7) of the Black Administration Act and related regulations which segregated the administration of intestate black deceased estates. The court further asked the Department of Justice and Constitutional Development to make the necessary changes in statutory law to align such with the Constitutional Court decision.

Impact on Women's Rights

- Women may now be appointed as executors by the Master of the High Court in terms of the Administration of Estates Act
- The Master has jurisdiction in the administration of black deceased estates.

Case Overview

Moseneke and Others v Master of the High Court dealt with a challenge to the constitutional validity of section 23(7)(a) of the Black Administration Act, which was said to discriminate unfairly on the ground of race in excluding the Master of the High Court's authority from the administration of deceased black estates. This therefore resulted in a situation where only magistrates could handle the administration of estates of deceased blacks. It was also argued that the relevant regulations, in this case, Regulation 3(1), also, infringed the rights of women to equality.

Regulation 3(1) promulgated under the Act published under Government Notice R200 (Government Gazette 10601) of 6 February 1987 (the regulations) states that:

“All the [designated] property in any estate [of a black person who dies leaving no valid will] shall be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided and such magistrate shall give such directions in regard to the distribution thereof as shall seem to him fit and shall take all steps necessary to ensure that the provisions of the Act and of these regulations are complied with.”

The administration of estates in terms of the *Black Administration Act* compounded unfair discrimination experienced by women and children as a result customary law and custom, in particular, the rules of *primogeniture*. Section 2(e) of the regulations required that the immoveable property of black persons who died intestate should devolve according to customary law and custom. In terms of customary law and custom, as it has come to be interpreted, the eldest male becomes heir to the property and the representative in the deceased estate. While women may be appointed by the Master as executors provided they are fit and proper persons, in terms of the Administration of Estates Act No. 66 of 1965, they are prohibited from such by the Black Administration Act when black estates are involved.

The applicants, the family of Moseneke who died intestate, brought an application in the Transvaal High Court for an order directing the Master to register and administer the deceased's estate and for a declaration that his refusal to do so was unlawful and unconstitutional. The High Court granted the order on an unopposed basis. The Registrar of the High Court referred the order to the Constitutional Court for confirmation. The Constitutional Court found that the provisions of both section 27(3) and regulation 3(1) were unconstitutional in that they were rooted in racial discrimination which severely assailed the dignity of those concerned. The court then ordered that the word "shall" in regulation 3(1) be read to mean "may" until the government had reviewed the whole field of succession and the administration of deceased estates in a harmonious and effective manner. Regulation 3(1) now reads:

"Regulation 3(1) of the regulations promulgated under the Act published under Government Notice R200 (Government Gazette 10601) of 6 February 1987 (the regulations) states that: "All the [designated] property in any estate [of a black person who dies leaving no valid will] **may** be administered under the supervision of the magistrate in whose area of jurisdiction the deceased ordinarily resided and such magistrate shall give such directions in regard to the distribution thereof as shall seem to him fit and shall take all steps necessary to ensure that the provisions of the Act and of these regulations are complied with."

The Constitutional Court noted that if the foundational value of creating a non-sexist society is to be respected, proper consideration has to be given to the way the measures concerned impact, in practice, both on the dignity of widows and their ability to enjoy a rightful share of the family's worldly goods.



Important Links

- *Bhe and Others v Magistrate, Khayelisha and Others; Shibi v Sithole and Others; SAHRC v President of the RSA and Others* 2005 (1) SA 563 (CC); 2005 (BCLR) 1 (CC)
- *Daniels v Campbell No and Others* 2004 (7) BCLR 735 (CC)
- *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) 157

Bhe and Others v The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others Case; South African Human Rights Commission and Another v President of the Republic of South Africa 2005 (1) SA 563 (CC); 2005 (1) BCLR 1 (CC)

Brief Summary

The Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture which only allows an oldest male descendant or relative to succeed to the estate of a Black person. It also declared unconstitutional and invalid, section 23(7) of the Black Administration Act which unfairly discriminates against women and others with regard to the administration and distribution of black deceased estates. The court proceeded to impose, as an interim measure, the provisions of the Intestate Succession Act on estates previously dealt with under the Black Administration Act. It also made special provision for estates relating to polygamous marriages and that estates previously administered in terms of the Black Administration Act must now be administered by the Master of the High Court in terms of the Administration of Estates Act.

Impact on Women's Rights

- A major victory for rights of black women generally and women married under customary law in particular.
- Black women now enjoy equal succession rights to those of their white counterparts and men.
- Women in polygamous marriages have valid succession rights with all the wives having equal rights
- All girl and boy children regardless of birth position, have equal succession rights
- Children born in marriage and those born out of wedlock have equal rights to inherit.
- The law no longer recognizes the concept of “Indlalifa” or universal heir.
- All deceased estates regardless of race now fall under the authority of the Master of the High Court.



Case Overview

Bhe and Others v The Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa, is a trilogy of cases where the Constitutional Court dealt with the constitutionality of the rule of primogeniture and related intestate succession provisions of the Black Administration Act, which excluded women and others from succession under customary law.

The court struck down the impugned statutory provisions, section 23 of the Black Administration Act, 38 of 1927 and section 1(4)(b) of the Intestate Succession Act, 81 of 1987, replacing these with a new interim regime to govern intestate succession in respect of black estates until statutory changes are made. The interim regime involved temporarily imposing the provisions of the Intestate Succession Act and the Administration of Estates Act on all estates previously regulated under the Black Administration Act with special provisions made to deal with deceased estates involving polygamous marriages.

