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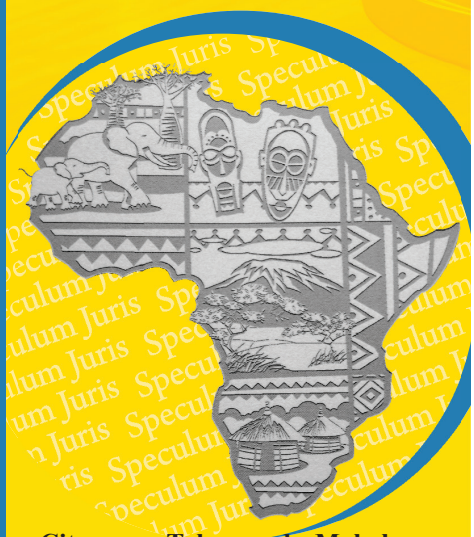

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Kukithi La ("This is Our Home"): An Interplay Between Common Law and Customary Law in "Family House" Disputes in *Shomang v Motsose NO and Others* 2022 5 SA 602 (GP)*

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Abstract

This case note analyses the decision of the North Gauteng High Court in Shomang v Motsose NO, on a somewhat unique topic relating to "family house" disputes. The court dealt with the interplay between the common law and customary law of ownership and succession in these unique types of disputes. The discussion identifies how the court addressed two important questions: (a) whether the Intestate Succession Act or the customary law of succession should be applied where families have agreed that the property is a "family house" and (b) whether family house rights agreements should be recognised as these agreements are not regulated by the relevant legislation, including the Intestate Succession Act, and the Administration of Estates Act. It analyses how the court adopted the correct approach to deal with this

* The reference to Zulu; "Kukithi La" is based on a show with the same title on Moja Love DSTV channel 157, presented on Thursday at 21:30 pm, where family house disputes are discussed.

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interplay but failed to deal with these two questions and other outstanding issues that will still perplex the courts and other tribunals that deal with family house disputes. The case note recommends how courts in similar disputes should address these questions.

Keywords: family houses; family house rights agreement; ownership; customary law; intestate succession

1 INTRODUCTION

In 2022 the North Gauteng High Court, in *Shomang v Motsose NO*[1] (*Shomang* case), had to decide on a recurring and thorny issue that indicates a continuing tug-of-war between customary law and common law to solve disputes that have emerged as "family home/house disputes". These issues generally relate to ownership, where one of the family members is nominated as the custodian of the family house. As a result, conflicts arise between the individual owner recorded on the title deed of the property and family members. The disputes raise the following issues: the invisibility of family homes/houses and the rights of members in terms of common law, the validity of the family rights house agreement (as discussed below) and the effects of this agreement on conferring an individual title on behalf of family members, and the application of the customary law of succession to these disputes as compared to how they are dealt with in terms of common law. This case note critically discusses the decision in the *Shomang* case in relation to the conflicts that arise between common law and customary law to solve family house/disputes. It analyses whether the customary law of succession, or succession in terms of the common law should be applied in family house disputes. It also identifies whether the court adopted the correct approach to deal with the identified interplay between the customary and common law of succession. It specifically focuses on the legal status of the family house rights agreement that is used in these disputes as a contractual instrument to address them through customary norms. It also discusses how the occupation of family houses by family members is often at odds with individual ownership in terms of the common law.

2 FACTS OF THE CASE

The dispute that the court had to resolve arose between Shomang (the applicant) and her step-uncle, Moloi, who both occupied a house in Naledi Township, Gauteng, dubbed a "family house". The unique facts of the case must be understood in the context of the property title systems that prevailed at a particular time. During the 1960s, black people were prevented from obtaining titles to land that guaranteed them the security of tenure. They were granted Permission to Occupy (PTO) certificates, which permitted them to occupy their dwellings as rental houses only. Around 1960, Shomang's late grandfather (Johannes Motaung) applied to the municipal council for accommodation.[2] The permit was approved, and the house was allocated to Motaung.[3] He then moved into and stayed in the house with his family.[4] Shomang and her mother continued to reside in the house with Motaung.

Around 1979, Shomang's mother moved out of the family home, leaving Shomang in the house with her grandfather. Around 1986, Shomang's grandfather married Saralia Motaung who became her step-grandmother.[5] Her step-grandmother's two sons (Paulus Moloi and Johannes

1 2022 5 SA 602 (GP), The case was referred to briefly, and without any detailed analysis in the South African Law Reform Commission Discussion Paper 160 Project 100 Review of Aspects of Matrimonial Property Law June 2023.

2 *Shomang* para 19.

3 *Ibid*.

4 *Ibid*.

5 *Ibid* para 20.

