Custom-based or gender-based approach? Considering the impact of the National Movement of Rural Women as *amicus curiae* in litigation involving rural women

Keneilwe Radebe

KENEILWE RADEBE is a Lecturer at the Department of Public Law, University of Pretoria. She holds the degrees LLB and LLM in Constitutional and Administrative Law (Pret). Prior to joining the University of Pretoria, she worked as a Candidate Attorney at a law firm in Pretoria, and later worked as a Law Researcher of the North West High Court. She was admitted as an attorney of the High Court of South Africa in 2011. She is currently studying towards her doctorate in law. Email: keneilwe.radebe@up.ac.za

Abstract

The National Movement of Rural Women (NMRW), formerly known as the Rural Women's Movement, was established in 1990 with a focus on, among others, uniting rural women and giving them a voice. Amongst the organisation's aims was to create forums for rural women to unite against oppression, for rural women to have equal rights to land, and for rural women to have a say in political matters. The organisation is to be commended for its contribution as *amicus curiae* – 'a friend of the court' – in customary law cases involving inheritance, marriage and chieftaincy disputes. This article explores the two approaches used by the NMRW as friend of the court, namely the custom-based and gender-based approach, and concludes that these two approaches are in direct conflict with each other. It is suggested that perhaps an approach which is more beneficial to rural women should be followed instead.

Keywords: rural women, customary law, gender-based approach, custom-based approach

Introduction

The Rural Women's Movement (RWM) was formed in the 1990s, sparked by gender bias and the unjustified strain it puts on rural women (Manganara, 2017). Among others, this organisation was inspired by the story of the founder, Sizani Ngubane, who one day found herself and her family members homeless. Maganara (2017) mentions that Sizani's family was evicted by her brother, and disappointingly, when Sizani's mother approached a traditional leader for help, she received the following reply:

> Mama Ngubane, I wish your daughter was your son, I would be allocating land to you now. But because she is a girl and your eldest son is still too young, I am unable to allocate land to you in your own right as a woman.

The above event resulted in Sizani, together with her mother and siblings, being rendered homeless (Manganara, 2017). This story depicts challenges faced by black women during the apartheid years – and unfortunately still experienced by some women in the constitutional era. The formation of the RWM thus had its roots in forceful evictions and patriarchal customary law practices which affected rural women (Manganara, 2017). The primary focus of the RMW, as mentioned by Sizani, is on "women and girls as well as on land, property and inheritance rights" (Juda-Chembe, 2018:91). Furthermore the organisation takes on issues involving gender equality and HIV/AIDS (Juda-Chembe, 2018:91).

In addition, the RMW also has a strong interest in alleviating cultural practices that could potentially perpetuate gender-based violence, such as *ukuthwala* (Juda-Chembe, 2018: 91). The cultural practice of *ukuthwala* is often argued to have the potential of resulting in violent

crimes against women and girls, such as rape and assault (Juda-Chembe, 2018:91). The organisation also seeks to oppose patriarchy, as mentioned by Sizani as follows: “the RWM is about changing patriarchy … because the struggle is not over yet” (Nkomo, 2013:126). The RMW has since changed its name to the National Movement of Rural Women (NMRW), and will be referred to as NMRW in this article.

Among many of the NMRW’s significant contributions was their contesting of the Traditional Communal Land Rights Act 11 of 2004 (Juda-Chembe, 2018:91) and the Traditional Courts Bill (Moshenberg, 2014). The organisation also assists as *amicus curiae*, “a friend of the court” (Spies, 2014) in court cases related to rural women (Juda-Chembe, 2018:91).

The organisation is to be commended for its contribution as *amicus curiae* in customary law cases involving inheritance, marriage and chieftaincy disputes. The NMRW’s stance in such disputes has been to advocate for the proper interpretation and application of the customary law-related ‘custom-based approach’ (Spies, 2014). The organisation advocates for customary law to be seen as an inherently flexible, living system of law, which develops over time to meet the changing needs of the community (*Shilubana v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008)). The organisation has, however, also adopted a gender-based approach – which is in conflict with its custom-based approach.

The NMRW’s role remains prevalent, as women continue to be faced with property ownership challenges, as reflected in the recent case of *Rahube v Rahube* (CCT319/17 [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018)). This case illustrates the continuing inequality faced by African women, particularly with regard to aspects of property ownership.

Figure 1: Sizani Ngubane about to give an address on rural woman to the United Nations. Photo courtesy of the RWM.

