Reportable

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 71/98

In the matter between

MILDRED HLEZIPHI MTHEMBU **Appellant**

and

HENRY K LETSELA **1st Respondent**

The MAGISTRATE, Boksburg **2nd Respondent**

Coram: **Smalberger, Marais, Zulman JJA, Mpati and Mthiyane AJJA**

DATE HEARD: 4 May 2000

DATE DELIVERED: 30 May 2000

JUDGMENT

Mpati AJA

[1] This is an appeal against a judgment of Mynhardt J in the Transvaal Provincial Division, which is reported as *Mthembu v Letsela and Another* 1998 (2)

SA 675 (T) (the 1998 judgment).

[2] Tebalo Watson Letsela (the deceased) died on 13 August 1993, gunned down by an unknown person or persons. At the time of his death he was the holder of a 99 year leasehold title in respect of a fixed property known as Erf 822 Vosloorus Extension 2 Township, Registration Division I.R.,Transvaal, situate at 822 Ditopi Street, Vosloorus, Boksburg (the property). He lived on the property with the appellant and her two minor daughters, one of whom, Tembi Mthembu (Tembi), was born of an intimate relationship between the appellant and the deceased. Tembi was born on 7 April 1988. The deceased, a South Sotho, had no other issue, but is also survived by his father, the first respondent in this matter, mother and three sisters. He died intestate. His parents, together with one of their daughters and her children, share the same house on the property with the appellant and her two daughters.

[3] The magistrate, Boksburg (the second respondent), appointed the appellant, in terms of regulation 4(1) of the regulations made in terms of the Black Administration Act 38 of 1927 (the Act) and published under Government Notice R200 of 6 February 1987, to administer the estate of the deceased. He indicated in a letter to the appellant's legal representatives that the deceased's estate was to devolve in terms of Black law and custom . The first respondent claims that the

property has devolved upon him by virtue of the operation of the customary law rule of succession.

[4] The appellant brought an application in the Transvaal Provincial Division for an order, *inter alia,* declaring:

1 the customary law rule of primogeniture, which generally excludes African women from intestate succession; and

2 regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks, made in term of s 23(10) of the Act and promulgated under Government Notice R200 of 6 February 1987, (the Regulations),

to be invalid on grounds of being inconsistent with the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution).

Mynhardt J dismissed the application with costs, but granted the appellant leave to appeal to this Court.

[5] In her founding affidavit the appellant alleges that on 14 June 1992 she and the deceased entered into a customary union at Brakpan. In support of this allegation she has annexed to her founding affidavit a copy of an acknowledgment of receipt of the first instalment of R900,00 towards her *lobola* of R2 000,00, signed by her brother, Richard Mtembu. The balance was to be paid soon thereafter. The deceased, however, died before it was paid. The appellant accordingly claims, on the strength of the affidavits filed in the papers, to be the deceased's widow.

[6] That an amount of R900,00 was paid towards the appellant's *lobola* is

not in dispute, but the first respondent denies that a customary union was ever entered into as alleged and states that certain essentials of a customary union were not satisfied.

[7] The matter first came before le Roux J, who was unable to resolve the factual dispute relating to the existence or otherwise of a customary union between the appellant and the deceased. The learned judge referred that issue for oral evidence. The matter was accordingly postponed *sine die*. The judgment of Le Roux J is reported as *Mthembu v Letsela and Another* 1997 (2) SA 936 (T) (the 1997 judgment). When the case came before Mynhardt J, however , no evidence was led and counsel were *ad idem* that the matter "stands to be determined on the facts that are common cause". Counsel for the appellant (before Mynhardt J) went further and said that "because no evidence has been tendered from either side the [appellant] accepts that the matter is to be decided on the basis that there was indeed no such marriage between the parties". The matter was accordingly decided on the basis that Tembi is the deceased's illegitimate child. Counsel for the appellant, however, submitted in the court *a quo* that on the facts which were common cause Tembi is the only heir to the estate of the deceased. That argument was persisted in before us by Mr Gauntlett, who, together with Mr Chaskalson, appeared for the appellant.