Moloi, her step-uncles) would visit from time to time.[6] One of the uncles disappeared in 1990, and the applicant's grandfather died the same year.[7] After his passing, the residential permit was never transferred to a specific individual in the family and remained in the name of Motaung. The reason was that the Conversion of Certain Rights to Leasehold Act[8] (the Conversion Act) that intended to formalise and confer leaseholds or full ownerships upon the beneficiaries was implemented, and the issuing of the residential permits was discontinued.[9]

As early as 1988 the government at the time attempted to reform land ownership in areas occupied by black South African communities through the Conversion Act. This was a shift from the permit system that gave black people the right to occupy properties while not owning them. In terms of section 2 of the Conversion Act, an inquiry into who had been given the right was an administrative process that entailed the Director-General (DG) of the Gauteng Provincial Department of Human Settlements inquiring whether the site in question falls within a formalised township and whether those who claim the rights over the properties satisfied the conversion requirements in terms of this Act.[10]

During this time, the remaining uncle moved into the family home to reside with his mother and Shomang.[11] His mother died in 1994, and in 1996, Shomang and her uncle both lodged competing applications for ownership of the property at the Housing Transfer Bureau.[12] As a result of the disputed claim, an inquiry in accordance with section 2 of the Conversion Act took place for the members of the executive council (MEC/s) for the Department of Human Settlement (Gauteng) (DHSG) to adjudicate the claims and determine the lawful beneficiaries.[13] In a meeting attended by Shomang and her uncle, the council officials informed Shomang that due to competing claims lodged, the council was compelled to adjudicate these claims and a subsequent meeting was held in 1997.

At this meeting, both parties did not dispute that the house was a "family house", and that they intended to keep the property for the benefit of the family. They requested that the property be registered in both their names. However, the official rejected the request, stating that they were not allowed to register the property in the name of more than one family member. Instead, they were advised to enter into a "family house rights agreement", whereby the family would appoint a custodian of the title of the property on behalf of the family.[14] Notably, such a custodian would not acquire the sole ownership of the house but would only play a supervisory role, while the right to use and occupy the property remains with "the direct family".[15] Based on this recommendation, they entered into a family house rights agreement, and the property was registered in the name of Moloi, subject to a condition granting Shomang and her descendants "full right of the family to the property".[16] Notably, the agreement was not inserted as a condition in the title deed. They continued to live together on that understanding until the uncle passed away in 2003, and Shomang was eventually appointed the executrix of his estate. She occupied the house with her children until 2016 when she was called by the Master of the High Court

6 *Ibid*.

7 *Ibid* para 21.

8 81 of 1988.

9 *Shomang* para 22. See Makaleng "The Registration of '*Family Homes' in terms of South African Land Tenure* (LLM-dissertation, UNISA, 2022) 28–29.

10 *Makaleng* 28–29.

11 *Shomang* para 23.

12 *Ibid* para 24.

13 *Ibid* para 25.

14 *Ibid* paras 26 and 27.

15 *Ibid* para 27.

16 *Ibid* para 28.

for the re-adjudication of the appointment of the late Moloi's executorship.[17] She learned for the first time at this meeting that Moloi had a child, Motsose (the first respondent). The Master declared Motsose the lawful child of Moloi and appointed him as the executor (in terms of section 18(3) of the Administration of Estates Act[18] ("Estate Act")). Following his appointment, Motsose threatened Shomang with eviction.[19]

Suspecting that Motsose also wanted to sell the property, Shomang and two other family members approached the DG to investigate the matter.[20] The DG compiled a report that identified some errors in the family house rights agreement. These included not registering Shomang's rights, and not noting a caveat against the property to protect it against future alienations.[21] Importantly, the DG concluded that the transfer and registration of the property in the name of Moloi was subject to the "family house rights agreement", which gave them equal rights over the property.[22]

3 ISSUES BEFORE THE COURT

Due to the initial threats of eviction and the sale of the property, Shomang claimed that Motsose could not be trusted. As a result, she applied to the court for a number of orders which related to the relevant parties' rights and their entitlements to the family house.[23] Firstly, she asked the court to set aside an adjudication decision made in 1997 by the DG and the MECs, which declared her uncle as the custodian of the family home. Secondly, she asked the court to direct the Registrar of Deeds, Johannesburg, to cancel the title deed registered in the name of her uncle. Thirdly, she asked the court to direct that ownership in the property revert to the Johannesburg Metropolitan Municipality and the latter to direct the DHSG to conduct an inquiry to determine whose name(s) should appear on the title deed of the "family home". Fourthly, she asked for an order that the DG and/or the MEC hold an inquiry in terms of section 2 of the Conversion Act for purposes of conferring ownership of the property. As an alternative to the fourth order, she asked the court to order that a caveat be noted against the property to protect it against any future alienations. Lastly, she asked the court that the first respondent (Motsose), who was appointed as the executor in terms of a letter of authority issued by the Master, be ordered to refrain from threatening to evict Shomang and all those who occupied the property through her.[24] The court broke down the orders requested by Shomang into the following main issues,