In the *Rahube* case a woman challenged the constitutional validity of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991, which prevented the applicant from owning an inherited house (par. 19). The applicant, Mantshabelle Rahube, was evicted from her family home by her brother on the basis that he had acquired ownership of the property by virtue of being appointed by the applicant's family as the holder of a Deed of Grant in respect of the house under dispute (par. 8). In accordance with section 2(1) of the Upgrading Act, the Deed of Grant would be converted to ownership rights in respect of the applicant's brother (par. 9), since a woman could not be head of a family and thus could not have the Deed registered in her name (par. 14). The Constitutional Court confirmed the High Court's order declaring section 2(1) as unconstitutional (par. 75). The case of *Rahube v Rahube* highlights that although significant strides have been made with regard to gender equality and customary law, the battle continues.

This article explores the two approaches – custom-based and gender-based – used by the NMRW as friend of the court, as depicted in the cases below.

The NMRW as friend of the court

The NMRW has acted as friend of the court in the cases of *Shilubana v Nwamitwa*; *Mayelane v Ngwenyama* (CCT 57/12) [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC) (30 May 2013) and *Jezile v S* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).

A friend of the court assists in complex matters where a court lacks expertise; a friend of the court would provide information to the court on that particular complex area of the law (Spies, 2015:136). A friend of the court merely assists the court and is not a litigating party (Spies, 2015:136). The role of the friend of the court can be particularly crucial in litigation involving women, in that the court's attention may be pointed to women's realities and the impact that the law has on women (Spies, 2015:136). Thus a friend of the court could, in some instances, assist towards the creation of judgments that are sensitive to women's experiences (Spies, 2015:140). In most cases the contribution made by the friend of the court could ensure that the courts make informed decisions (Spies, 2015:138). A friend of the court does not represent a litigating party but represents a much broader community faced or affected by similar issues as that of the litigating party (Spies, 2015:138).

The NMRW's approach as friend of the court in *Shilubana v Nwamitwa* and *Mayelane v Ngwenyama* is referred to in this article as the custom-based approach. In its application in *Shilubana v Nwamitwa*, the NMRW advanced the following submission (Notice of Application to Intervene as *Amicus Curiae*, Founding Affidavit deposed by Likhapa Mbatha, case No. CCT03/07 par. 10.1):

> Customary law is in a constant state of development, and is inherently flexible. The customary law which is recognised in the Constitution is the "living law", which includes aspects of and develops the codified system which has been recorded in statutes and judicial decisions of years gone by. The flexibility and the development of the "living customary law" is demonstrated by the appointment of the Appellant as hosi. This process of development should be recognised and encouraged by the Courts.

Similarly, in the case of *Mayelane v Ngwenyama* (Notice of Application to Intervene as *Amicus Curiae*, case No. CCT 57/12), the NMRW adopted a custom-based approach, in that they sought to make submissions based on the argument that the answer sought by the Constitutional Court could only be found in living customary law. However, in the case of *Jezile v S* the NMRW applied a gender-based approach, in that it challenged the patriarchal nature of the practice of *ukuthwala* (*Jezile v S* par. 79).

The NMRW's custom-based approach in *Shilubana v Nwamitwa* and *Mayelane v Ngwenyama*

Bronstein (1998:403) mentions that "when a woman comes to court to argue about her status, she does not dislodge herself from culture"; thus courts should not remove these women from the realities of their culture when resolving the conflict. Courts should instead seek or employ a custom-based approach when resolving the conflict. A custom-based approach to litigation is inspired by the fact that culture is important and forms part of people's everyday realities and identities (Bronstein, 1998:393). Therefore according to the custom-based approach, when a woman comes to court to assert her rights in terms of customary law, the fight is not between equality and culture; rather, the fight is described as an intra-cultural conflict (Spies, 2014:100).

Thus in order to promote custom in litigation, courts must not automatically view gender conflicts involving particular customary rules as automatically unconstitutional. The courts must first strive to understand the particular customary rule as lived, and the needs as well as the social context of relevant affected women should also be understood by courts. For instance, Mailula (2008:217) argued that equality between men and women in customary law should always be considered in its historical and social context. This author defends the constitutionality of the principle of male primogeniture in the context of succession to chieftaincy (Mailula, 2008:217). He argues that although male primogeniture in the context of succession to chieftaincy violates the right to equality, such violation or discrimination is not unfair (Mailula, 2008: 217). He bases this on the fact that appointing males is essential for the preservation of culture and family or community identity (Mailula, 2008:217).