[8] The customary law of succession in Southern Africa is based on the principle of male primogeniture. In monogamous families the eldest son of the family head is his heir, failing him the eldest son's eldest male descendant. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds. Bekker: *Seymour's Customary Law in Southern Africa*, 5 ed, p 274*;* Bennett: *A Sourcebook of African Customary Law for Southern Africa,* 1 ed (1991) p 399-400. See also Kerr: *The Customary Law of Immovable Property and of Succession,* 3 ed, p 99. It follows that in terms of this system of succession, whether or not Tembi is the deceased's legitimate child, being female, she does not qualify as heir to the deceased's estate. Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources, and not to expel them from his home. Kerr, *op cit* at 100-108.

[9] The customary law of succession, i.e. the principle of primogeniture, also enjoys legislative recognition. It is embodied, for example, in regulation 2 of the Regulations, which reads as follows:

> "2 If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:
> (a) ....
> (b) ....
> (c) ....
> (d) ....
> (e) If the deceased does not fall into any of the classes described in paragraph (a), (b), (c) and (d) the property shall be distributed according to Black law and custom."
> (My underlining)

It is not in dispute that *in casu* regulation 2(e), if valid, applies, i.e. the deceased's estate falls to be distributed according to Black law and custom.

[10] Both before Le Roux J and Mynhardt J, as well as before this Court, it was argued that the rule of customary law of succession, i.e. the principle of primogeniture (the rule) is grossly discriminatory; that it discriminates against all Black women and girls and all Black children who are not eldest children by excluding them from participation in intestate succession, while it does not visit the same disability upon eldest sons or anybody who is not Black.

[11] In dealing with an argument that the rule is obviously unconstitutional

on the basis that it contravenes ss 8(1), 8(2) and 14 of the interim Constitution as it discriminates between persons on the grounds of sex or gender, Le Roux J said the following in the 1997 judgment (at 945H-946C):

> " If one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of primogeniture (a feature which has been called 'one of the most hallowed principles of customary law - see T W Bennett *A Source Book of African Customary Law for Southern Africa* (Juta, 1991) at 400), I find it difficult to equate this form of differentiation between men and women with the concept of 'unfair discrimination' as used in s 8 of the Constitution. ... In view of the manifest acknowledgment of customary law as a system existing parallel to common law by the Constitution (*vide* ss 33(3) and 181 (1)) and the freedom granted to persons to choose this system as governing their relationships (as implied in s 31), I cannot accept the submission that the succession rule is necessarily in conflict with s 8. There are other instances where a rule differentiates between men and women, but which no right- minded person considers to be unfairly discriminatory. ... It follows that even if this rule is *prima facie* discriminatory on grounds of sex or gender and the presumption contained in s 8(4) comes into operation, this presumption has been refuted by the concomitant duty of support."

[12] The learned judge found that the rule is not inconsistent with "the fundamental rights contained in chap 3 [of the interim Constitution] and the injunction found in s 33 (3) can accordingly be implemented, namely to construe the chapter in such a way as not to negate" the rights conferred by the rule (at 946 C-D). For convenience I quote s 33 (3) of the interim Constitution. It reads:

> "The entrenchment of the rights in terms of this Chapter [Chapter 3] shall not be construed as denying the existence of any other

> rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter."

[13] In this Court (and before Mynhardt J) four grounds of attack were advanced against the operation of the rule. These are:

> 1 The regulation (regulation 2(e) of the Regulations) is *ultra vires* at common law; it constitutes delegated legislation which may not be partial and unequal in its operation unless specifically authorized by the enabling Act.
>
> 2 The regulation has been impliedly repealed by s 1(1) read with 1 (4) (b) of the Intestate Succession Act 81 of 1987.
>
> 3 The rule is to be developed in terms of section 35 (3) of the interim Constitution with due regard to the fundamental value of equality, to avoid discrimination between children of a deceased.
>
> 4 If not so developed the rule would be repugnant to the "principles of public policy or natural justice" within the meaning of s 1 of the Law of Evidence Amendment Act 45 of 1988, and the courts will accordingly not apply it.

Mynhardt J dismissed all four grounds of attack.

[14] In their supplementary heads of argument counsel for the appellant (who are not the counsel who represented the appellant before Le Roux and Mynhardt JJ and who drafted the main heads of argument) state that the appellant "will not advance oral argument relating to the principal submissions" under the

first and second grounds of attack. Mr Gauntlett stressed, however, that this did not mean that they were abandoning the said two grounds, but that their argument would focus on the following propositions:

1 Tembi would have succeeded by intestate succession at customary law to her deceased father's estate but for the fact that she is female.