17 *Ibid* para 30.
18 66 of 1965.
19 *Shomang* para 30.
20 *Ibid* paras 32–33.
21 *Ibid* para 34.
22 *Ibid*.
23 *Ibid* para 36.
24 *Ibid* para 36

which in the court's view, were identical:[25]

> (a) whether the Intestate Succession Act[26] (IS Act) or the customary law of succession could be applied where families have agreed that the property is a "family house".
>
> (b) whether family house rights agreements should be recognised as these agreements were not regulated by either the IS Act, the Wills Act[27] or the Estate Act.

In the court's view, these issues were identified and important mainly because a '"family house is invisible to the 'formal laws' of South Africa".[28] The discussion in this note is restricted to these two issues as they are relevant to determine how the court dealt with the interplay between the common law and customary law. Before discussing how the court answered these questions, it is important to briefly outline the relevant legal principles.

4 THE LAW RELATING TO FAMILY HOUSE/HOME DISPUTES

4 1 Tenure Systems under Customary Law

Although a detailed discussion of the applicable laws and principles falls outside the scope of this discussion, a brief overview is provided below to provide a context and the basis for the decision of the court.

The parties' dispute and the reasons of the court in this case were informed by the land tenure systems embedded in evolving African customs that view land as belonging to both the living and the dead and extending these rights to families whose members belong to family land.[29] With some elements of individual ownership largely applicable in common law, land is owned communally and collectively.[30] The common law-based formal land registration system in terms of the Deeds Registries Act[31] ("DRA"), for instance, defines an "owner" as "the person registered as the owner or holder thereof" and does not refer to a family or community as an owner. This is in contrast with section 25(6) of the Constitution of the Republic of South Africa[32] that protects the right to security of tenure of "a person or community" whose tenure is legally insecure. Cousins and Classen correctly view "communal tenure" systems that derive from customary norms as mixed tenure regimes, which very often comprise bundles of individual, family, sub-group, and larger group rights and duties.[33] With regard to the administration of land, pre-colonial land tenure laws did not allow the registration of ownership of land in the name of black people.[34] The government introduced PTO certificates to be issued to black

25 *Ibid*.

26 81 of 1987.

27 43 of 1992.

28 *Shomang* paras 46 and 52.

29 Kingwill "Lost in Translation: Family Title in Fingo Village, Grahamstown, Eastern Cape" 2011 *Acta Juridica* 210 215; See also Mailula "Customary (Communal) Land Tenure in South Africa: Did *Tongoane* Overlook or Avoid the Core Issue?" 2011 *Constitutional Court Review* 73 73–74.

30 Ndima "Judicial Review and the Transformation of the South African Jurisprudence with Specific Reference to African Customary Law" 2007 *Speculum Juris* 75 84.

31 47 of 1937. See s 102.

32 Constitution of the Republic of South Africa 1996.

33 Cousins and Classen "A Communal Tenure 'From Above' and 'From Below'" paper presented at the Conference on "Competing Jurisdictions: Settling Land Claims in Africa" at Vrije Universiteit, Amsterdam 24–26 September 2003.

34 *Tongaone v Minister for Agriculture and Land Affairs* 2010 6 SA 214 (CC) para 10 (*Tongoane* case).

people and made their land rights conditional and not formally secure.[35]

The post-1994 government made efforts to protect the tenure rights of people who owned land through less secure forms such as PTOs. These include the Interim Protection of Informal Land Rights Act (IPILRA), which provided interim protection of "informal rights to land" such as PTOs.[36] Most importantly, the promulgation of the Communal Land Tenure Rights Act[37] (CLARA) was a major step to protect the land tenure of communal landowners in terms of section 25(6) of the Constitution. The main purposes of CLARA include (a) providing for legal security of tenure by transferring communal land and (b) providing for a land rights inquiry conducted to determine the transition from old-order rights to new-order rights.[38] CLARA specifically allows for the registration and transfer of communal land in the name of any person or community, including women.[39] CLARA also requires land rights inquiries to be conducted prior to any transfer or registration in relation to competing or conflicting rights.[40] In 2010, the Constitutional Court (CC) in *Tongoane v Minister for Agriculture and Land Affairs* declared CLARA unconstitutional. In its decision, the CC emphasised the need to prioritise security of tenure of communal land.[41] Notably, the Minister for Rural Development and Land Reform in 2017 published the Communal Land Tenure Bill for public comment.[42] Despite this initiative, the Bill has not been enacted into law owing to various criticisms levelled against its protection of traditional leaders, the community's decision-making process, and its constitutionality.[43] As a result, the legislator is still in the process of revising the Bill to incorporate some of the comments and concerns.

