

A cityscape at sunset with a teal-bordered white box containing text. The background shows a dense urban area with various buildings, including a prominent orange-colored building in the foreground. The sky is filled with soft, golden light and scattered clouds. The text is centered within the white box.

EMPOWERING
WOMEN'S LAND,
HOUSING AND
PROPERTY RIGHTS

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INTRODUCTION

“EMPOWERING WOMEN’S PROPERTY RIGHTS,” A PAMPHLET BASED ON LEGAL CASES AND REFORMS THAT HAVE ADVANCED GENDER EQUALITY IN PROPERTY OWNERSHIP AND INHERITANCE. IN THIS PAMPHLET, YOU’LL LEARN ABOUT LANDMARK CASES AND THE RESULTING SOLUTIONS THAT PROMOTE WOMEN’S RIGHTS TO PROPERTY AND CHALLENGE DISCRIMINATORY PRACTICES. IT AIMS TO ASSIST INDIVIDUALS, HOUSEHOLDS AND COMMUNITIES KNOW THEIR PROPERTY-RELATED RIGHTS AND RECOURSES AVAILABLE TO THEM.

A low-angle photograph of a modern, multi-story building with a light-colored facade and large windows. The building is set against a clear blue sky. A teal rectangular frame is overlaid on the image, containing the text.

3. THE CONSTITUTION AND GENDER EQUALITY

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Since 1996, South Africa's Constitution upholds gender equality, ensuring everyone is equal before the law and has the right to equal protection and benefit of the law.

3.1. CONVENTION ON ELIMINATION OF DISCRIMINATION

South Africa signed the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) in 1995, further reinforcing its commitment to women's rights.

3.2. PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT (2000):

This act aims to eliminate gender discrimination and promote equality. It specifically prohibits practices that undermine the dignity and rights of women, including unfair inheritance practices.

3.3. CONSTITUTIONAL PROTECTION

The South African Constitution protects women's property rights and guarantees equal access to resources and land.

3.4. COLONIAL AND APARTHEID LEGACIES:

Colonialism and apartheid had a profound impact on customary law, limiting women's participation in its development and decision-making structures.



**4.
WOMEN UNDER
UPGRADING OF
LAND TENURE
RIGHTS ACT (ULTRA
ACT)**

4. WOMEN UNDER UPGRADING OF LAND TENURE RIGHTS ACT (ULTRA ACT)

ULTRA – ACT BEFORE THE AMENDMENTS

During apartheid's dying days, as part of the early steps toward a political settlement the Upgrading of Land Tenure Rights Act (ULTRA) was passed in 1991 to allow for the upgrade and transition of some land rights from semi-formal and informal to ownership through registration in the Deeds Registry.

4.1. WHO CAN MAKE USE OF ULTRA TO UPGRADE THEIR PROPERTY RIGHTS

Any person with a land tenure right (for example leasehold, dead of grant, quitrent or any other right created by or under any law). This property must be in a formalized township or land that is surveyed.

4.2. WHAT HAPPENS WITH THE LAND TENURE RIGHTS

When a township register is opened (or was opened before the act) the land tenure right is automatic converted into ownership in the persons whose name it was.

4.3. LANDMARK JUDGMENT: RAHUBE V RAHUBE AND OTHERS:

In a significant legal milestone, the Constitutional Court issued a crucial order safeguarding women's housing right. This landmark decision found that Section 2(1) of the Upgrading of Land Tenure Rights Act (ULTRA) violated the right to equality enshrined in Section 9 of the constitution.

BACKGROUND:

Ms. Rahube approached the court after being evicted by her brother, alleging that she had been deprived of her house's ownership due to apartheid laws and Section 2(1) of ULTRA.

In the 1970s, Ms. Rahube and her brother shared a house with their family. Most of the family moved out between 1980 and 2000, leaving Ms. Rahube living there alone. In 1987, her brother received a certificate of occupation (only granted to men), and in 1998, he was issued a deed of grant, effectively making him the owner of the house.

