Summary

MTHEMBU v LETSELA: THE NON-DECISION

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The debate concerning the apparent conflict between equality (section 9 of the Constitution of the Republic of South Africa 108 of 1996) and culture (sections 30 and 31 of the 1996 Constitution) is ongoing. This debate, in many ways foreseen, was pre-empted by the Constitutional Court per Sachs J in Du Plessis and Others v de Klerk and Another 1996 3 SA 850 (CC), when he stated that "... sooner or later, the question of the relationship between the Constitution and customary or indigenous law will have to be confronted."

The purpose of this note is to analyse the decisions of the courts, with reference to a discussion of the rules of customary intestate succession and the requirements for a valid customary marriage, and then to propose a possible different outcome which, if applied by the courts, would have been beneficial to all the parties involved. This then leads to a proposal of an alternative remedy to the postulated problem.