4 2 Disputes Resolution Mechanisms

Disputes that require the determination of rights to family houses that are communal in nature have been continuing before and after the constitutional dispensation, the promulgation of CLARA, and the declaration of this Act as unconstitutional in the *Tongoane* case. Many of them relate to rights of ownership to land that are held by certificates of occupation or PTOs. As a result, the issues were dealt with in terms of the Conversion Act, which provides for the conversion of land permits into leaseholds and leaseholds into ownership.[44] Notably, with the coming into effect of the Upgrading of Land Tenure Rights Act (ULTRA), all leaseholds and similar rights were converted into full ownership. The Conversion Act also empowers the relevant DGs of provinces to conduct inquiries relating to the identity of the affected land sites and of the claimants of such sites.[45] The DG was specially empowered to determine who may

35 See Black Areas Land Regulation, 1969 (Proclamation R188 of 1969).

36 31 of 1996, ss 1 and 2. See also the upgrading and conversion into ownership of certain rights granted in respect of land, including PTO, in terms of the Upgrading of Land Tenure Rights Act 112 of 1991("Upgrading Act").

37 11 of 2004.

38 CLARA Preamble.

39 *Ibid* ss 5 and 6.

40 *Ibid* s 14(2)(a)(iii)).

41 *Tongoane*, para 125.

42 GN 242 in GG 40965 of 2017-07-01.

43 Ubink and Duda "Traditional Authority in South Africa: Reconstruction and Resistance in the Eastern Cape" 2021 *Journal of Southern African Studies* 192; See also Coetzee "Constitutional Framework for Traditional Leaders in South Africa" (Masters Dissertation, University of the Free State, 2023).

44 See Mostert "The Diversification of Land Rights and its Implications for a New Land Law in South Africa" in Cooke *Modern Studies in Property Law Vol II* (2002) 13, See also *Tshabalala and Others v Tshabalala and Others* (38827/2016) [2019] ZAGPJHC 192 (28 June 2019) unreported, paras 15 and 16 and *Khwashaba v Ratshitanga* (27632/14) [2016] ZAGPJHC 70 (29 February 2016) unreported, para 5.

45 The Constitution of the Republic of South Africa s 235(8); Act 200 of 1993, which assigned the power to administer the Conversion Act to the provinces.

be declared to have been granted a right of leasehold or ownership in relation to affected sites in a formalised township.[46] The Conversion Act empowers the DG in executing this duty to give effect to any existing agreement, transaction between any holder of the right and any persons, or any testamentary disposition made before the death of the last holder of the right in question.[47]

In Gauteng, where the majority of these disputes arise in relation to houses in townships,[48] the Housing Act authorises the DG to adjudicate disputes that arise from transfers of properties in terms of the Conversion Act.[49] As a measure to formalise the resolutions and the decisions taken at these adjudication processes, the Department of Housing introduced family house rights agreements.[50] These agreements serve to formalise and recognise one or more family members as the custodian(s) of the property, while protecting the occupational rights of other members of the family and restricting evictions or alienation.[51] Where the disputes are subject to adjudication, and parties conclude the family house rights agreement, further challenges may arise where such agreements are not considered when the rights are upgraded to full ownership in terms of the ULTRA.[52] As Bolt and Masha highlight:

> the agreements were not legally enforceable, as they lacked recognition in formal property registration. Later attempts to incorporate the agreements into deeds registration proved equally thorny in legal terms.[53]

As a result, the property is registered in the name of one or more persons without considering the rights and interests of other family members. As the case under discussion highlights, one of the questions is whether such agreements override any testamentary dispositions of the properties or the law applicable to intestate succession upon the holder's death. It further raises the question whether the provision of the family house rights agreement may be recognised as an important condition of title that may be endorsed against the title deed of the property.[54] It also leaves a question whether the Master of the High Court who deals with the liquidation of the deceased estates must apply or consider the provisions of a family house rights agreement.

5 COMMENTS AND DISCUSSION

5 1 The General Approach

The decision and the reasoning of the court in *Shomang* illustrate that, although the court's analysis of these topical issues may be correct in many instances, the application on the ground is rendered more difficult. The decision must be commended for the court's approach to the issues and the need to develop jurisprudence on customary law. It shows how our courts are gradually accepting their duty imposed in terms of section 211(3) of the Constitution to "apply customary law when it is applicable, subject to the Constitution and any legislation that deals

46 The Conversion Act Section 2(1).

47 The Covenant Act s 2(3).

48 See *Khwashaba*; *Tshabalala*, *Moloi v Moloi*, *Smith v Mokgedi* (unreported) ((20175/2010, 14628/2012) [2012] ZAGPJHC 275 (26 October 2012); *Maimela v Maimela* (13282/16) [2017] ZAGPJHC 366 (24 August 2017) unreported; *Hlongwane v Moshoaliba* (A5009/2017) [2018] ZAGPJHC 114 (2 February 2018) unreported; and *Rahube v Rahube* 2019 (2) SA 54 (CC).