Mbatha (2002:284) describes the custom-based process as follows:

> first, identifying the cultural value to be protected, then ascertaining the different ways in which community members protect the cultural value and, finally, looking into the constitutionality of these practices to craft a unique remedy dependent on the relevant custom.

In terms of the custom-based approach, living customary law as opposed to codified customary law could result in the application of customary law in ways that promote gender equality. Mbatha (2002:259) mentions that "the living customary law has already begun to change in order to allocate family property more equitably, and no longer bars women from controlling marital property after the death of their husbands". Thus according to a custom-based approach, custom is viewed as a primary source of law and seen as a primary avenue to resolve customary law disputes.

The process best suited for a custom-based approach is also described by Ntlama (2009:350) as follows:

> the question on whether a customary rule limits constitutionally guaranteed rights should entail an enquiry examining (i) the content and scope of the relevant protected rights; and (ii) the meaning and effect of the impugned customary law rule to determine whether there is any limitation of the protected rights.

In simple terms, a custom-based approach is one that primarily supports customary law.

Shilubana v Nwamitwa: Gender equality denied in succession for chieftainship

The Constitutional Court in *Shilubana v Nwamitwa* was faced with the question whether the royal family had the power to develop laws to outlaw gender discrimination in chieftainship succession (par. 1). This case was heard on appeal from the Supreme Court of Appeal, which had upheld the rule of male primogeniture: "The argument advanced in the High Court and Supreme Court of Appeal was that a female could not be appointed as chief even if she was first born" (Ntlama, 2009:346).

In this case the royal family had decided that Ms Shilubana would be the next *Hosi* (chief) after she was previously disqualified from chieftainship on account of her gender (par. 23). After the death of her father, the former *Hosi* (*Hosi* Fofoza), Ms Shilubana was disqualified from being a *Hosi* for being female. As a result, Ms Shilubana's uncle (*Hosi* Richard) was appointed to be the next *Hosi* instead (par. 23). The dispute involved Mr Nwamitwa, *Hosi* Richard's son, who challenged the appointment of Ms Shilubana as a *Hosi* on the basis of lineage and based on the argument that the royal family did not have the authority "to develop customs and traditions of the Valoyi so as to outlaw gender discrimination" (par. 30, par. 32).

In its contribution, the NMRW provided that the appointment of Ms Shilubana should not be seen as a development of customary law. They submitted that customary law is flexible and develops over time to meet the changing needs of the community (par. 35). Thus the NMRW argued that the process for the appointment of a *Hosi* had always been adaptable to appoint whoever met the needs of the community at that time (par. 61). They further provided precedent of the rare instances where women were appointed as traditional authorities (par. 62). In those instances, the NMRW argued, a change of a customary rule had not taken place but rather customary law was exercised in accordance with its inherent and flexible nature.

The court was, however, not in full agreement with the NMRW's submissions, and held that the royal family should be given broader powers, as this would enable it to "make constitutionally driven changes in traditional leadership". The court thus also mentioned that if the Valoyi authorities have narrower powers, the achievement of the values in the Bill of Rights would be negatively affected. The court further held as follows (par. 75):

> Accordingly if the authorities do not have power to bring law and practice of customary leadership into line with Constitution their power must be expanded. It must be held that they have the authority to act on constitutional considerations in fulfilling their role in matters of traditional leadership.

The Constitutional Court held that the actions of the Valoyi family, in appointing Ms Shilubana as chief, represented the development of customary law (par. 75). The court's judgment thus placed more emphasis on gender equality and on the application of section 9, and did not fully take into account the NMRW's submission. This view has been criticised by authors such as Ntlama, among others, for undermining customary law (Ntlama, 2009:352). However, Mireku (2010:523) commends the decision for promoting gender equality through recognising the right of women to be appointed as *Hosi*. The judgment is also commended for empowering traditional authorities to make relevant changes, which will assist in keeping customary law in line with constitutional values such as equality (Mireku, 2010:523). Mmusinyane (2009:156) also supports the Constitutional Court's decision for giving "recognition to women as adult human beings who are capable of leading and building their communities as leaders".

