

**REFORM OF CUSTOMARY MARRIAGE,
DIVORCE AND SUCCESSION IN
SOUTH AFRICA**

Living Customary Law and Social Realities

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Umbulelo

Uphando olukule ngxelo lukwazi ukubakho ngenxa yenkxaso nothakazelelo lwamadoda namabhinqa kunye neenkokheli zomthanyama ezihlala kumaphondo ahluahlukeneyo, kwakunye nenkxaso efunyenwe kwiNational Movement of Rural Women. Sikwazi ukwenza uphando ngaphakathi ezinkundleni ngoncedo Lomlawuli Jikelele kwiSebe lezeMithetho noPhuhliso loMgaqo Siseko, kwakunye noNobhala beNkundla Ephakamileyo nabeNkundla yeMaster. Umbulelo okhethekileyo siwusa ku Nkszn Ntibidi Rambete, uMlawuli kwiGender Directorate. Uxabiso olukhethekileyo lukwabhekiswa nakwiinkokheli zomthanyama eziye zasabela kwizicelo zethu zodliwano-ndlebe zaza zasivumela ukuba sithethe nabantu basekuhlaleni ukuze senze uphando kwakunye nee-workshop nodliwano-ndlebe labantu abathile.

Iziphumo zokuqala zolu phanda kwathethwa ngazo kwi-workshop eyayibanjelwe eYunivesithi yaseKapa (UCT) ngoFebruwari 2014. Sibulela bonke abathathi nxaxheba kule workshop, kuquka neenkokheli zomthanyama, abasemagunyeni kwi-ofisi yeMabi Mafa, abezomthetho, kunye neSebe lezeKhaya; abalawuli kunye nabaququzeleli be National Movement of Rural Women; kunye nezifundiswa zaseYunivesithi yaseRhodes, e-UCT kunye neYunivesithi yeNtshona Kapa. Ngokukhethekileyo, sinombulelo kwizifundiswa ezininzi eziye zanikela ingxelo namagqababaza: Jacqueline Heaton, Helen Kruuse, Robert Morrell, Lea Mwambene, Deborah Posel, Jeremy Seekings noThandabantu Nhlapo.

Olu phando lufakwe kule ngxelo luxhaswe yi-South African Research CHairs Initiative of the Department of Science and Technology kanye ne-National Research Foundation of South Africa (Inombolo yegranti 64825). Naziphi izimvo, iziphumo kunye nezigqibo okanye uncomelo oluvela kolu xwebhu lolwabaphandi, yaye iNational Research Foundation ayamkeli tyala ngoku.

Sithanda nokudlulisa umbulelo kumalungu abasebenzi, ingakumbi uFatima Diallo, oye wanikela amagqabaza akhe kwiinxalenye ezininzi zolu phando, uNkanyiso Sibanda oye waququzelela iinxalenye ezuthile zolu phando kunye nabafundi noSihlalo, oye waxhasa uSihlalo ngeeendlela ezininzi. Singathanda nokubulela abancedisi babaphandi abaninzi abaye bancedisa ngemisebenzi emininzi ebisenziwa xa kuqhutywa uphando kunye nokuchwetheza nokuguqulela inkcazelo efunyenweyo.

Okokugqibela sinombulelo omkhula kwabaJuta & Co, abaye bavuma ukupapasha iziphumo zophando njengencwadi ehlalutywe ngabalingane phantsi komxholo othi *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities*. Le ngxelo lushwankathelo loko kuxutyushwe kwisahluko 11 sale ncwadi kwakunye nomqkumbelo wayo. Umbulelo okhethekileyo uya kuLinda van de Vijver ngamagqabaza akhe aluncedo nomonde wakhe ongapheliyo xa bekusenziwa inkqubo yokupapasha incwadi nale ngxelo.

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1. Intshayelelo

Kule ngxelo sixubusha iziphumo zophando lwethu lwendlela esebenza ngayo iRecognition of Customary Marriages Act, 120 ka 1998 (RCMA) kunye nemithetho yomafa equlunqwe yiNkundla yoMgaqo-siseko ku *Bhe v Magistrate, Khayelitsha, (the Bhe rules)*, Siye sacebisa ngendlela yokuphucula indlela lo mthetho onokuphunyezwa ngayo (ekuye kwathiwa ukususela ngoku imithetho emitsha).