Ms. Rahube argued that ULTRA converted housing rights into ownership rights without considering competing claims or the discrimination against black women during apartheid, which violated her right to equality based on gender and sex.

The High Court declared ULTRA provisions unconstitutional for converting ownership rights in violation of women's rights.

The Constitutional Court agreed, stating that ULTRA's provisions contradicted the legislature's intent by perpetuating apartheid-era discrimination against black women. The court's order applied retroactively from April 27, 1994, benefiting all women.

Exceptions

- .The order did not affect property transferred to third parties in good faith.
- .It did not apply to inheritance by third parties through finalized estates.
- .The upgrade of housing rights to ownership by a woman acting in good faith was also excluded.

4.4. RECENT AMENDMENTS (JUNE 2020) AS A RESULT OF THE MARY RAHUBE JUDGMENT

The most important amendments to the act is that if the Minister receives an application for the opening of a township – register, published in the gazette, a local newspaper, social media platforms and a notice at the local municipality. The notice must inform affected parties that they can object against the conversion. A process will be followed to determine in whom the ownership will vest.

If any person feels aggrieved by a conversion that took place since 27 April 1994, can apply to the court to set the conversion aside and for an order that is just and equitable.



5.

**WOMEN AND
SUCCESSION**

5. WOMEN AND SUCCESSION

Under South African law, individuals have the legal right to create a will to determine how their assets and estate will be distributed upon their death.

When someone passes away with a valid will in place, the Wills Act of 1953 applies, and this is known as dying testate. A valid will ensures that the deceased's assets are distributed according to their specified wishes. If a person passes away without a valid will, they are considered to have died intestate, and the Intestate Succession Act of 1987 comes into play. This law outlines specific procedures for dividing the deceased person's assets among their spouse and family members in the absence of a will.

In some cases, a person may have created a will but did not cover all their assets, resulting in a situation where they are deemed partially testate and partially intestate. In such instances, the assets not addressed in the will are distributed according to the Intestate Succession Act.

Having a will is recommended because it allows individuals to have control over the distribution of their estate after their passing and helps minimize administrative complexities for their heirs.

The process of handling a deceased person's estate, whether they died testate or intestate, is regulated by the Administration of Estates Act of 1965. Estate disposal is typically carried out by an executor who has been granted a Letter of Executorship by the Master of the High Court. In cases where the estate's value falls below a government-regulated threshold, the disposal may be directed by the Master of the High Court.

5.1. WHAT IS A WILL?

A will, or testament, is an expression of how a person, known as the testator, wants the property in their estate to be distributed after their death.

5.2. REQUIREMENTS FOR A VALID WILL:

The will must be voluntarily made.

The testator must at the time of making their will have testamentary capacity.

This means they must be older than sixteen years and were mentally capable, that is of sound mind, and so able to appreciate what they were doing. It is assumed that anyone making a will is mentally capable unless it is proved otherwise.

The will must comply with the required formalities outlined in the Wills Act. If any of these requirements are not met, then the deceased will have died intestate.

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5.3. WHAT HAPPENS IF A DECEASED HAS NO WILL?

If a person dies without a will, their estate is administrated under the Intestate Succession Act 81 of 1987. This stipulates how the estate will be divided. Under the Intestate Succession Act, the rules of succession apply is based on the family structure:

- One spouse, no children: Spouse inherits the entire estate.
- Multiple spouses, no children: Spouses inherit equal shares.
- No spouse, but children: Children inherit equal shares.
- One spouse and children:
Spouse inherits what is known as a child's share or a specific amount, with children sharing the remainder.

WHAT IS A CHILD'S SHARE?

A child's share is determined by dividing the intestate estate by the number of surviving children of the deceased and deceased children who have left issue, plus the number of surviving spouses.

Multiple spouses and children: Each spouse inherits a child's share or a specific amount, with children sharing the remainder.

NOTE: A person can make a will during National Wills Week every year. It takes place within the first 2 weeks of September. Visit: <https://www.lssa.org.za/> for more information.