The *Bhe* and *Shibi* cases dealt with applications for confirmation of orders of constitutional invalidity made by the Cape and Pretoria High Court, respectively. Both courts found section 23(10)(a), (c) and (e) of the Black Administration Act and regulation 2(e) of the Regulations for the Administration of Estates of Deceased Blacks unconstitutional and invalid. Section 1(4)(b) of the Intestate Succession Act was also declared unconstitutional in so far as it excluded estates regulated under section 23 of the Black Administration Act.

Bhe involved an application made by a mother, *Bhe*, on behalf of her two minor daughters in respect of the estate of their deceased father, her late partner. The case before the court was that the customary rule of male primogeniture and the impugned statutory provisions unfairly discriminated on the grounds of gender and specifically against the two female children by excluding them from inheriting the estate of their deceased father. A similar argument was made in respect of *Shibi* whose application involved inheriting the estate of her late brother. In the *Bhe* case the estate had been taken over by the grand father and in the *Shibi* case by two male cousins.

The *South African Human Rights Commission* case involved direct access to the court in a third case brought to court in the form of a class action on behalf of all women and children prevented from inheriting by reason of the impugned provisions and the rule of male primogeniture. The Commission on Gender Equality

(CGE) was admitted as *amicus curiae* and together with the Minister of Justice and Constitutional Development, a respondent in all three cases, also presented arguments.

The court held that, “construed in the light of its history and context, section 23 of the Black Administration Act is an anachronistic piece of legislation which ossified “official” customary law and caused egregious violations of the rights of Black Africans persons” The court declared unconstitutional and struck down section 23 of the Black Administration Act and its regulations, basing its decision on the fact that these were manifestly discriminatory and in breach of the right to equality in section 9 and dignity in section 10 of the Constitution. The court further held that both the substantive and procedural provisions relating to customary law created a racially segregated system of administration of estates that was inconsistent with the provisions of the Constitution.

The court held that the African customary rule of male primogeniture, in the form that it has come to be applied discriminates unfairly against women and children born out of wedlock and accordingly declared it unconstitutional and invalid. The court held that although courts should ideally develop customary law and align it with the Constitution, it was not feasible in this matter. The court further held that the provisions of the Intestate Succession Act and the Administration of Estates Act, with special modifications to accommodate polygamous marriages, would apply to all estates previously regulated under the Black Administration Act and the rules of male primogeniture, until the legislature was able to provide a lasting solution.

The order of the court was made retrospective, dating back to the 27th of April 1994, with completed transfers of ownership insulated, except in cases where the heir had notice of a challenge to the legal validity of the relevant statutory provisions and the rule of male primogeniture. With regard to the administration of estates, the court ordered that from the date of the judgment, future deceased estates which would have previously been administered by magistrates in terms of the Black Administration Act must be administered by the Master of the High Court in terms of the Administration of Estates Act of 1965.

Important Links

Daniels v Campbell NO and Others 2004 (7) BCLR 735 (CC)

Amod v Motor Vehicle Accident Fund 1999(4) SA 1319

Moseneke and Others v Master of the High Court 2001 (2) SA 18 (CC)



Recognition of Customary Marriages Act, 120 of 1998.

***Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)**

Brief Summary

The Supreme Court of Appeal upheld a widow's compensation claim in terms of the Multilateral Vehicle Accidents Fund Act 93 of 1989, relating to the loss of a breadwinner following the death of her husband in a car accident, to whom she had been married in terms of Muslim law. The court developed the common law concept of duty of support to take into account the diversity of religions and cultures in South Africa and the changing boni mores of the diverse South African community. The court held that a de facto monogamous Muslim marriage entitled a spouse to a right of support worthy of public recognition and protection by law. It held further, that there was no reason why the applicant should be denied the common law relief to which she was entitled. The decision of the Durban and Coastal Division was reversed.

Impact on Women's Rights

- Legal recognition of Muslim marriages demonstrated in this case.
- The right of Muslim women to benefit upon husband's death is recognised.
- The precedent for recognition of Muslim marriages may be applied in respect of claims by women married under Muslim law in other circumstances.

Case Overview

***Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 SA (4) 1319 (SCA)** dealt with an appeal by a widow in terms of an unregistered Muslim marriage, against the decision of the Durban and Coast Local Division, which denied her the common law relief of a claim for damages for loss of a breadwinner in terms of the Multilateral Motor Vehicle Accident Fund Act, 93 of 1983.

The deceased and the appellant had been married according to Islamic law but had not registered the marriage in terms of the Marriage Act, 25 of 1961. Upon

the death of her husband she filed a claim against the respondent, the Multilateral Vehicle Accidents Fund. The Fund declined her claim on the ground that her 'potentially polygamous' Muslim marriage was not lawful according to common law and because of such she did not have the common law claim for support based on the loss of a breadwinner.

The Supreme Court of Appeal held that the correct approach was not to ask whether or not the marriage was lawful in terms of common law, but to enquire whether or not the deceased owed the applicant a legal duty of support during the subsistence of the marriage and, if so, whether the right of the widow was in the circumstances a right which deserved protection for the purposes of the dependant's action. The approach adopted in the case of *Santam Bpk v Henry* 1999 (3) SA 421 (SCA), was cited with approval.