1.1 Iingoongo neenkqubo zophando

Uphando luye lafuna ukukhangela indlela imithetho emitsha esebenza ngayo ngokwembono yabantu ngabanye abaphila ngomthetho wesintu, ii-arhente zikarhulumente, kuquka neenkundla kunye neSebe leZekhaya, neenkokheli zomthonyama. Injongo ibikukukhangela ukuthotyelwa nokungathotyelwa kwe RCMA kunye ne *Bhe rules*. Injongo eyintloko ibe kukuphanda enoba lo mthetho mtsha uyakhusela yaye uwakhusela kangakanani amalungelo abantu owenzelwe ukuba uwakhusela, kuze kunikezelwe ngeengcebiso zendlela zokuphucula apho kukho imiqobo efunyenweyo.

Phantsi koMgaqo-siseko omtsha, ukutshintsha kwicandelo lomthetho yemitshato yesintu nokwabiwa kwamafa kubangele kubekho imithetho emitsha elawula ubomi babantu abaninzi baseMzantsi Afrika. Nangona lunzini uphando oluye lwahlola impumelelo yemithetho elawula umtshato, ukuwuhawula kunye namafa, lube mbalwa oluye lwanikezela ingxelo ephangaleleyo yendlela ephunyezwe ngayo le mithetho mitsha kwinkalo ezahlukahlukeneyo zomtshato, uqhawulo mtshato kunye nokwabiwa kwamafa, nendlela iinxalenye ezahlukahlukeneyo zentlalo yoluntu eziye zabandakanyeka ngayo. Le ngxelo ibalaselisa imiba ebalulekileyo efuna ingqalelo ekhawulezileyo ukuze kuphuculwe ukuphunyezwa kwale mithetho.

Uphando luqhutywe ngoncedo lweDST/NRF Chair in Customary Law, Indigenous Values and Human Rights (uSihlalo) eYunivesiti yaseKapa ngaba baphandi balandelayo: UChuma Himonga, oye wakhokhela uphando nobambe ubuSihalo; u-Elena Moore weSebe leZentlalo eYunivesithi yaseKapa kunye ne-National Movement of Rural Women phantsi kolwalathiso luka Likhapha Mbatha.

Olu phando luyinxalenye lweprojekhi eziyintloko zikaSihalo yaye lukwinqanaba lwesibini kuphando. Uphando luqale ngo-2011. Kuye kwacaca msinya ukuba ukuqonda imiphumo yemithetho yesintu kuza kufuna kungekhona nje indibanisela yezomthetho nezentlalo-ntle kodwa okubaluleke nangakumbi, ukuhlomla kwabantu abaphila ngomthetho wesintu. Ngenxa yoko, uphando olwenziwa ngamasebe ahlukahlukene luye lwaqulunqwa ukuze luquke iinxalenye ezininzi zomthetho wesintu, izigxina ezininzi zecandelo lezomthetho kunye nentlalo-ntle yabantu. UHimonga, uMoore kunye neNational Movement of Rural Women luqhube uphando lweenyanga eziyi-20 kumaphondo amathandathu.

Inkqubo yophando esetyenziswe kuphando ixutyushwe ngokweenkcukacha kwisahluko seseibini sencwadi ethi: *Reform of Customary Marriage, Divorce and Succession in South Africa*.

¹ 2005 (1) SA 580 (CC).

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1.2 *Imvelaphi neemapawu zomthetho omtsha*

De kwango-1994, inkqubo yomthetho yaseMzantsi Afrika ibihlulwe kubini kiwimithetho elawula umtshato nokulawulwa kokwabiwa kwamafa. Le nkqubo yomthetho yayenzelwe ukucalucalula phakathi kwabantu abamnyama baseMzantsi Afrika nezinye iintlanga kumbandela wale mithetho. Ngokuthe jikelele umthetho wesintu, oninzi lwawo wawucinezela, wawuqulunye ngurhulumente wobukholoniyali nowocalucalulo njengomgaqo nkqubo wokwahlula abantu, lo mthetho wawusebenza kubantu abamnyama ngoxa umthetho oqhelekileyo wawusebenza kwabanye abantu.