49 6 of 1998, ss 24A and 24B.

50 See Bolt and Masha "Recognising the Family House: A Problem of Urban Custom in South Africa" 2019 *SAJHR* 147 151.

51 *Khwashaba* para 81, *Ntshalintshali v Sekano* (unreported) (2014/31317) [2015] ZAGPJHC 123 (12 June 2015); See also, *Ntshalintshali*, and Bolt and Masha 2019 *SAJHR* 151.

52 See *Khwashaba* para 10.

53 Bolt and Masha 2019 *SAJHR* 151.

54 See *Ntshalintshali* para 5.

with customary law". The decision is further commended for correctly identifying the issue before it as one that involves the clashing of norms between customary law and common law of inheritance and succession, with the former underlying the idea of family home, while the latter acknowledges ownership being restricted to a private individual. The court correctly held that "an important starting point is that customary law must be understood in its own framework, not through the common law lens".[55] This is the right approach in that if the starting point is a common law one, this will require the court to determine whether the relevant legislative measures, such as the DRA, recognise family homes. As this Act currently does not recognise this form of rights (and correctly acknowledged by the court),[56] that would have been the end of the protection of the applicant's family home rights. Although the DRA provides for the registration of properties in the name of various persons as co-owners or protecting other rights as conditions of title, such as the personal servitudes of usufructs and usus,[57] the court would have addressed the issue without pronouncing the rights to family homes and houses from their customary settings. As discussed below, the question remains whether it applied this approach of understanding customary law through its own lens and if applying such an approach is without challenges.

The court commented on the effect of placing customary law within the common law of intestate succession and saw this as a clash of norms.[58] In this case, the rightful heir in terms of the common law is determined by the intestate succession upon the death of the owner.[59] The other norm relates to where the family house is not regarded as a property that can be inherited in terms of the common law. In terms of this latter norm, the property is not inherited, and the succession relates only to the duties and responsibilities of the custodian, while ownership remains with the deceased.[60] In addressing the question of how to solve this conflict of norms, and relying on case law,[61] the court correctly reiterated the need to deal with customary law on its own terms rather than through the lens of the common law.[62] The court found the need to recognise a family house as a property that deserves its own protection. This is because the "ownership right" of such houses rests solely on kinship and the fact that the property is more than a commodity that can be traded and inherited. The property is characterised as a collective good whose value is bigger than that which the person registered on the title deed can fetch in the market. While the court did not denounce the trading of the property and the registration of ownership in the name of one person, it correctly emphasised how the property in terms of the customary law could not be alienated by the sole decision of the person holding the title deed.[63] This is in accordance with an understanding that customary law promotes the common holding, usage, and ownership of the property over the individual title to the property under the common law. On this score, the court correctly emphasised the need to view family house rights within their customary law setting.

The court also turned its attention to how ownership in terms of customary norms should be understood. It referred to the system of land rights where there is a hierarchy of rights and the institution of ownership is privileged.[64] The court highlighted how ownership remains at the top

55 *Shomang* para 56.

56 *Ibid* para 52.

57 See, for instance, regulation 31 and s 3(r) of the DRA.

58 *Shomang* para 51.

59 *Ibid*.

60 *Ibid*.

61 *Ibid* paras 52–59.

62 *Ibid* para 60.

63 *Ibid* para 61.

64 *Ibid* para 71.

of this hierarchy of rights, followed by real rights, and personal rights such as those created in family house rights agreements at the bottom.[65] The court was concerned about the ownership model under the common law, which is inflexible and does not accommodate alternative social forms of tenure that operate outside formal systems.[66] To address this and transform property law, the court recommended the fragmentation of rights "not by abolishing ownership, but by developing a more comprehensive range of rights, such as a property right in a family home, that can sometimes trump ownership".[67] The court saw this process as giving effect to other priority rights rather than making them common-law owners. This approach is informed by the need to be flexible and context-sensitive and the adaptability of existing rights to new situations. As a result, the court viewed this as a constitutional ideal of achieving transformation and addressing structural inequalities in property rights.[68]

Having outlined its grounds for approaching the conflicting norms by understanding family house tenure within its customary framework, the court focused on the impact its decision would have on the rights of Shomang, the applicant. The court considered the administrative process and practices of subjecting family house disputes to the DHS as a sign that they already recognised the use of these agreements "enough not to have to turn their normative understanding about a 'family home' into the language of the formal law".[69] It, therefore, found Shomang's case stronger as she relied on this administrative system to assert her rights and concluded a family house rights arrangement. In the court's view, it became clear that the DHS attempted to recognise the customary understanding of property rights in these family homes, although such rights were not enough to hold in a court of law without developing property law.[70] Quite correctly, without developing the property law in this context, the mere recognition of family house rights agreements to prove some form of real rights to property would not be sufficient. These agreements are not concluded in all family house disputes that come before the courts. In the absence of such agreement, even in its transformed customarily law status, there would still be a need to develop this law to recognise rights in these homes, without reference to these agreements.