The NMRW in its contribution as friend of the court did not engage in a gender debate, but rather emphasised on custom in resolving the matter. According to its affidavit (Notice of Application to Intervene as *Amicus Curiae*, Founding Affidavit deposed by Likhapa Mbatha, case No. CCT03/07 par. 10.1) to the court. the NMRW advanced the following submission:

> Customary law is in a constant state of development, and is inherently flexible. The customary law which is recognised in the Constitution is the "living law", which includes aspects of and develops the codified system which has been recorded in statutes and judicial decisions of years gone by. The flexibility and development of the "living customary law" is demonstrated by the appointment of the Appellant as hosi. This process of development should be recognised and encouraged by the Courts.

The NMRW's approach was not entirely pro-women as "gender discrimination was at the centre of dispute in this case", but they did not address the issue of gender inequality or discrimination (Mailula, 2008:221). According to Khumalo (2017:36), the NMRW's argument in *Shilubana* disregarded the effect that gender has on whether one can be appointed as a traditional leader. The argument discarded the reality that gender plays a pertinent role in the appointment of a chief. The organisation placed emphasis on the fact that the needs of the community at a specific time play a role in determining who the next *Hosi* is. Khumalo (2017:36) stresses that the very needs of the community can be influenced by patriarchy. Problematically, according to Khumalo (2017:37) although the NMRW's submission was in favour of Ms Shilubana, their reasoning was not completely beneficial to women.

Figure 2: Sinzani Ngubane. Photo used courtesy of the International Alliance of Women.

Mayelane v Ngwenyama: Whose equality?

The above matter was before the Constitutional Court on appeal from the Supreme Court of Appeal. In this case two women alleged that they were both married to the (now deceased) Mr Moyana according to customary law (par. 4). The applicant in this case is Ms Mayelane, who alleged to have concluded a customary marriage with the deceased in January 1984 (par. 4). The respondent is Ms Ngwenyama, the subsequent wife, who alleged having concluded a customary marriage with the deceased on 26 January 2008 (par. 4). The applicant alleged that, in the absence of her consent to the marriage, the marriage between the respondent and the deceased could not be said to be valid in terms of Xitsonga customary law (par. 4).

The NMRW in this case again made a submission in terms of a custom-based approach. In their submission their primary focus was on, among others, "the need for the constitutional recognition of living customary law as an independent source of law" (Notice of Application to Intervene as *Amicus Curiae*, Founding Affidavit, case No. CCT57/12 par. 35): Thus the approach followed by the NMRW was that: "unless the customary law of marriage is properly understood from the perspective of those that practice it, there is no real possibility of engaging in any useful debate about its 'development' in terms of section 39(2) of the Constitution" (Notice of Application to Intervene as *Amicus Curiae*, Founding Affidavit, case No. CCT57/12 par. 35).

In determining the consent issue, the court in *Mayelane* relied on diverse forms of evidence from, for instance, Tsonga people in polygamous marriages, to traditional leaders and expert testimonies (par. 54). From the evidence, the court found that the subsequent marriage between the deceased and Ms Ngwenyama was invalid in the absence of the first wife's (Ms Mayelane) consent (par. 83). The court's focus on Tsonga customary law led to more

emphasis being placed on the first wife's right to equality and human dignity, compromising the subsequent wife's rights. Ms Ngwenyama's constitutional rights are not mentioned in the case.

As per the NMRW's submissions, the court's focus was on customary law. This approach failed to address the challenges of the second wife and many others who could be in her position. The second wife was left "powerless and unable to live her life with dignity and respect" (Spies, 2014:135). This approach was compared to that of the Woman's Legal Centre Trust, which sought to apply a rights-based approach and make a contest in terms of the contract. That approach had the potential to balance the rights of both wives (Spies, 2014:135).

According to De Vos (2013) the judgment appears to further perpetuate the negative effects brought about by patriarchal systems on women and children. The Women's Legal Centre Trust was also concerned that subsequent wives were deprived of "important legal and constitutional protection" (Kruuse and Sloth-Nielson, 2014:1715). Kruuse and Sloth (2014:1715) argue as follows:

> With regard to the consequences of *Mayelane* for equality, the resultant non-validity of the marriage of the second wife (whose husband failed to inform the first wife of the intention to marry) ironically puts the second wife as dependent on the vagaries of male behaviour to determine her standing as under any formal system of patriarchy. This is an invidious position indeed.

Himonga (2014) also argues that the subsequent wife was punished whilst the "wrongdoer", who is the man, was left unpunished. Himonga is of the view that the court failed to balance the competing rights of the first wife and the subsequent wife.