5.4. WHAT IS SUCCESSION?

The right to inherit

A Will is a legal document which outlines the manner in which beneficiaries are going to inherit property and assets of the deceased.

BENEFITS:

- .Your wishes will be carried out when you die
- .You can decide who gets what and how much
- .There will be less disputes over your assets
- .You can appoint an executor you trust to carry out your wishes
- .You can appoint guardians for your children
- .Your estate will be sorted out quicker
- The order in which inheritance is distributed.
- The order in which or the conditions under which one person after another succeeds to a property, dignity, title, or throne.

A photograph of a dirt road in a rural tropical setting. In the foreground, a person wearing a blue and yellow patterned skirt and a white shirt is walking away from the camera. Further down the road, another person in a white shirt and blue pants is walking away. The background is filled with lush greenery, including several tall palm trees under a bright, slightly overcast sky. A semi-transparent white box with a teal border is overlaid on the center of the image, containing the text.

6. CUSTOMARY LAW, PROPERTY RIGHTS AND CUSTOMARY MARRIAGES

6. CUSTOMARY LAW, PROPERTY RIGHTS AND CUSTOMARY MARRIAGES

6.1. WHAT IS CUSTOMARY LAW?

Customary law refers to established patterns of behavior which practices are recognised within a particular community.

Usually, the Chief or headman of a community is the person responsible for allocation of communal land, usually in consultation with a traditional council.

Women under customary law were regarded as minors who are unable to inherit or make decisions about their own futures.

Customary law is flexible and adaptable according to the current customary practices of a community.

6.2. IMPORTANT COURT CASE:

The case of *Bhe and others v Magistrate, Khayelitsha, and Others* (2005) played a pivotal role in challenging discriminatory customary succession practices.

The father of Ms. Bhe's two daughters had died without a will and according to the laws of succession under customary law the deceased's father was to inherit the house she lived in with her daughters.

It was argued on Ms. Bhe's behalf that the customary law of succession that allows only males to inherit was unconstitutional because it discriminates against women, and the Constitutional Court agreed.

The court said that the customary law of primogeniture was a violation of women's equality and rights to dignity, which are protected under the Bill of Rights in the Constitution. Ms. Bhe's daughters, as the children of the deceased, were allowed to inherit the property

The Constitutional Court declared primogeniture unconstitutional, allowing women and children to inherit property.

6.3. REFORM OF CUSTOMARY LAW OF SUCCESSION

The government introduced the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which prohibits primogeniture and recognizes the rights of widows and children in customary marriages.

6.4. WHAT IS A CUSTOMARY MARRIAGE?

A marriage entered into in terms of customary practices.

Requirements [Section 3 of the 'Recognition of Customary Marriages Act 120 of 1998]

- The prospective spouses must both be older than 18;
- They must both consent to be married to each other under customary law; and
- The marriage must be negotiated and entered into (or celebrated) in accordance with customary law.

Failure to register a customary marriage does not affect the validity of that marriage, but they should be registered within 3 months of the celebration.

A man and woman who have entered into a customary marriage can only enter into a contract of marriage under the Marriages Act 25 of 1961 if they are not already married to someone else in terms of customary law.

The husband in an existing customary marriage wishing to marry a second wife must apply to a competent court for such a marriage to be legal and detail the way matrimonial property system will apply to all wives.

The failure of a husband to make an application to court to approve a written contract regulating the matrimonial property system of both the first and second marriages does not invalidate the second customary marriage, but makes the second one out of community of property [Ngwenyama v Mayelane and Another 2012 (4) SA 527 (SCA)]

Customary marriage is in community of property and profit and loss – this means that everyone part of the marriage shares debts and gains in equal share.

A customary marriage needs to be dissolved the same way as a civil marriage, by decree of divorce otherwise it doesn't count. Separation is not enough.