Ngaphezu koko, umthetho wesintu wawujongwa njengongaphantsi kumthetho oqhelekileyo, ngenxa yokuba umthetho karhulumente wawungakwamkeli ukutshata ngokwesintu, ngokwahlukileyo kwimitshato ekutshatwe ngayo ngokoMthetho weMitshato 25, ka-1961 yona owawuyamkela ngokupheleleyo imitshato yesintu. Imeko efanayo yayikhona naxa kusabiwa amafa apho umthetho oqhelekileyo wawusetyenziswa, ngaphandle kokusetyenziswa ngokulinganiselweyo komthetho oqhelekileyo kumafa abantu abamnyama ngokusekelwe kwimithetho yempikiswano kumthetho. Lo mahluko wawukho naxa kusabiwa amafa: amafa abantu abamnyama ayesabiwa kwiinkundla zikamantyi ngoxa amafa ezinye iintlanga aye lawulwa nguMphathi weNkundla Ephakamileyo.

Umthetho womgaqo siseko wawungangqinelani nalo naluphi uhlobo localucalulo kwinkqubo yezomthetho. Ukubakho kwaMalungelo Oluntu kuMgaqo-siseko wexesha eliphakathi (Umthetho 200 ka 1993) nakuMgaqo-siseko omiselweyo ka-1996 kwenza ucalucalulo ngokwesini nangokobuhlanga lubekelwe iliso. Icandelo 9(1) loMgaqo-siseko omiselweyo uthi “Bonke abantu bayalingana phambi komthetho kwaye banelungelo lokukhuselwa ngokulinganayo ngumthetho nokuzuza ngokulinganayo kuwo” , ngoxa u9(3) echaza ukuba urhulumente akanakucalucalula ngokungqalileyo okanye ngokungangqalanga nabani na ngokusekelwa kwimiba ethile equka ubuhlanga, isini, iminyaka nobume bakhe. Amalungelo Oluntu ukwaqinisekisa amalungelo abantwana aliqela, yaye uquka umgaqo wokuba ukulungelwa komntwana kokona kubalulekileyo kuyo yonke imibandela ebandakanya umntwana. UMzantsi Afrika uye waqinisekisa izivumelwano zamazwe ngamazwe ezikuthintelayo ukucalucalulwa ngokwesini nokutshatiswa kwabantwa. Ngenxa yolu lawulo lwesizwe nolwezizwe ngezizwe lamalungelo, kuye kwabakho ixesha lotshintsha kwinkqubo yomthetho kwicandelo lomtshato wesintu nokwabiwa kwamafa. IPalamente yamisela iRecognition of Customary Marriages Act (RCMA) ngo-1998. Lo Mthetho waphelisa imigaqo eyayikho phantsi kweBlack Administration Act nezinye izinto ezisemthethweni kwimithetho yesintu ngokumayela ubume obusemthethweni kwemitshato yesintu. I-RCMA iye yaphucula ukukwazi kwabasetyhini ukufikelela kwizimali zomtshato, yaye yenze ibe zinkundla eziphakamileyo nezingingqi kuphela ezikwazi ukugweba kwiimbambano zomtshato.

Ngokuthe ngqo i-RCMA ithetha ngezi zinto: imfuneko yokubakho komtshato wokwenene; ukubhaliswa komtshato; umtshato wesithembu; ukulingana kwamaqabane omtshato emtshatweni kunye nobunini bezinto zomtshato kwakunye

²uMthetho 38 ka 1927 (ngoku oye watshitshiswa).

³Ngokomzekelo, imigaqo esemthethweni yomthetho yemitshato yesintu equlethwe kwimithetho engaphambili ne Natal Code of Zulu Law Proc R151 oka1987.