2 The customary law rule of primogeniture is offensive to public policy or natural justice (within the meaning of s 1(1) of the Law of Evidence Amendment Act , 1988) because it is incompatible with the value of equality which is a fundamental element of public policy in this country and this Court accordingly may not give effect to it.

3 Section 35(3) of the interim Constitution applies to this case, but even if it did not the argument in 2 above would hold true.

[15] Before I consider these submissions, it will be convenient to deal first with a preliminary issue raised before us. The court *a quo* held that Tembi was not a victim of gender discrimination because any illegitimate child of the deceased would have been disinherited. The learned judge expressed himself thus

(at 686E-G):

> "In the present case the applicant was not married to the deceased. Her child, Tembi, is therefore an illegitimate child *vis - a - vis* the deceased and his family. Tembi has no right to inherit intestate from the deceased. That is so simply because she is not the legitimate child of the deceased. It matters not that Tembi is a girl. Even an illegitimate son would have had no right to inherit intestate from the deceased. The disqualification of Tembi ... flows, therefore, from her status as an illegitimate child and not from the fact that she is a girl and that the system of primogeniture is applied in customary law."

[16] Mr Gauntlett submitted that this reasoning by Mynhardt J is flawed. First, it was argued that because there had been an agreement between the appellant and the deceased to marry and bridewealth had been paid in part, Tembi was, at customary law, the deceased's legitimate daughter. Mr Gauntlett sought support for this proposition from an article by Sandra Burman: *Illegitimacy and the African Family in a Changing South Africa,* 1991 Acta Juridica, 36, where the learned writer says the following at p 41:

> "In customary law a child born within a customary union is presumed to be legitimate and thus part of its father's family. However, as outlined above, the crucial element <u>in the marriage</u> which transfers the child into the father's family is not the ceremony, as in civil law, but the payment of bridewealth, at least in part." (My underlining)

[17] In my view, counsel's interpretation of this passage is incorrect. The

learned writer speaks of the crucial element " in the marriage" which transfers the child into the father's family as being payment of bridewealth or part of it. There must thus be a marriage (customary union) and not merely payment of bridewealth or part of it for the child to be "transferred" into its father's family. The position with regard to an illegitimate child is that he or she is legitimized by subsequent payment of dowry or bridewealth and marriage of the parents. Warner: *A Digest of South African Native Civil Case law* 1894-1957, 60 para 720 and the cases there cited; Bekker, *op cit*, 232. The position is the same in Sotho custom. Bekker, *op cit*, 233.

[18] *In casu*, it is common cause that no customary union existed between the appellant and the deceased when Tembi was born. It is also common cause that no customary union was entered into subsequent to her birth. It follows that although part of the bridewealth was paid, without a customary union between her parents, Tembi was not legitimized. Mynhardt J was accordingly correct in holding that Tembi is illegitimate.

[19] Second, Mr Gauntlett argued that if Tembi was the illegitimate daughter of the deceased, she was still the victim of gender discrimination because in the absence of any legitimate sons of a deceased Black person, customary law recognizes the right of an illegitimate son, but not an illegitimate daughter , to

succeed to the intestate estate of the deceased. The *causa causans* of the fact that she did not inherit was her gender, not her illegitimacy, so it was argued. Her gender and her gender discrimination in the primogeniture rule are therefore determinative of the result and not her illegitimate status. For the proposition that an illegitimate son of a deceased Black person succeeds to his estate in the absence of a legitimate son, Mr Gauntlett relied on a passage in Bennett, *op cit,* 372, where the learned author states that:

> "Amongst the Southern Nguni ... an illegitimate son may succeed to the head of a household if there are no other male descendants."

[20] I mean no disrespect to counsel when I say that he misread this passage, which is immediately qualified by the following:

> ". . . (and provided that he had not been repudiated by the deceased or that his mother had not been driven away because of her adultery)."

Clearly the learned author refers to the illegitimate son of a married women, i.e. one born during the subsistence of a customary union between his mother and the deceased. *Baatje v Mtuyedwa* 1 NAC 110 (1906); *Ludidi v Msikelwa* 5 NAC 28 (1926), referred to in Bennett, *op cit,* 372 (footnote 158); also in Warner, *op cit,* paras 3167 and 3172. Mr Gauntlett's second proposition is thus also without foundation.

[21] I now proceed to consider the grounds of attack against the rule.

Regulation 2(e) of the Regulations is *ultra vires* at common law.