The NMRW's gender-based approach in *Jezile v S*

Feminist and gender-focused lawyers try "to improve women's social and economic status; to reach those women most in need; and to enhance women's self-respect, power and ability to alter existing institutional arrangements" (Spies, 2015:140). The challenge of feminist and gender-focused litigators is often around making the law sensitive to women's experiences (Spies, 2015:140).

Spies discusses three methods in which to present gendered and feminist arguments before a court (Spies, 2015:140). She first identifies the "women question", which looks into the gender implications of rules and insists on applications of the law in a manner that does not perpetuate women's subordination (Spies, 2015:141). The women question accordingly helps to create an awareness of gender bias, and does not seek to advance any form of favouritism with regard to judicial outcomes (Spies, 2015:141). The second method is referred to as "feminist practical reasoning", which involves ''feminists providing contextual evidence to expose that which would otherwise go unnoticed and unaddressed" (Spies, 2015:141). The third method is identified as "consciousness-raising", which entails ''an interactive and collaborative process of articulating one's experiences and making meaning of them with others who also articulate experiences" (Spies, 2015:141).

A gendered approach to the law would thus entail an awareness of how the rigid enforcement of laws sometimes results in substantive gender inequality (Heaton, 2005:549).

Albertyn (2011:592) puts forward an argument based on transformative constitutionalism, and emphasises the importance of courts understanding the actual conditions in which people are living. She warns against addressing gender inequality in a manner that reinforces gender roles and stereotypes that place women in disadvantaged positions (Albertyn, 2011:600). Thus it is pertinent, according to Albertyn, for courts and lawyers to have a gendered understanding of women's situations (Albertyn, 2011:600). Therefore when women go before courts, lawyers and courts need to know and understand the context of these women's lives (Albertyn, 2011:605). Courts can therefore make equitable judgments when the context and impact of laws and policies on the real-life situations of women is considered by these courts (Albertyn, 2011:610).

***Jezile v S*: Why not custom this time?**

The above case concerns the abduction of a 14-year-old girl for purposes of marriage (par. 2-9). The case was brought on appeal against the Magistrate Court's decision to convict Nvumeleni Jezile of rape, human trafficking and assault (par. 51). In this case Jezile was accused of raping, abducting and assaulting a 14-year-old girl for the purpose of concluding a customary marriage in terms of *ukuthwala.* This case can be described as a situation of child abuse and child torture under the pretext of custom. The Appeal Court had the task of determining whether the appellant had succeeded in his defence of *ukuthwala* ("abduction for marriage in terms of customary law"). Prior to delving into the issue of customary law, the Constitutional Court discussed pertinent legislation and international conventions dealing with the issues of child abuse and human trafficking (par. 56). The Constitutional Court thus mentioned that "there is accordingly an abundance of clear authority to the effect that child trafficking and any form of abuse or exploitation for sexual purposes, is not to be tolerated in our constitutional dispensation" (par. 69).

Professor Nhlapo was one of the experts in the case, and he described the practice as involving participants of "marriageable age" and stated that consent of both the man and the woman was required, and that sexual intercourse was not permitted (par. 72). Nhlapo was of the view that *ukuthwala* was not properly performed in this case (par. 75). Inkosi Mahlangu, on behalf of the National House of Traditional Leaders as a friend of the court, was also of the view that what occurred in this case was a perversion of custom and constituted a departure from custom (par. 76).

Thus both Nhlapo and Mahlangu in their submissions make a distinction between the traditional form of *ukuthwala* and the misapplied form of *ukuthwala*. They emphasised that the consent of both the man and the woman was a requirement for the traditional form of *ukuthwala* (par. 83). In this case a misapplied form of *ukuthwala* or aberrant form of *ukuthwala* took place (par. 85). An aberrant form of *ukuthwala* would take place where parents of the girl are paid a fee which signifies *lobola*, and the girl is not aware of the arrangement (par. 76). Based on the experts' insight, the court arrived at the conclusion that the appellant could not rely on the traditional form of *ukuthwala* to justify his conduct (par. 90). Accordingly, only the traditional form of *ukuthwala* could be recognised under our law (par. 81). In this case it appears that the aberrant form of *ukuthwala* cannot be considered as constituting a form of living customary law.

The NMRW in this case were among the friends of the court who described both the 'aberrant and traditional' forms of *ukuthwala* as patriarchal in that they subordinate women (par. 79). The distinction between the traditional and aberrant form of *ukuthwala* appeared

not to have played any significant role for the NMRW (par. 79). Their approach was gender-based, in that their primary focus was on the effect of the practice on women (par. 79). In this case the NMRW did not focus on the question of whether the aberrant form of *ukuthwala* could be said to constitute living customary law and thus was deserving of constitutional protection (par. 79).