After noting that the general *mores* of society had changed to embrace cultural and religious diversity, the court held further, that regard be had to the fact that the marriage between the applicant and the deceased was contracted according to the tenets of a major religion. The marriage involved a public ceremony, special formalities and obligations for both spouses in terms of applicable principles of Islamic law and was also de facto monogamous, indeed constituted a right that deserved such protection. The matter was decided in favour of the applicant.

Important Links

- Santam Bpk v Henry 1999 (3) SA 421 (SCA)
- Bhe and Others v Magistrate, Khayelisha and Others; Shibi v Sithole and Others; SAHRC v President of the RSA and Others 2005 (1) SA 563 (CC); 2005 (BCLR) 1 (CC)
- Daniels v Campbell NO and Others 2004 (7) BCLR 735 (CC)



5. SOCIO-ECONOMIC RIGHTS

Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)

Brief Summary

The Constitutional Court set aside orders made by the High Court in a matter involving an application to order the Minister of Health and others to remove restrictions on the public availability of Nevirapine which is an antiretroviral drug that reduces mother-to-child transmission in pregnancy. The applicants, the TAC and other associations and members of civil society, also sought to compel the respondent, the Minister of Health, to provide and implement a more comprehensive plan to prevent HIV transmission to ameliorate the impact of HIV/Aids. The argument was that current responses to HIV, including government policy and a programme aimed at reducing the risk of mother to child transmission, fell short of the Constitution's requirements.

The court held that section 27(1) and (2) of the Constitution requires that government devise and implement within its available resources, a comprehensive and coordinated programme to realise progressively, the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child HIV transmission. The court declared that such programme should include counselling, voluntary testing and availability of treatment to reduce mother-to-child transmission. The court ordered government to, without delay, remove restrictions on the availability of Nevirapine; permit and facilitate its use and make it available when medical practitioners consider it appropriate treatment; and provide counselling and testing facilities throughout the public health sector.

Impact on Women's Rights

- Socio-economic rights of benefit in health care to women may be enforced in appropriate circumstances
- All pregnant women are entitled to receive, progressively, nevirapine or equivalent treatment and related counselling and testing to reduce mother-to-child HIV transmission

Case Overview

Minister of Health and Others v Treatment Action Campaign and Others was a socio-economic rights case which dealt with the adequacy of government responses to mother-to-child HIV transmission in the light of the right to health care as provided in section 27 of the Constitution. The applicants, the Treatment Action Campaign with a number of associations and members of civil society sought a court order to compel the respondent, the Minister of Health and Others to provide a comprehensive programme to prevent intrapartum (during pregnancy) mother-to-child transmission of HIV.

As part of a variety of responses to the HIV pandemic, the government devised a programme to deal with mother-to-child transmission of HIV at birth and identified Nevirapine as its drug of choice for this purpose. However, the programme imposed restrictions on the availability of Nevirapine in the public health sector. Unhappy with the restrictions, and having tried to request government to extend its programme for the prevention of intrapartum mother-to-child transmission of HIV to other areas, the applicants approached the Pretoria High Court to seek an order compelling government to do so.

The Pretoria High court granted the order, dismissing the Minister of Health's argument that the extension was premature as they were still conducting a study on the viability and safety of nevirapine, its drug of choice, and that there were concerns about, amongst other things, the safety and efficacy of Nevirapine. The Minister of Health had also announced that each province would select two sites for further research and the use of the drug would be confined to those particular research sites. The applicants successfully argued that when measured against the Constitution, these restrictions were unreasonable.

The government's appeal to the Constitutional Court against the findings and the order of the High Court was successful. Although the Constitutional Court confirmed the High Court's order, it substituted the High Court's order with comparable orders.

The Constitutional Court declared that section 27(1) and (2) of the Constitution require the government to devise and implement, within its available resources, a comprehensive and co-ordinated programme to progressively realise the rights of pregnant women and their newborn children to have access to health services in order to combat mother-to-child transmission of HIV; that this programme had to include reasonable measures for counselling and testing pregnant women for HIV,



counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.

The court further found that the policy for reducing the risk of mother to child transmission of HIV as previously formulated and implemented by government fell short of compliance with these requirements.

The Constitutional Court ordered the respondents to immediately remove, the restrictions preventing Nevirapine from being made available for the purposes of reducing the risk of mother-to-child transmission of HIV to all public hospitals and clinics. The Court further ordered the respondents to permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available at hospitals and clinics when in the judgment of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned this was medically indicated, which would include if necessary, appropriate testing and counselling of the mother concerned, making provision if necessary, for counsellors based at all public hospitals and clinics to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child HIV transmission; taking reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child HIV transmission.

Important Links

- Hoffman v South African Airways 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211(CC)
- Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC)
- PE Municipality Various Occupiers 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)
- Zondi v MEC for Council of Traditional Leaders 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC)



6. NATIONALITY AND IMMIGRATION

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)

Brief Summary

The court upheld an application to declare invalid section 25(9)(b) of the Aliens Control Act restricting foreign spouses from joining their South African spouses in South Africa. The court held that although the Constitution did not have a specific clause dealing with the protection of family rights, the right to enter into and to sustain a family relationship was critical and legislation that undermined family relationships constituted an infringement of the right to dignity. The court held that the effect of section 25(9) read with section 26(3) and (6) of the Act was to undermine marital relationships as foreign spouses could only continue to reside in South Africa while their applications for immigration permits were being considered if they were in possession of a valid temporary residence and that such temporary residence permits was often refused arbitrarily by the home affairs officials with unlimited discretion to issue them. The court noted that this often entailed that foreign spouses leave the country and where possible, be joined outside the country by the South African spouse and that women were most likely to suffer in these circumstances.