[22] Section 23(10) of the Act empowers the State President to make regulations, not inconsistent with the Act, *inter alia*, "prescribing tables of succession in regard to Blacks" (s 23 (10) (e)) . The Regulations are, therefore, a form of delegated legislation. Joubert: LAWSA, Vol 25 at 197, para 264. As such they may be declared to be invalid "on the ground of unreasonableness ... if they are found to be partial and unequal in their operation as between different classes, unless of course the enabling Act specifically authorizes such partiality and inequality". *R v Abdurahman* 1950 (3) SA 136 (A) 143 C-H, and the cases there cited. The question then is whether regulation 2(e) of the Regulations is unreasonable for being partial and unequal. Said regulation provides that if a Black person dies leaving no valid will and without having lived with someone as his putative spouse, or a partner in a marriage or customary union, his estate "shall be distributed according to Black law and custom". It is submitted in the appellant's main heads of argument that the regulation in issue gratuitously discriminates against women and girls, children who are not eldest children and illegitimate children. The enabling provision in s 23 of the Act does not permit such discrimination, so it was argued.

[23] What needs to be stressed from the outset is that the regulation in issue did not introduce something foreign to Black persons, as was the case in *Machika en Andere v Staatspresident en Andere* 1989 (4) SA 19 (T). It merely gave legislative recognition to a principle or system which had been in existence and followed, at least, for decades. It is not inconceivable that many Blacks, even to this day, would wish their estates to devolve in terms of Black law and custom. Section 23(3) of the Act provides that: "All other property of whatsoever kind [excluding property referred to in ss (1) and (2)] belonging to a Black shall be capable of being devised by will". The existing law therefore enables Blacks to avoid the consequences of the application of the customary law of succession if they so wish. It is therefore within the power of Blacks to choose how they wish their estates to devolve. If they take no steps to alter the devolution of their estates (as is their right), the resulting consequences cannot be assumed to be contrary to their wishes .

[24] As the wishes of the deceased are still paramount in our law, it is difficult to see how a regulation which respects that right can be said to the unreasonable and *ultra vires* at common law.

Regulation 2(e) has been impliedly repealed.

[25] The argument on behalf of the appellant is that there is an apparent

conflict between regulation 2 (e) of the Regulations and section 1 of the Intestate Succession Act 81 of 1987 (the Intestate Succession Act), and that being so the Intestate Succession Act, being an act of Parliament, must prevail over the regulation, which is subordinate legislation.

[26] The Intestate Succession Act came into operation on 18 March 1988. Section 1(1) prescribes how the estate of a person who, after the commencement of the said Act, dies intestate, either wholly or in part, shall devolve. Section 1(4) (b) is in the following terms:

> "(4) In the application of this section [s 1] -
>
> (a) ...
>
> (b) " intestate estate" includes any part of an estate which does not devolve by virtue of a will or in respect of which section 23 of the Black Administration Act 1927 (Act No 38 of 1927) does not apply;
>
> (c) ....
>
> (d) ....
>
> (e) ...
>
> (f) ..."

[27] Mynhardt J agreed with counsel's submission that the word "or" in ss (4) (b) of s 1 means "and". He agreed further that an "intestate estate" is thus an estate which devolves neither under a will nor under s 23 of the Act. In my opinion, this interpretation is correct.

[28] A law (which includes subordinate or delegated legislation) may be impliedly repealed "by a later repugnant law of the same or a superior legislature".

R v Sutherland 1961 (2) SA 806(A) 815 A; *New Modderfontein Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 at 397. If the later law "professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions". *New Modderfontein Gold Mining Co v Transvaal Provincial Administration*, *supra*, at 397. What is necessary, then, is to ascertain the "true interpretation" of the Intestate Succession Act, so as to establish its ambit.

[29] Section 1(4) (b) of the Intestate Succession Act excludes from its operation, *inter alia,* that part of the estate of a deceased which falls under s 23 of the Act. Section 23 (1) of the Act makes provision for the devolution and administration, by Black law and custom on the death of a deceased, of property which, for present purposes, may conveniently be termed "house property" . Such property devolves according to Black law and custom, i.e. in terms of the rule, whether or not the deceased dies intestate. If he dies intestate, house property will not devolve in terms of the Intestate Succession Act, but in terms of Black law and custom. That being the case it cannot be said, in my view, that the Intestate Succession Act "professes or manifestly intends to regulate the whole subject to which it relates", i.e. intestate succession. I am in any event of the view that the court *a quo* was correct in holding (at 683 J - 684 A of the 1998 judgment), that

once it is accepted , as it must be, that ss (10) of s 23 of the Act is included in the reference thereto in s 1 (4) (b) of the Intestate Succession Act, it follows that the Regulations are also included in that reference. By excluding s 23 of the Act from the operation of the Intestate Succession Act, the legislature clearly intended to preserve the rule.