The issue of *ukuthwala* is particularly complex, and divergent views exist with regard to its continued practice. Some authors are of the view that positive aspects of the culture should be promoted (Mwambene and Sloth-Nielsen, 2011:11). This could perhaps take place when a proper distinction is made between the correct practice of the custom and instances where it is wrongly practiced or abused. For instance, according to Dr Nokuzola Mdende "abducting a girl of 12 or 13 is not the cultural practice we know" (Mwambene and Sloth-Nielsen, 2011:5). According to some authors a distinction should be made between the forms of *ukuthwala* that constitute human rights violations (Mwambene and Sloth-Nielsen, 2011:11). According to the authors not all forms of *ukuthwala* "can be labelled as objectionable, harmful or detrimental" (Mwambene and Sloth-Nielsen, 2011:11). According to them "South African law should recognise those forms of *ukuthwala* where the requirement of consent of the 'bride' is met, and she colludes or is aware of the mock abduction" (Mwambene and Sloth-Nielsen, 2011:16). Importantly, the authors mention that child participation in the practice of *ukuthwala* would be a tenet of the Children's Act 38 of 2005 (Mwambene and Sloth-Nielsen, 2011:16). There are, however, also less accommodating authors who strongly oppose *ukuthwala* on the basis of a connection of the practice with violence and economic marginalisation (Rice, 2018:407).

The position of the NMRW on the issue of *ukuthwala* also appears to be less accommodative of the practice. As highlighted, the organisation argued that "both forms of *ukuthwala*, (traditional and aberrant), feed on the patriarchal nature of customary law" (Prinsloo and Ovens, 2015:178). In their accounts women are often raped, beaten and abducted in order for them to submit to marriage (Prinsloo and Ovens, 2015:179). The NMRW in fact also views the practice as perpetuating violence against women (Haysom, 2017:128).

Since some communities view *ukuthwala* as a practice that they will not neglect, it is very pertinent for public participation and engagement on the practice to take place (Mwambene and Kruuse, 2017:21). Mwambene and Kruuse's research highlights the existence of a great deal of confusion between some community members and the justice system with regard to the practice of *ukuthwala* (Mwambene and Kruuse, 2017:21). The community researched by these authors favoured its retention and blamed the abuse of the practice on the breakdown of values in societies (Mwambene and Kruuse, 2017:7). Disappointingly, the community also viewed the judgment in *Jezile v S* as not helpful in addressing the effect of *ukuthwala* or rather the deviated form on women and children (Mwambene and Kruuse, 2017:21). The pertinent question is whether the "prohibitionist stance" (Mwambene and Sloth-Nielsen, 2011:11) is realistic and helpful considering the practice's continued existence in some communities?

Conclusion

In this article I mention the purpose of the NMRW as an organisation and its important contribution in issues involving rural women and customary law. The organisation has contributed as a friend of the court in customary law cases involving women. In its

contribution the NMRW appears to follow conflicting approaches in their role as friend of the court, and those approaches have not always been beneficial for rural women.

In *Shilubana v Nwamitwa* a custom-based approach was followed, with the argument being that such an approach did not really improve gender equality. The effect of male primogeniture and its patriarchal nature was not addressed; rather, emphasis was instead placed on the rare occasions where custom would dictate that the needs of society favoured the appointment of a woman as a *Hosi*.

The custom-based approach is also followed in the case of *Mayelane v Ngwenyama*; however, here this led to preferential treatment between the two wives, with the subsequent wife's constitutional rights being ignored. The reality is that most women find themselves in Ms Ngwenyama's position, and unfortunately the effect of the case would lead to their further marginalisation. The outcome thus is rather harsh and further perpetuates the disadvantages brought about by patriarchal practices on women.

In *Jezile v S* a gender-based approach was followed in that the NMRW focused more on the impact of *ukuthwala* on women. However, is the real fight against *ukuthwala* or against deviations from the practice of *ukuthwala*? The NMRW appears to apply a prohibitionist approach, and the question is whether this approach will benefit women in communities where the traditional form of *ukuthwala* is still practiced.

Unfortunately, the NMRW's approaches appear to be in conflict with each other. It is thus particularly confusing as to whether the organisation stands for gender or for custom. It is suggested that perhaps an approach which is more beneficial to rural women should be followed instead.

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