The court declared section 25(9)(b) unconstitutional and invalid but suspended the effect of the judgment for two years to allow government to change the law to insert criteria for refusal to grant or extend temporary residence permits. In the meantime, Home Affairs officials were ordered to take into account the constitutional rights of spouses and grant or extend the permits in question unless good cause existed for refusal, e.g. when the grant or extension of a permit would constitute a real threat to the public.

Impact on Women's Rights

- Rights of families to live together enhances gender equality since women are often left alone with children in migrant relationships
- Home Affairs is to exercise discretion in the award of permanent residency, within constitutional limits and transparency thus reducing the scope for corruption.

Case Overview

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) dealt with an application to the Constitutional Court for confirmation of an order of constitutional invalidity of section 25(9)(b) read with section 26(3) and (6) of the Aliens control Act, brought by spouses, one of whom was South African and the other a foreigner who was seeking an immigration permit to settle in South Africa. The applicants had applied to the Cape High Court for an order declaring, amongst others, section 25(9)(b) of the Aliens Control Act 96 of 1991 to be in conflict with the Constitution on the ground that it, inter alia, infringed the applicants' right to dignity, in particular, because it provided that an immigration permit could be granted to the spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary residence permit. If the foreign spouse of a South African citizen did not have such a permit such a spouse would either have to be separated from his/her spouse and leave the country until the application for the permit was processed, or the South African spouse would have to leave the country together with the foreign spouse.

The Constitutional Court based its finding on human dignity since South Africa does not have a specific provision protecting family life as in other constitutions and in many international human rights instruments. The court held that the decision to enter into a marriage relationship and to sustain such a relationship was a matter of defining significance for many and to prohibit the establishment of such a relationship impaired the ability of the individual to achieve personal fulfilment in an aspect of life that was of central significance.

According to the court, the effect of section 25(9), read with sections 26(3) and (6) of the Act was that foreign spouses could only continue to reside in South Africa while their applications for immigration permits were being considered, if they were in possession of valid temporary residence permits.

Given the fact that such applications were not automatically granted but had to be considered on their merits, in essence these provisions authorized immigration officials and the Director-General of Home Affairs to refuse to issue or extend such temporary permits. The effect of such refusal, according to the court, was that a South African married to a foreigner was forced to choose between going abroad with his or her partner while the application was considered and remaining



in South Africa alone. Many South African spouses would not even have faced this dilemma on account of their poverty or other circumstances and would have had to remain in South Africa without their spouses.

The court further found that the effect of section 25(9)(b), read with sections 26(3) and (6), resulted in an unjustifiable infringement of the constitutional right of dignity of applicant spouses who were married to people lawfully and permanently resident in South Africa.

The court granted an order in the form of a *mandamus*, requiring immigration officials and the Director-General, when exercising the discretion conferred upon them by sections 26(3) and (6) in relation to applicants who were people referred to in sections 25(4)(b) or (5) of the Act, to take into account the constitutional rights of such people and to issue or extend temporary permits to such people unless good cause existed to refuse to issue or extend such permits. Good cause, would be established, for instance, where it has been shown that the issue or extension of a permit, even for the temporary period until the immigration permit application had been finalised, would have constituted a real threat to the public.

Important Links

- *Booyesen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC)
- *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA (1) CC; 2000 (1) BCLR 39 (CC)

***Booyesen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC)**

Brief Summary

The Constitutional Court confirmed, with slight variation, a Cape High Court order declaring unconstitutional and invalid, section 26(2)(a) and section 26(3)(b) of the Aliens Control Act. Relevant provisions required an application by a foreign spouse for a work permit to be only made while the applicant is still outside the country and that the issuing of such work permits be restricted to occupations where there is an insufficient supply of local persons. The court suspended its order for a period of 12 months to give Parliament an opportunity to remedy the defect that resulted from the declarations of invalidity but stipulated that should the legislature fail to act within this period, applications by resident foreign spouses for work permits should be accepted unless good cause for refusal was established.

Impact on Women's Rights

- A major breakthrough for women as they usually are the ones who follow their spouses to the spouse's country
- Women who are foreign spouses may now get work permits, when they are resident in South Africa, unless Home Affairs officials are able to show good cause for not granting such permits.

Case Overview

Booyesen and Others v Minister of Home Affairs and Another 2001 (4) SA 485 (CC); 2001 (7) BCLR 645 (CC) dealt with the constitutional validity of section 26(2)(a) of the Aliens Control Act 96 of 1991 which provides that an application in terms of section 26 for a work permit may only be made while the applicant is outside the Republic and that such applicant shall not be allowed to enter the Republic until a valid permit has been issued to him or her, and section 26(3)(b) read with section 25(4)(a)(iv) which provides that the Director-General shall only issue a work permit if the applicant does not and is not likely to pursue an occupation in which in the opinion of the regional committee a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic.