The court concluded the process of addressing the conflicting norms by recognising the need to give effect to the Constitution, its transformative imperatives, and the need to develop property law.[71] The court addressed this within the purview of the property clause. Although the court correctly pronounced section 25(5) and 25(6) of the Constitution as the appropriate avenue for such development, it did not pronounce or interpret how these provisions will apply to family houses. Nonetheless, it is quite clear that the state assumes the responsibility to take reasonable measures to ensure that members of family houses who are not owners of the property gain access to the land upon which such houses are built on an equal basis compared to any person who may already be recognised as the owner under common law. Any persons or community or members who are entitled to a family house and whose rights were legally unsecure, before any development of the customary law as proposed in this case, are entitled to a tenure that is legally secure. As the court correctly indicated, the solution lies in developing customary law in terms of section 39(2) and "to the extent that the Act of Parliament provides".[72] Therefore, the solution rests both with courts to develop customary law in terms of section 39(2) and on

65 *Ibid*.

66 *Ibid* para 73.

67 *Ibid*.

68 *Ibid*.

69 *Ibid* para 74.

70 *Ibid*.

71 *Ibid* para 67.

72 *Ibid* para 69.

the legislature in terms of section 25(6) to provide tenure redress. The court, however, left the main issue to be addressed by the legislature.[73] While the Communal Land Tenure Bill, 2017 is yet to be promulgated, it should be expected that its final version will take cognisance of the pronouncements in this case and the need to afford family house rights their rightful place.[74]

5 2 Family House Rights Agreement and the Common Law Rights of Ownership

The dispute between the parties in this case rests solely on the answers to the two questions that the court raised, as highlighted in 3 above. The questions relate to the recognition of family house rights agreements or the common law of succession, considering that these agreements are not regulated by the IS Act and the Estate Act. An additional question that may be asked is whether these agreements afford parties any real right.

Regarding the two questions raised in 3 above, it is accepted that the IS Act and Estate Act do not recognise family house rights agreements. Courts would therefore generally not recognise a succession regime in terms of this agreement. Whether they should be recognised was answered by the court with reference to the general approach to addressing competing norms. To reiterate, the court highlighted possible distortion of the concept of "family home" by intestate succession,[75] the need to accommodate different systems of law[76] and placing customary law as a source of law in its own right.[77] The court, however, did not specifically answer the question whether these types of agreements should be recognised by any relevant legislation.

To address how these questions relating to the status of family house rights agreements can be addressed correctly, cognisance should be taken of possible applicable laws when the case was decided. The court overlooked the relevance of the Reform of Customary Law of Succession and Regulation of Related Matters Act ("Reform Act").[78] Motsose would arguably still become the beneficial owner in terms of the IS Act[79] and the Reform Act. The reason is that the Reform Act generally requires the estate of any person subject to customary law to devolve in terms of the IS Act.[80] Circumstances of the case under discussion indicate that the recognition of family house rights agreements may, therefore, stand against the legislature's position in terms of the IS Act and the Reform Act. The court in *Shomang* clearly highlights how the "intestate succession might distort the concepts of family home".[81] The agreements entered into with the DHSDG may in effect devolve the property against the objectives of the IS Act and the Reform Act, as both these Acts recognise the last in blood line as the heir. It cannot be expected that all family house disputes will be subject to the court's interpretation of customary norms. While the court in *Shomang* acknowledged the importance of interpreting family house disputes in terms of their customary law setting, the application of the common law of succession is likely to hold in these disputes until challenged and interpreted through customary norms, as in this case. The Reform Act may, therefore, need to be amended so that it does not prioritise the law of

73 *Ibid* para 78.

74 The Communal Land Tenure Bill, in its current form, does not deal with family or household rights, but only refer to household forum as a dispute resolution mechanism. It is argued that, in the final Act, the legislator must incorporate household/family rights in Chapters 3 and 6, 9, and 11, that deal with the transfer, conversion and registration of communities' land tenure rights, land rights enquiry, land household forum, and general dispute resolution mechanisms.

75 *Shomang* para 58.

76 *Ibid*, referring to a similar position held in *Bhe* case.

77 *Ibid* para 60.