[30] I am accordingly satisfied that regulation 2(e) of the Regulations has not been impliedly repealed by the Intestate Succession Act.

Development of the rule in terms of s 35 (3) of the interim Constitution.

[31] Section 35 (3) of the interim Constitution enjoins courts to develop the common law and customary law. It reads:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter".
> (See also s 39(2) of the final Constitution, Act 108 of 1996).

[32] Mr Gauntlett submitted that the rule is inconsistent with the value of equality enshrined in s 8(1) of the interim Constitution. Equality is one of the core values embodied in the Constitution. (See *Fraser v Children's Court , Pretoria North and Others* 1997 (2) SA 261 (CC) para 20; *President of the RSA and Another v Hugo* 1997 (4) SA 1 (CC) paras 41, 74 -76, 92; *Prinsloo v Van der Linde and Others* 1997 (3) SA 1012 (CC) para 31-33. Mr Gauntlett contended that the

rule is based on “inequality, arbitrariness, intolerance and inequity”, all of which are repugnant to the new constitutional order. He urged us to develop the rule, as we are enjoined to do by s 35 (3) of the interim Constitution, so as to allow all descendants, whether male or female, legitimate or illegitimate, to participate in intestacy, which will enable Tembi to inherit from the deceased’s estate. It would be a great injustice, so the argument continued, if Tembi is disinherited and “thrown out of her home” simply on the basis of her gender or illegitimacy.

[33] As the court *a quo* held, Tembi, of course, is excluded from inheriting because she is illegitimate. The question of gender discrimination is not reached in this case and it is not desirable to address a question of such constitutional importance in a case in which it is academic. She would be in the same position as, for example, illegitimate male children. What requires consideration, however, is whether the interim Constitution applies in the present matter, since it only came into operation on 27 April 1994, which was after the death of the deceased on 13 August 1993. Mr Tee, who, with Mr Carrington, appeared for the first respondent, submitted that the first respondent has a vested right in the estate of the deceased, which he acquired before the interim Constitution came into effect.

[34] In intestate succession the inheritance vests immediately upon the

death of the deceased. Corbett *et al*: *The Law of Succession in South Africa* (1980), at 134. The first respondent thus acquired a right to claim ownership of the property upon the death of the deceased. Tembi had no right to succeed the deceased as his heir. This is so because as an illegitimate child in customary law she belongs to her mother's family. Bekker, *op cit*, 233.

[35] The Constitution (both interim and final) does not operate retroactively. *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) para 13. At page 866 para 19 of that judgment Kentridge AJ said the following:

> " ... What is clear is that there is no warrant in the Constitution for depriving a person of property which he lawfully held before the Constitution came into force by invoking against him a right which did not exist at the time when the right of property vested in him."

In my view this statement clearly applies to the present matter.

[36] Mr Gauntlett, however, referred us to the following passage in the *Du Plessis v De Klerk* judgment (para 20):

> "...we leave open the possibility that there may be cases where the enforcement of previously acquired rights would, in the light of our present constitutional values, be so grossly unjust and abhorrent that it could not be countenanced, whether as being contrary to public policy or on some other basis."

This appeal, so it was argued, concerns such a case.

[37] I do not agree. An illegitimate child in customary law "belongs" to the maternal grandfather or his successor, who is obliged to provide for him or her. Such child may ultimately have rights of succession in the mother's family. Bekker, *op cit*, 296. There can thus be no question of Tembi being " thrown out of her home" (and by implication virtually left destitute) simply on the basis of her illegitimacy as was contended by Mr Gauntlett.