The case involved spouses in four marriages involving nationals and foreign spouses who were not in possession of immigration permits. In the Cape High Court, the applicants contended that the effect of section 26(2)(a) of the Act was seriously to disrupt their family life and to impede the possibilities of their living together and giving each other marital support. They also contended that the effect of subparagraph (iv) was to prevent foreign spouses from working if they did not have scarce occupational skills, pointing out that in many cases the foreign spouse was the sole or main provider for the family and this highly restrictive provision prevented them from fulfilling their duty to support their families.

Although the Minister of Home Affairs and the Director-General of the Department of Home Affairs initially opposed the applications, this changed after the judgment of the Constitutional Court in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others*.

The High Court found the impugned statutory provisions to be inconsistent with the Constitution and invalid.

The Constitutional Court confirmed the decision of the High Court but varied the order of the court. The court declared section 26(2)(a) of the Aliens Control Act to be inconsistent with the Constitution and invalid but suspended the order for 12 months to give Parliament an opportunity to amend the law. In the interim, applications by resident foreign spouses for work permits had to be accepted.

The court also declared section 26(3)(b) of the Act to be inconsistent with the Constitution and invalid, suspending the declaration of invalidity for 12 to enable Parliament to pass legislation to change the law. The court ordered that in the interim Home Affairs officials were not to refuse permits when exercising their discretion, unless good cause was established to justify the refusal.

Important Links

- *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)



7. POSITIVE MEASURES & OTHER AREAS OF THE LAW

President of South Africa v Hugo 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)

Brief Summary

The Constitutional Court dismissed an application by a father to have the court declare unconstitutional a presidential act involving the remission of the sentences of mothers with children, whose sentences were less than 12 years, without extending the same privilege to fathers with children under 12. Having indicated that equality does not mean similar treatment in unidentical circumstances and often means treating people differently as a positive measure to redress past imbalances, the court held that the presidential pardon of mothers in prison on May 10, 1994 was constitutional and did not constitute unfair discrimination on the ground of gender even though no similar privilege was extended to fathers. The court held further, that the Act did not violate the dignity and equal worth of men and or perpetuate the systemic disadvantages of the past.

Impact on Women's Rights

- Equality does not necessarily mean treating persons identically regardless of differing circumstances. Equality often entails treating women and men differently to accommodate their differences.
- To achieve equality between women and men, short term preferential treatment of women may be necessary
- The achievement of gender equality often entails practical short term measures that embrace their gendered circumstances and sometimes means focussing on women's long term strategic gender needs. The latter involves breaking down the gender stereotyping of women.

Case Overview

President of South Africa v Hugo 1997(4) SA 1 (CC); 1997 (6) BCLR 708 (CC) dealt with a constitutional challenge of the President's administrative act of remitting the sentences of mothers of children under twelve years and not extending the same privilege to fathers with children under 12. The court dismissed the suggestion that simply because both sets of mothers and fathers had children under 12, that their position as parents was identical. Noting the historical gender division of

labour in society and in particular the different roles played by men and women in respect of child upbringing and related family responsibilities, the court held that the president's action did not constitute unfair discrimination in violation of section 8 in the Interim Constitution.

The action arose from the President's exercise on, 10 May 1994, of his power to remit sentences of prisoners. Only female prisoners with children under 12 had their sentences remitted. Hugo, a father within the same category, challenged the President's action, arguing that it violated the right to equality as it discriminated unfairly on the ground of sex against similarly situated men.

The case centred on whether or not fathers with children in the same age category were similarly situated and therefore deserved the same privilege. The majority of the court held that women as parents were a disadvantaged group and not men and accordingly female parents deserved special treatment. The court held that although both fathers and mothers may have children in the same category, it does not follow that they are similarly situated as mothers tend to take most of the responsibility of parenting.

The court held further, that the President's action did not impair men's sense of human dignity and equal worth and did not have the impact of perpetuating entrenched systemic inequalities of the past. It was further held that the decision en masse remission of sentences of mothers did not preclude fathers in similar circumstances to approach the President individually and plead their special circumstances.

Important Links

- Bannatyne v Bannatyne 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC)
- City Council of Pretoria v Walker 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC)
- Minister of Finance and Others v South African Airways 2000 (1) BCLR 1211 (CC)



8. OVERVIEW OF OTHER NOTEWORTHY CASES

Brief Summaries of other Cases with a Positive Impact on Women's Rights

1. ***Bezuidenhout v Bezuidenhout* SCA-364/2003, decided August 24, 2004:** Where parties are married out of community of property, it is unfair discrimination to undervalue the role of the housewife and mother, as traditionally conferred upon women by society. Her contribution as a homemaker must be afforded some weight in the division of the estate upon divorce. Direct contribution to the family or spouse's business must also be taken into account.
2. ***Brink v Kischoff* NO 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC):** Insurance provisions that deprive married women equal benefits constitutes unfair discrimination in violation of section 9 of the Constitution. The Constitutional Court declared section 44(1) and (2) of the Insurance Act, 27 of 1943, unconstitutional and invalid.
3. ***Daniels v Campbell NO and Others* 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC):** The word "spouse" in the Intestate Succession Act, 81 of 1997 and the Maintenance of Surviving Spouses Act of 1990, includes the surviving partner to a monogamous Muslim Marriage and accordingly women married under Muslim law may inherit, claim maintenance from and be appointed as administrators of their deceased husbands' estates.
4. ***Ferreira and Others v The State* [2004] JOL 13027 (SCA):** The history of various forms of domestic violence was found by the court to constitute substantial and compelling circumstances justifying a lighter sentence for an abused intimate partner (a woman) who had sought to escape her abuse by hiring contract killers to murder a man with whom she had had an abusive intimate domestic relationship for several years.
5. ***Fraser v Children's Court, Pretoria North and Others* 1997 (2) SA 218 (T); [1997] JOL 382 (T) or 1997 (2) BCLR 153 (CC); 1997 (2) SA 267 (CC).** Dispensing with a father's consent over the adoption of his extra-marital child constitutes unfair discrimination in violation of section 9 of the Constitution. However, the nature of the parent's relationship and the circumstances are to be given consideration in determining whether or not the father needs to be involved.

