

Access to Land in Post-apartheid South Africa: Implications for the South African Black Woman

After the post-apartheid constitutional transformation of 1993, the land policy of South Africa had to be revised to conform to the new constitutional order. However, it would seem that not much thought was given to the fact that South African black society was a patriarchal one in which women carried a heavier load in production and reproduction but did not enjoy equal rights in terms of access to resources like land (Meena 1992: 12). This paper evaluates the influence of customary law and post-apartheid reform legislation with a view to assessing their impact on the black woman's capacity to access land capacity. It argues that despite the revision of the past property relations, though salutary, early judicial decisions ignored significant gender elements in the country's property history.

The black woman and land

The restriction of the black woman's capacity to access land in South Africa falls within a wider context of the tendency that regards women as unequal to men. It is this tendency that explains why Mr McLoughlin, a European judge in South Africa, regarded the patently discriminatory subjection of women to tutelage under customary law as not inconsistent with the general principles of civilisation.¹

The quality of access to land in any community inevitably turns on the dominant features in the management of land in the community. While there are admittedly significant cultural differences in land tenures across South Africa, communal ownership is the common and most prevalent feature of indigenous land tenure in the country (Barry 2004).

This form of land holding fitted the way of life of ancient African communities because it had built-in safeguards to ensure fairness with regards to entitlements, duties and responsibilities. Succession rules under this system of land management were concerned more with ascending to status as family or clan head than issues of access through the distribution of family or clan property.² Corporately held property was invariably left in the unit to

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strengthen group stability and access to it was not dominated by exclusionary rules against women as such.

The colonial regime however had an ambivalent attitude towards customary law. At certain times it disregarded the customary rights of indigenous people to their ancestral land, thereby dispossessing Africans of land in favour of European arrivals.³ At other times, the colonialist distorted customary law to the disadvantage of women and children. Under the latter, customary property structure in the country was made unduly to stress the status of males in the family. *Sijila v Musumba*⁴ classically reflects this by defining family property as ancestral property in which the senior males of the Kraal head's family and indirectly the ancestors are concerned.

This notion enthrones the male head of the household as the only true person and holder of family property. Bennet (1991: 12) also made reference to a similar belief in the existence of a link between ancestors and land but quarrels with it for linking conceptual analysis to the metaphysical domain which 'obscures rather than clarifies' the issues involved. Although it is true that ancestral connections cannot be empirically demonstrated in property matters, this idea explains the notion that land belongs to a 'vast family of which many are dead, few are living and countless members are still unborn' (Fissy 1992: 6). Thus seen, it is difficult to discriminate against women in the distribution of land because to do so will expose them to the wrath of the ancestors (ibid)

The allusion may on the other hand be construed so as to raise significant negative consequences for the capacity of African women to access land. The linkage may result in the perception of land as playing an important ritualistic role. Land from this perspective is a medium

for performing rituals to commune with ancestral spirits – a symbolism that influences the vesting of land in male leaders who perform such rituals. The lack of understanding of traditional laws and customs by early European settlers in South Africa favoured the emergence of official customary law that is consistent with the latter restrictive interpretation.

Legislation and black woman's capacity to access land

The denial of land rights for black women was only a part of a broad legacy of centuries of land dispossession through racially discriminatory laws (Lahiff 2004). Marcus (Ibid) has stated that the Native Land Act No 27 of 1913 forced black women to work as labourers on white farms under labour tenancies that were easily subject to terminations. This made them more vulnerable to evictions than their male colleagues (Lahiff 2004).

A direct and more obnoxious restriction was introduced under the rules of customary law of succession created by Section 23 of the Black Administration Act No 38 of 1927. Subsections 1 and 2 of this provision which are particularly instructive because of their reinforcement of official customary law rules of succession state thus:

(1) All movable property belonging to a black and allotted by him or accruing under black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolved and be administered under Black law and custom.

(2) All land in a tribal settlement held in traditional tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under subsection (10).

This law was without doubt the culmination of colonial bias against the black woman and has been deservingly condemned. Its fossilisation of customs contributed to a situation where 'customary law was lamentably marginalised and allowed to degenerate into a vitrified set of

norms alienated from its roots in the community'.⁶

Although the Matrimonial Property Act, 1988, conceived as a response to a less discriminatory property bias against white women in civil marriages, introduced a spirit of justice and equality into property relations in South African marriages, it deliberately left out customary marriages in which the majority of black women were engaged (Goldberg 1994: 24) for reasons of racial bias. This meant that the bulk of black women living in rural areas were left out of the relief provided by this law during apartheid.