78 11 of 2009.

79 IS Act s 1(b).

80 The Reform Act a 2(1).

81 *Shomang* para 58.

succession in the IS Act. It must require the application of customary law and the reinforcement of family house rights agreements by the parties as evidence of customary law.

The court's decision in favour of Shomang that the Registrar of Deeds cancel the transfer to Moloi and that the DG and MEC reconsider whose name should be entered on the title deed,[82] is welcomed in as far as it allows both parties to apply their customary rights in terms of the family house rights agreement. That is, however, only enough as far as solving the factual disputes in this case is concerned. The court in *Shomang* therefore failed to specifically answer the main legal questions, namely (a) whether the IS Act or the customary law of succession should apply in these types of disputes (b) and whether these agreements should be recognised by the relevant legislation. Considering that this is the decision of the High Court (which may go on appeal or to the CC), it can be expected that until a similar dispute arises with similar questions, the legislature should consider amending the IS Act and the Reform Act as recommended.

Closely related to the role of family house rights agreements in succession is the role it plays in determining the rights of parties. Under common law, family house rights agreements are simply contractual arrangements that afford parties nothing beyond personal rights.[83] Viewed through this lens, the relevant question remains whether any provision in the family house rights agreements may be recognised as an important condition that may be endorsed against the title deed of the property. At common law, such a possibility is closer to zero. It is likely that the registration of any provision of this agreement will be restricted in terms of section 63 of the DRA. This section restricts the registration of any condition in a deed that purports to create or embody any personal right without restricting the exercise of any right of ownership in respect of immovable property. It is also doubtful that rights from these agreements will pass the subtraction from the dominium test as they do not burden the land, but merely an obligation binding on some person.[84] Therefore, when applying the common law, any rights in terms of these agreements would remain a personal right that cannot be registered in the title to land.

An interpretation that looks at family house rights agreements beyond the lens of common law and the need to afford members of a family house an elevated protection would, however, (and as the court correctly did in *Shomang*) see the status of these agreements differently. The court in *Shomang* was uncomfortable with agreeing with the position that family house rights agreements are merely personal arrangements between family members without affording them any real right of ownership in the property.[85] The court correctly took a position that family house rights agreements are entitled to a different interpretation.[86] The reason, the court held, is that, should it take a common law approach, this would mean that when the estate were finalised, the property would be transferred to Motsose, who would become the common-law owner, and he would be referred to as the registered owner.[87] Such property rights would be in conflict with rights in Shomang's family home, which are unregistered.[88] The court further found support for this alternative interpretation in how the repealed CLARA provided for the possibility of the property held in terms of the customary law to be accommodated for registration in the deeds office.[89] It should be noted that, although the Communal Land Tenure Bill, 2017 is yet to enter into force, courts may still find a similar support as it also provides for the registration of land into community names and restricts transfers of properties to any person without the

82 *Ibid* para 81.

83 See reference to the decision in *Hlongwane* above and *Shomang* para 67 of this case.

84 *Ex Parte Geldenhuys* 1926 OPD 155 164.

85 *Shomang* para 67.

86 *Ibid*.

87 *Ibid* para 68.

88 *Ibid*.

89 *Ibid* para 63.

consent of the community.[90] The reason for elevating the family house rights agreements into more than just contractual agreements was further informed by the duty of the court to interpret any legislation and to develop customary law in terms of section 39(2) of the Constitution.[91] This is a milestone for the development of customary law by considering family house rights agreements as instruments to promote the tenure of other non-owner members and to afford them equal rights in family houses, comparable to those of beneficial owners. However, from a registration point of view, the court ignored the practical impact that its pronouncement would have with regard to registering the rights or incorporating the provisions of family house rights agreements without falling foul of section 63 of the DRA.

5 3 Outstanding and Relevant Issues

The court's decision left a number of issues and questions open that need to be addressed to achieve the main purpose of interpreting customary law within its own framework. These are 1) the difficulty of applying the relevant customary law to solve family law disputes, and 2) competing roles of the Master and the DHSDG.

Regarding 1), in adopting the developing jurisprudence on customary law and the application of the provisions of section 211(3) of the Constitution, the court highlighted some of the continuing challenges that hamper the application and the development of customary law. It referred to the difficulty of applying customary law as it is "not written, but a system of law known to the community, practised and passed on to generations".[92] The court, in this instance, shares the sentiments of the existing case law on how to ascertain indigenous law and whether such law "can be ascertained readily and with sufficient certainty" as required by section 1(1) of The Law of Evidence Amendment Act.[93] Although ascertaining this law may be difficult, our courts have clearly set out steps on how this can be achieved. The first is to take judicial notice in terms of section 1(1) if the law can be ascertained readily and with sufficient certainty. If this cannot be achieved, parties may adduce evidence or eventually refer to textbooks and case law.[94] The CC in *Bhe v Magistrate Khayelitsha*, however, warned of the challenges of relying on statutes, case law and textbooks as they "may no longer reflect the living law".[95] As observed in these cases, courts continue to interpret customary law by relying on these sources. Such development is necessary in solving family house disputes, as indicated in the throng of cases above, including *Shomang*.