[38] We were referred to the decision in *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA), where this Court , at para 30, left open the question as to whether s 35(3) of the interim Constitution, or s 39 (2) of the final Constitution "can properly be applied in respect of a cause of action which arose before the commencement of the interim Constitution". In that case the issue for determination was whether the respondent was legally liable to compensate the appellant for loss of support of her deceased husband to whom she was married by Islamic rites. Their marriage was potentially polygamous. The appellant's husband had died in a motor collision on 25 July 1993, i.e. before the coming into operation of the interim Constitution. The court below had answered the question in the negative; this Court in the affirmative. At para 20 of the judgment the Chief Justice held that to deny the appellant compensation only on the basis that the only duty of support which the law will protect is that flowing

from a marriage solemnized and recognized by one faith or philosophy, to the exclusion of others ,is an untenable basis for the determination of the *boni mores* of society. He further held that such basis for determination of the *boni mores* of society "is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993". " The new ethos" , he said, "was firmly in place when the cause of action in the present matter arose on 25 July 1993."

[39] The *Amod* case was not about potentially competing rights. It does not assist the appellant in this matter.

[40] In my opinion, the present is not a case where the recognition and respecting of previously acquired rights would be so grossly unjust and abhorrent, in the light of the present constitutional order, that they cannot be countenanced; nor is this an appropriate case, on the facts, to entertain an invitation to develop the rule. In any event, we would be ill-equipped to develop the rule for lack of relevant information. Any development of the rule would be better left to the legislature after a process of full investigation and consultation, such as is currently being undertaken by the Law Commission.

The Law of Evidence Amendment Act, 1988.

[41] Section 1(1) of the Law of Evidence Amendment Act provides that any court may take judicial notice of indigenous law in so far as it can be ascertained readily and with sufficient certainty, with the proviso that such law shall not be opposed to the principles of public policy or natural justice. "Indigenous law" means customary law as has been referred to throughout this judgment (see s 1(4) of the Law of Evidence Amendment Act).

[42] The argument advanced under this ground of attack is that if the rule were retained in its present form and not developed to permit female participation in intestacy, then it would be profoundly offensive to public policy. Invoking a decision of this Court in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 13 J, Mr Gauntlett submitted that the rule, which he contended has an arbitrary and unjust effect, is clearly "unconscionable and incompatible with the public interest", and therefore contrary to public policy.

[43] This Court has held that the interests of the community or the public are of paramount importance in relation to the concept of public policy (*Sasfin v Beukes, supra*, at 8C-D, and that public policy "reflects the *mores* and fundamental assumptions of the community"; it is "the general sense of justice of the community, the *boni mores* manifested in public opinion". *Longman Distillers Ltd*

v Drop Inn Group of Liquor Supermarkets (Pty) Ltd 1990 (2) SA 906 (A) 913 G-H; *Schultz v Butt* 1986 (3) SA 667 (A) 679 C-E.

[44] As was said in *Schultz v Butt*, *supra*, at 679, questions of public policy may be important in a particular case, e.g. in matters such as where the validity of a contract is in issue. In my view, the present is not such a case. If , for example, the deceased had made a will in which he bequeathed the whole of his estate to his father, the first respondent, such bequest could not have been challenged on grounds of public policy. The deceased would have been perfectly entitled to bequeath his entire estate to his father. It cannot now be said, in my view, that the consequences of his dying without a will are contrary to public policy. The deceased may well have known what such consequences were and have been content not to alter them.

[45] Further, and as has been mentioned above, the rule is embodied in statute (s 23 (1) of the Act and also regulation 2 (e) of the Regulations). It cannot successfully be argued, in my view, that a statute can be struck down on grounds of public policy, which would be the effect if the rule were held to be invalid for being contrary to public policy as that concept is understood and applied in the common law.

[46] In the course of his argument Mr Gauntlett referred us to a judgment

of Levinsohn J in *Zondi v President of the Republic of SA and Others* 2000 (2) SA 49 (N), where the learned judge held certain provisions of regulation 2 of the Regulations to be inconsistent with the equality provision in the Constitution and therefore invalid. In my opinion, the facts of the present matter do not permit of a consideration of the correctness or otherwise of that decision.

[47] In conclusion, a *caveat* from Mr Tee for the first respondent:

To strike down the rule would be summarily to dismiss an African institution without examining its essential purpose and content. "Decisions like these can seldom be taken on a mere handful of allegations in a pleading which only reflects the facts on which one of the contending parties relies", per Hefer JA in *Minister of Law and Order v Kadir* 1995 (1) SA 303 (A) 318 H.

[48] The conclusion is that on all four grounds the appellant must fail.

[49] We were informed by counsel that irrespective of the result, neither of the parties would seek a costs order. Mr Tee also placed on record that the first respondent abandons the costs awarded in his favour in the court *a quo.*

[50] The appeal is dismissed.

MPATI AJA