6. ***Harksen v Lane* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)**: The test for unfair discrimination in violation of section 9 of the Constitution involves crossing a number of hurdles or stages. The inquiry commences with establishing if a differentiation that is not rationally connected to a legitimate government purpose, occurred. The next step is to establish if the differentiation amounts to discrimination and then if the discrimination is unfair. If the discrimination is unfair the next step is to establish if such discrimination is justified under the limitations clause.
7. ***Hlophe v Mahlalela* 1998 (1) SA 449 (TPD)**: The payment of Lobolo is not a consideration in the determination of child custody. The paramountcy of the best interest of the child is the determining factor in the award of child custody.
8. ***Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (Tks)**: A customary marriage that is properly concluded under bona fide ignorance of an existing civil marriage is *void ab initio* but is regarded as a putative marriage for certain purposes, including child legitimacy.
9. ***Prior v Battle and Others* 1999 (2) SA 850 (Tk)**: Confirmation that marital power was abolished by the Matrimonial Property Act of 1988 as amended in 1997 and that the Rationalization of Justice Laws Act extended the abolition of marital power to the Transkei and other areas where different local laws previously applied.
10. ***Santam Bpk v Henrey* 1999 (3) SA 421 (SCA)**: A divorced spouse who had a legally enforceable maintenance claim against and was being maintained by a now deceased's ex-spouse has a legally enforceable duty of support against the deceased's ex-spouse's estate and against any person(s) responsible for the death of the ex-spouse. The approach in this case may be explored to assert the rights of women in putative marriages and other domestic partnerships.
11. ***Sonderep v Tondelli and Another* 2001 (1) SA 1171 (CC); 2001 (1) BCLR 152 (CC)**. The international abduction of a minor child either through unlawful removal or retention, is in violation of the Convention on Civil Aspects of International Child Abduction, which forms part of South African law since its domestication through the Convention on Civil Aspects of International Child Abduction Act, 72 of 1996.



Brief Summaries of Cases with an Indirect Positive Impact on Women's Rights

- 1. *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC):** Equality does not necessarily mean identical treatment and differentiation between township and suburban rates are justified if this is implemented as a measure to redress the historical legacy of systemic inequality.
- 2. *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC); 2003 (2) SA 198 (CC):** Statutory provisions that restrict adoption rights to married heterosexual couples discriminate unfairly on the grounds of sexual orientation in violation of section 9 of the Constitution.
- 3. *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 11 69 (CC); 2001 (1) SA 46 (CC):** The Constitution requires the state to devise and implement within available resources, a comprehensive and coordinated programme, to progressively realise the right to adequate housing and such programme must include the provision of relief for people with no roof over their heads or in crisis situations.
- 4. *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC):** Refusal to hire a person who is HIV positive solely because of their HIV status constitutes unfair discrimination in violation of section 9 of the Constitution.
- 5. *Metiso v Padongelukfonds* 2001 (3) SA 1142 (TPD):** Child adoption that is properly performed under and announced as required under customary law but not formally registered, is recognised by law and accepted as a legal basis for adoptive parents' enforceable duty to maintain the child and the child's claim against the deceased estate and or person(s) responsible for the adoptive parent's death. The best interests of the child is the test.
- 6. *Minister of Finance and Others v Van Heerden* 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC):** Legislative and other positive measures that properly adhere to the requirements of section 9(2) of the Constitution are not presumptively unfair.

6. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC): Eviction order not granted to a Municipality who had not taken reasonable measures to determine the circumstances of land occupiers and to explore alternative accommodation or land.
7. *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC): Metrorail's has a positive duty to protect train passengers from violent attacks.
8. *Satchwell v President of RSA & Others* 2003 (4) SA 266 (CC): Denying benefits to persons in same sex domestic relationships is unconstitutional.
9. *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC): The sale in execution of people's homes without judicial oversight is unconstitutional.
10. *Zondi v MEC for Council of Traditional Leaders* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC): Ordinance allowing immediate seizure and impoundment of trespassing livestock, is unconstitutional and invalid



9. CASE INDEX

Violence Against Women

Rape & Public Violence

- *Carmichelle v Minister of Safety and Security* 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC)
- *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA); [2002] 4 All SA 322 (SCA)
- *S v Chapman* 1997 (3) SA 341 (SCA)
- *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC)

Sexual Harassment

- *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C)

Domestic Violence

- *S v Baloyi (Minister of Justice Intervening)* 2000 (2) SA 425 (CC); 2000 (1) BCLR 86 (CC)
- *Narodien v Andrews* 2002 (3) SA 500 (CC)