N.B. Make sure to get your marriage registered and recognized

6.5. LANDMARK: GUMEDE V PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS

In 2008, Gumede v President of the Republic of South Africa and Others challenged the limitation on women to have equal property rights under customary law in the Constitutional Court, arguing that it was unfair. The court agreed and removed the restriction. Now, all women in customary marriages, no matter when they were married, have equal property rights. This change corrected a historical injustice.

Ms. Gumede entered into a customary law marriage with her husband in 1968, and by the time the parties divorced in 2003 they had acquired two houses. Because the marriage pre-dated the Act, it was subject to customary law and Ms. Gumede was denied any property rights to the two houses.

The Constitutional Court agreed that this restriction in the Act was discriminatory and unfair, and struck down the limiting provision. Now all women in customary marriages, whenever the marriage was entered into, have equal rights to property, because their marriages are all automatically in community of property.

6.6. CUSTOMARY MARRIAGES ACT (1998):

This Act grants wives in customary marriages full legal status, capacity, and property rights.

Women can acquire, manage assets, enter contracts, and litigate, enhancing their financial independence.

It is Important to Remember:

To register customary marriage. It is not required by law, but the danger if you do not is the difficulty in proving a valid customary marriage took place.

To make sure that property like a house is registered in both names to ensure security of tenure.

6.7. SUCCESSION AND CUSTOMARY LAW:

6.7.1. Landmark Case: Shilubana and Others v Nwamitwa

Background:

The case involved a dispute over chieftainship (Hosi) succession in the Valoyi community in South Africa.

Initially, Valoyi customs followed male primogeniture, excluding Ms. Shilubana, the eldest daughter, from consideration.

The Royal Family later decided to appoint Ms. Shilubana as Hosi, but there was a dispute.

The Constitutional Court ruled in favor of Ms. Shilubana, recognizing her as the rightful heir and allowing communities to adapt their customs in line with the Constitution.

The Court emphasized the importance of gender equality and community empowerment in making these decisions. More important it recognized the fact

that Customary law is a living law, meaning that the law must be adopted to reflect the time of day.

6.8. CHANGES IN CUSTOMARY LAW:

Historically, women faced discrimination under customary law, but important legal changes have occurred:

- Women can now inherit property under customary law, women do have an equal right to inherit. Primogeniture is unconstitutional.
- Women have the right to own property, They must be treated equally, and have equal rights to own and acquire property.
- Customary marriages are considered in community of property, granting wives equal rights to marital assets upon divorce.
- Women's right to land tenure, women have equal rights as men to acquire land tenure. Traditional leaders and councils must treat women equally.



7. FAMILY HOUSE

7. FAMILY HOUSE

It is common in South Africa that families have what they regard as a “family house”. This house is regarded as belonging to the family and people can move in out based on their personal circumstances. Mostly it is women who is affected. The current law does not recognize the concept of a “family house” and for that reason no registration can be made at the Deeds office. There are currently litigation going on to challenge this.

8. CONCLUSION

South Africa has made significant strides in protecting women’s property rights. It is essential to be aware of these laws and changes to ensure that women can enjoy equal rights to property and financial independence.

9. FOR FURTHER INFORMATION

- Consult the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1998.
- Refer to the Upgrading of Land Tenure Rights Act 112 of 1991.
- Review the Rahube v Rahube and Others 2018, ZACC 42 case.
- Explore the Upgrading of Land Tenure Rights Amendment Act 6 of 2021.
- Bhe and others v Magistrate, Khayelitsha, and Others (2005).
- Customary Marriages Act (1998).
- Promotion of Equality and Prevention of Unfair Discrimination Act (2000).
- Intestate Succussion Act 81 of 1987.
- Constitution of the Republic of South Africa act no 108 OF 1996.
- Shilubana and Others v Nwamitwa CCT 3/07
- Ngwenyama v Mayelane and Another 2012 (4) SA 527 (SCA)

PROTECTING WOMEN’S HOUSING AND PROPERTY RIGHTS
UPHOLDING EQUALITY!

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