Black women and property rights after apartheid

Section 25 of the 1996 Constitution - the property clause of the new dispensation - marked a welcome departure from the past by re-conceptualising access to land for the previously disadvantaged as a human right. By mandating the state to take reasonable legislative and other measures 'to foster conditions which enable citizens to gain access to land on an equitable basis',⁶ it makes equity and fairness the new spirit that should underpin the rules of accessing land. The non-discrimination prohibitions in Sections 9(3) of this Constitution and 9(1)(b)(i) of the Communal Property Association Act of 1996 both have identical prohibitions against unfair discrimination on the basis of race, gender, sex, etc., which may be seen as lying at the heart of the constitution and an appropriate response to the complex customary obstacles militating against black women's capacity to own land. Miller and Pope (2000: 475) have interpreted the Communal Property Association Act's prohibition as concerned with ensuring that black women are not discriminated against in the reformed new structures introduced under it.

However, it would seem from early post-independence decisions that the non-prohibition grounds in the above provisions were not sufficiently strong enough to decisively check limitations on black women's land accessing capacity resulting from patriarchal bias supported by distorted customs. This much is deducible from *du Plessis & Others v de Klerk & Others*⁷ and *Re Certification of the Amended Constitution of RSA*.⁸ Both cases were by implication tolerant of official customary law that limited land grants to male heads of households and restricted the succession rights of female members.

In the latter case the Congress of Traditional Leaders (CONTRALESA) argued that an application of the Bills of Rights to customary matters was going to undermine the core of indigenous law. By casting the Bill of Rights as promoting foreign legal ideas at the expense of customs at a time when the country was just emerging from the horrors of centuries of colonialism and apartheid, the Congress successfully played on the tendency not to be seen to be out of tune with the nationalist tide of the time. These decisions apparently reflect a fear of a backlash from traditionalists.

A pleasant change came in 2005 when the Constitutional Court in *Bhe v Magistrate; Khayelisa: Shibi v Sithole*; *SA Human Rights Com v President of the RSA*,⁹ revolutionised the law in this province by rejecting customs which discriminated against black women's inheritance rights. The court stressed that the inheritance of property by a male heir subject to the duty to maintain widows could no longer be feasible because it is a product of a custom that is inherently incapable of changing in keeping with the changing life of the people it serves.

Justification for this decision was found amongst others in the fact that while traditional societies of the past were communitarian and structured to contribute to the general welfare, modern South African traditional society is radically different as social conditions no longer make it realistic or tolerable for widow and heir to live together, as was the case in the past. The facts of the *Bhe* and *Shibi* cases themselves demonstrated how unrealistic changed circumstances have made the communitarian approach to life and succession of the past.

Langa J was convinced that these rules of succession, which in substance restrict the black woman's land accessing capacity as demonstrated in the *Bhe* and *Shibi* cases, amounted to the violation of the human rights of those who are among the most vulnerable in society. The rules were criticised for violating 'the right of women to human dignity as guaranteed in section 10 of the constitution' before the court categorically declared section 23 of the Act and its regulation invalid. This decision, which has safeguarded the right of the black woman to access land through inheritance on equal terms, is certain to impact positively on the black woman's capacity to own land.

Conclusion

This article has reviewed the effect of the post-apartheid land rights model on the black woman's capacity to access land in the country. The writer offers a critique of South Africa's Constitutional Court's initial reluctance to reject inhibitory customs that discriminate against black women. It is noted that the country's land reform programme has a better prospect of success because of the groundbreaking decision of the Constitutional Court in the *Bhe* Case, striking down obnoxious patriarchal succession rules. The strengthening of the values of equal access to land for all by *Bhe's* case must be applauded.

Notes

1. *Bhe v Magistrate Khayelisa: Shibi v Sithole: SA Human Rights Com v President of the RSA* 2005 (1), *BCLR* 1 (CC).
2. *Bhe's* Case.
3. Like in the Richtersveld community.
4. 1940 NAC (C&O), 42.
5. *Bhe's* Case.
6. Section 25(5) of the 1996 Constitution.
7. 1996 3 SA 850 (CC).
8. (1997) (2) SA 97.
9. 2005 (1) *BCLR* 1 (CC).

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