Family Law

Maintenance

- *Bannatyne v Bannatyne and Another* 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC)
- *Mngadi and Beacon Sweets & Chocolates and Others* 2003 2 All SA 279 (D)
- *Visser v the State* [2004] 1 All SA 605 (SCA)
- *Peterson v Maintenance Officer* 2004 (2) SA 56 (C); [2004] 1 All SA 426 (C)

Child Custody

- *Sonderup v Tondelli and Another* 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC)
- *Hlophe v Mahlalela and Another* 1998 (1) SA 449 (TPD) *

Adoption

- *Fraser v Children's Court* 1997 (2) BCLR 153 (CC); 1997 (2)_SA 261 (CC)
- *Du Toit and Another v the Minister for Welfare and Population Development* 2002 (10) BCLR 1006 (CC); 2003 (2) SA 198 (CC)*
- *Metiso v Padongelukfonds* 2001 (3) SA 1142 (TPD)

Proprietary Rights

- *Brink v Kitshoff NO* 1996 (4) SA 197 (CC); 1996 (6) BCLR 798 (CC)
- *Bezuidenhout v Beizendenhuit* 2005 (2) SA 187 (SCA)
- *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC)
- *Prior v Battle and Others* 1999 (2) SA 850 (Tk)

Customary Marriages

- *Thembisile and Another v Thembisile and Another* 2002 (2) SA 209 (T)
- *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509

Succession

- *Moseneke and Others v Master of the High Court* 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC)
- *Bhe and Others v the Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; South African Human Rights Commission v President of South Africa* 2005 (1) SA 563 (CC); 2005 (1) BCLR 1 (CC)
- *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA)
- *Daniels v Campbell NO and Others Case* 2004 (7) BCLR 735 (CC); 2004 (5) SA 331 (CC)
- *Santam Bpk v Henry* 1999 (3) SA 421 (SCA)

Socio-Economic Rights

- *Minister of Health and Others v Treatment Action Campaign and others* 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)
- *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC)*
- *Zondi v MEC for Council of Traditional Leaders* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC)
- *Jaftha v Schoeman and Others* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC)



Nationality and Immigration

- *Dawood, Shalabi and Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC)
- *Booyesen and others v Minister of Home Affairs and Another* 2001(4) (SA) 485 (CC); 2001 (7) BCLR 645 (CC)

Positive Measures and Other Rights

- *President of South Africa and Another v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC)
- *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC)*
- *Minister of Finance and Others v Van Heerden* 2004 (11) BCLR 1125 (CC); 2004 (6) SA 121 (CC)*
- *Hoffman v South African Airways* 2000 (11) BCLR 1211 (CC); 2001 (1) SA 1 (CC)*

* Case does not deal with women's rights or gender equality.



10. WHERE TO GO FOR HELP

If you need any help in respect of any of the above, you may contact any of the following institutions:

- **Justice Centres or Legal Aid Board Offices**
- **Your Nearest Magistrate or Maintenance Court**
- **Your Nearest Equality Court**
- **A Police Station (Violence and Other Crimes Unit)**
- **Commission for Gender Equality (CGE) Offices**
- **Your Nearest Family Court**
- **South African Human Rights Commission Offices**
- **Law Clinics at Various Universities**
- **And Various NGO's**

PROVINCE	INSTITUTION	TELEPHONE	ADDRESS
GAUTENG	Department of Justice and Constitutional Development	011 223 7600 011 331 0452/1062	Commissioner Street, Carlton Centre, 16th Floor, JHB
	Legal Aid Board: Justice Centre	011 877 2000	29 De Beer Street, Braamfontein, Johannesburg
	Equality Court & Magistrate Court	011 491 5000	Corner Fox & Mariam Makeba Street, Magistrates Court
	Commission for Gender Equality	011 403 7182	2 Kotze Street, Old Women's Jail, East Wing, Constitution Hill, Braamfontein Johannesburg
	South African Human Rights Commission	011 484 1380 /1360	29 Princess of Wales Terrace, Cnr York and St Andrews Street, Parktown, Johannesburg
	Wits Law Clinic	011 717 8562	1 Jan Smuts Avenue, Braamfontein, 2107
	University of Pretoria Law Clinics	012 420 4155	UP Law Clinic, Room 5/95 Academy Road, Pretoria
	Legal Resources Centre	011 836 9831	7 th floor, Bram Fisher House, 25 Rissik Street, Cnr Main Ghandi Square
	People Opposed to Women Abuse (POWA)	011 642 4345/6	P O Box 93416 Yeoville 2143
	Centre for Study of Violence and Reconciliation (CSVr)	011 403 5650	4 th Floor, Braamfontein Centre, 23 Jorissen Street, Johannesburg
	Tshwaranang Legal Advocacy Centre	011 403 8230/4267	23 Jorissen Street Braamfontein Centre, Johannesburg
	Gender Directorate, Department of Justice and Constitutional Development	012 315 1670/1	Momentum Building , 329 Pretorius Street, Pretoria