With regard to 2), the facts in this case raise possible competing roles of the Master and the DHSDG in adjudicating family house disputes. The court did not deal with this issue. It correctly highlighted how a family house is not understood as "property" in the common-law sense, and not "inherited" in the way a movable property devolves.[96] In terms of the Estates Act, the administration of deceased estates and dealing with disputes relating to succession remain the sole responsibilities of the Master. As indicated in 5 above, the Conversion Act promotes solving related disputes by considering the agreements by the parties where there is no will. The facts in *Shomang* highlight that Motsose approached the Master to lodge a competing claim over the property, while Shomang sought the same with the DHSDG. There are,

90 See clauses 12 and 13 of the Communal Land Tenure Bill, 2017 (Government Gazette (GN) 242 GG 40965 of 7 July 2017.

91 *Shomang* para 69.

92 *Ibid* para 57.

93 45 of 1988.

94 See *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC) para 45 and *Bhe v Magistrate Khayelitsha* 2005 1 SA 580 (CC) para 152 (*Bhe*).

95 *Bhe* para 154.

96 *Shomang* para 51.

therefore, competing authorities that may adjudicate family house rights disputes and possibly reach different conclusions. The court erred in not considering the provisions of the Reform Act in this regard. Section 5 of this Act empowers the Master to make any just determination relating to a dispute or uncertainty regarding the nature or consequences of customary law. The disputes include uncertainties relating to the claim or devolution of a "family property".[97] This Act further allows the Master to require the magistrate or a traditional leader in the area within such Master's jurisdiction to hold an inquiry and make recommendations. In making a determination, the Master "must have due regard to the best interests of the deceased's *family members* and the equality of spouses in customary and civil marriages".[98] Unless specifically amended by legislation, the Reform Act correctly reconciles the position of power exercised by various authorities who are likely to play a role in dealing with family house disputes. Without the application of the Reform Act, the problem of forum-shopping and competing authorities adjudicating these disputes remains. However, considering the provisions of the Reform Act, the Master retains the power to make the final determination on customary law rights of the parties by considering the recommendations of the magistrate or the traditional leader. Notably, this will address future challenges as to whom parties to a family house should approach. This requires the legislature to reconcile the provisions of the Conversion Act and the Reform Act to provide specific powers to the Master to make such determination, after an inquiry and recommendations by the magistrate or the traditional leaders. The DG of any provincial housing department may also be required to provide his/her recommendations before the Master can make the determination.

6 CONCLUSION

The decision of the High Court in *Shomang v Motsose NO* clearly indicates that the problem regarding the approach and relevant considerations on how to solve family house disputes are far from being settled. While parties will approach the relevant forum to solve these disputes, key questions will remain on whether they can agree on the applicable law in terms of common law and customary law. The court, in this case, has correctly established the approach for courts to deal with these disputes in the future. Key elements of such an approach are, firstly, that courts are duty-bound by section 39(2) of the Constitution to apply customary law when it is applicable. Secondly, whenever there is a clash of norms between the common law and customary law, they are required to start by understanding customary law from its own framework and not that of the common law. Family houses in their customary settings must be taken as a collective good whose value is bigger than the value that the title deed holder of the property could fetch in the market. When the question relates to who takes ownership of the house, the "ownership model" followed is not that under the common law, which is inflexible and that does not accommodate alternative social forms of tenure that operate outside the formal systems. It is one that transforms property law, and that develops a more comprehensive range of rights, such as a property right in a family home, which can sometimes trump ownership. As highlighted, the *Shomang* case leaves several questions unanswered. However, courts in future cases should consider that relevant legislative measures do not fully recognise the rights of family house members. It is, however, the legislature's prerogative to reconcile the wording of the IS Act and the Reform Act. In doing so, they must also clarify the role of the DG of DHS in terms of the Conversion Act, that of the Master in terms of the IS Act, and that of the magistrates and traditional leaders in terms of the Reform Act, to avoid possible forum-shopping and confusions that may ensue if parties do not know whom to approach to address family house disputes. From now on, however, it is clear that customary law takes precedence

97 The Reform Act s 5(1).

98 *Ibid* ss 5(2) and (3).

in family house disputes, and that courts should enforce the family house rights agreements that incorporate this law, in whatever forum parties may approach to solve their disputes. It remains uncertain whether all the family members involved in family house disputes can legally call the house: *kukithi la*.