THE ROLE OF TRADITIONAL AUTHORITIES IN DEVELOPING CUSTOMARY LAWS IN ACCORDANCE WITH THE CONSTITUTION: SHILUBANA AND OTHERS V NWAMITWA 2008 (9) BCLR 914 (CC)

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Summary

South African customary law is a body of law by which many South Africans regulate their lives in a multicultural society. South Africa's constitutional dispensation is based on the premise that all existing laws are subject to the *Constitution of the Republic of South Africa* 1996, including African customary law, and that all laws are limited only by the Constitution. Customary law existed long before the adoption of the Constitution which, among other things, aims at harmonising the different cultural practices that exist in the country. It is apparent that some traditional cultural practices that still exist are in conflict with the Constitution but, until they are challenged before a court of law, they will remain enforceable in our communities. This contribution investigates customary systems of succession that are guided by the principle of male primogeniture: a deceased's heir is his eldest son, failing which, the eldest son's oldest male descendant is his heir. The discussion focuses in particular on the case of *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC). This case concerns an application to the Constitutional Court for a leave to appeal against a decision of the Supreme Court of Appeal substantially confirming a decision of the Pretoria High Court that prevented a woman from being a *Hosi* (traditional leader) of her own community.

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