WESTERN CAPE	Department of Justice and Constitutional Development	021 462 5471/79 021 462 3135	Plein Park Building, 11th floor, Plein Street, Cape Town, 8000
	Equality Court & Magistrate Court	021 572 1003	Magistrate Offices Atlantis
	South African Human Rights Commission	021 426 2277	7 th Floor ABSA Building, 132 Adderley Street, Cape Town
	Commission for Gender Equality	021 426 4080/3	132 Adderley Street, 5 th Floor, Absa Building, Cape Town, 8001
	Women's Legal Centre	021 421 1380	4 th Floor Pearl House, 19 Adderley Street, Heerngracht, Cape Town
	Centre for Study of Violence and econciliation (CSV)	021 447 3661	501 Premier Centre, 451 Main Road Observatory, Cape Town
	Legal Aid Board: Justice Centre	021 426 4074	85 St George's Mall, Nedbank Building, Cape Town
	Ilitha Labantu	021 633 2383/78	NY 22 No. 26 (a) Guguletu
	University of Cape Town, Law Clinic	021 650 3551	Kramer Law School Building, Middle Campus, 1 Stanley Road
EASTERN CAPE	Department of Justice and Constitutional Development	043 702 7106 or 721 2782 043 721 1463	No. 3 Phillip Frame Road; Weaverly Park Chishurst, East London, 5200
	South African Human Rights Commission	041 582 4094/2611/4302	7 th Floor, Suite 22, Allied Building, 93 Govan Mbeki Avenue, Port Elizabeth
	Legal Aid Board: Justice Centre	043 704 4700	1 Commissioner Street, East London, 5201
	Commission for Gender Equality	043 722 3489	42-44 Oxford Street Cnr. Terminus & Oxford Streets, 3rd Floor Permanent Building, East London, 5200

NORTHERN CAPE	Department of Justice and Constitutional Development	053 8390000/1 053 832 7428	Cnr Stead & Knight Streets, New Public building, Kimberly. 8301 Private Bag x 6106, Kimberley, 8300
	South African Human Rights Commission	054 332 3993/4/5293	1 st Floor Ancorley Building, 50 Mark Street, Upington
	Legal Aid Board: Justice Centre	053 832 2348	43 Sydney Street, Kimberly, 8300
	Commission for Gender Equality	053 832 0477	Cnr. George & Jones Streets, 5th Floor Eskom Building, Kimberley 8301
NORTH WEST	Department of Justice and Constitutional Development	018 389 8302 018 384 2406	Dr Luthuli Street, C/N University Drive, Tirelo Building 3rd Floor Room 3.14, Mmabatho, 2735
	South African Human Rights Commission	041 592 0694	17 Klopper Street, Rustenburg
	Legal Aid Board: Justice Centre	018 384 4261	3 rd Floor East Gallery, Mega City, Mmabatho, 2735
	Commission for Gender Equality	018 381 1505	38 Molopo Road, Mafikeng, 2745
	University of Potchefstroom, Law Clinic	018 293 0045	Cnr Van der Hoff & Meyer Street, Potchefstroom
FREE STATE	Department of Justice and Constitutional Development	051 407 1800/5 051 448 4458	71 Maitland Street, Old Sanlam Building, Bloemfontein 9300
	South African Human Rights Commission	051 447 1130/3	1 st Floor TAB Building, 50 East Burger Street, Bloemfontein
	Commission for Gender Equality	051 430 9348	49 Maitland Street, 2nd Floor, Fedsure Building, Bloemfontein 9300, South Africa
	University of Free State Law Clinic	051 447 9915	2 nd Floor, 113 St Andrews Street, Bloemfontein
KWAZULU NATAL	Department of Justice and Constitutional Development	031 301 5348 031 301 5341	No 2 Devonshire Place; Smith Street, Durban, 4000



	South African Human Rights Commission	031 304 7323/4/5	136 1 st Floor, Victoria Embankment, Durban
	Commission for Gender Equality	031 305 2105	40 Commercial Street, 3 rd Floor Office 313, Commercial City, Durban 4001
	Legal Aid Board: Justice Centre	031 304 3290	Suite 401 Salsbury House, 332 Smith Street, Durban, 4001
	Legal Resources Centre	031 301 7572	N240 Diakonia Centre, 20 Diakonia Avenue, Durban
	University of Kwa Zulu Natal , Law Clinic	031 260 2446	Room 49 Howard College, Univ of Kwa Zulu Natal, Howard College Campus
LIMPOPO	Department of Justice and Constitutional Development	015 297 5562/86 015 297 5570	92 Bok Street, Polokwane 0700
	South African Human Rights Commission	015 291 3500/4	1 st Floor , Office 102, Library Gardens Square, Cnr Schoeman and Gliber Street Polokwane
	Commission for Gender Equality	015 291 3070	Cnr Grobler & Schoeman Street, 1 st Floor, Office 106 Library, Garden Square, Polokwane 0700
	Legal Aid Board: Justice Centre	015 291 2429	2 nd Floor Pioneer Building, 52 Landdros Mare Street, Polokwane, 0700
	University of the North Law Clinic	015 268 2506/4506	University of the North, Law School Building
MPUMALANGA	Department of Justice and Constitutional Development	013 752 8393 013 752 2666	24 Brown Street, Nedbank Centre 4 th Floor, Nelspruit, 1200
	South African Human Rights Commission	013 752 5870/8292/5890	4 th Floor Carltex Building, 32 Bell Street, Nelspruit
	Commission for Gender Equality	013 755 2428	32 Bell Street, Office 212-230, Nelspruit 1200
	Legal Aid Board: Justice Centre	013 753 2154	Room 806 Nedbank Centres, 30 Brown Street, Nelspruit