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uqhawulo mtshato; ungenelelo lweenkundla eziphakamileyo nezengingqi kwiinkqubo zoqhawulo mtshato, endaweni yokuba inkqubo yokuqhawulo umtshato ibe kwiinkundla zesintu okanye nokwamalungiselelo abucala aphakathi kweentsapho zamaqabane omtshato, kunye namlungelo neembopheleleko zamaqabane omtshato kubantwana babo. Okubaluleke ngakumbi ngokuphathele ubunini bezinto zasemtshatweni, uMthetho uye wafaka umtshato wesintu phantsi kwesangqa semithetho yemitshato yaphambi komatyi ekungenwe kuyo ngokumayela neMarriage Act ka 1961. Ngoko ke, umtshato nomntu omnye umiselwa ngokokuba amaqabane omtshato ayakwahlula phakathi izinto xa etshata ngaphandle kokuba le ndlela yomtshato iye yaphetshwa ngokubakho kwesivumelwano saphambi komtshato esitsho ngokwahlukileyo, ngoxa indlela yomtshato yokongezeleleka iya kubakho xa kutshatwe ngaphandle kokuquka ipropati - out of community of property. Indlela zokwabiwa kobunini bezinto zomtshato zilawulwa ngokungqongqo ukuze kukhuselwe amalungelo abafazi besithembu.

Ngokumayela ukwabiwa kwamafa, umthetho wesintu waye wenziwa wahambelana nomgaqo-siseko ngenxa yotshintsho olwenziwa yiNkundla yoMgaqo-siseko ngo-2004 apho yaphelisa umgaqo ongathandwayo wokuba ngamadoda angamazibulo athatha indawo yooyise, ngena yokuba lo mthetho wesintu wabonwa ucalucalula yaye unxamnye noMgaqo-siseko. Inkundla yoMgaqo-Siseko yandisa ukusebenza kwe-Intestate Succession Act ka 1987, kumafa ebekade elawulwa ngumthetho wesintu, kwabakho utshintsho olwenzelwe ukuquka nemitshato yyesithembu. Inxalenye eyintloko yalo Mthetho eyenzelwe iinjingo zangoku kukwenzela ukuba amaqabane omtshato aphilayo nabantwana babaekwe kuqala njengeendlalifa eziyintloko endaweni yezizalwano zomfi, zona ziya kwabelwa ilifa ukuba umfi akanazo iindlalifa eziyintloko. Isigqibo seNkundla yoMgaqo-Siseko safaka nendlela efanayo yokulawula amafa kubo bonke abantu abaphantsi kolawulo loMphathi weNkundla Ephakamileyo. Kwixesha elidlulileyo amafa abantu abamnyama baseMzantsi Afrika ebelawulwa ngokuzimeleyo phantsi kwenkqubo engaphantsi eyayilawulwa ziinkundla zikamantyi.

I-*Bhe* rules zazikuqhubeka zisebenza de iPalamente iwise umthetho wokulawula ukwabiwa kwamafa phantsi komthetho wesintu. Ngo-2010 iPalamente yawisa lo mthetho wawulindelwe weReform of the Customary Law f Succession and Regulation of Related Matters Act ka 2009 olungiselela iindlalifa zabantu abe bengenamyolelo nokwabiwa kwamafa. Lo Mthetho waqala ukusebenza ngo-20 Septemba 2010. Ukususela ngoko, le mithetho ye-*Bhe* rules yayeka ukusebenza. Umthetho ka-2009 uye wafaka i*Bhe* rules, ingakumbi ukusebenza kwawo kumthetho we-intestate Succession Act. Ngenxa yeso sizathu, iziphumo zophando ngendlela yokusebenza kwenkqubo ye*Bhe* kwimithetho yokufa ungemyolelo iyangena kule ngxelo ngennjongo yokubonisa ukuba iinkalo ezithile zoMthetho ka-2009 ziza kusebenza njani ngokwesiqhelo.

Ukushwankathela, iingcambu zokuwiswa komthetho we-RCMA ne*Bhe* rules ziphuma ngenxa yokuzalwa kolawulo ngomgaqo-siseko kunyaka ka-1994 kunye naMalungelo Olunti abanzi. Ngaphandle kokwamkela kwemitshato yesintu, ukwayamiswa komthetho wesintu kunye nimgaqo ekumthetho womgaqo-siseko, ingakumbi umgaqo wokulingana nokungacalucalulwa sisizathu esibalulekileyo esibangele iinkundla nendlu yowiso mthetho zitshintshe mithetho elawula imitshato yesintu nokwabiwa kwamafa Le mithetho mitsha iquka inxalenye eninzi yemigaqo ekumthetho oqhelekileyo.

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Le ngxelo ichaza indlela le mithetho mitsha ephunyezwa ngayo, ibalaselise kokubini indawo othotyelwa kuzo neendawo ongathotyelwa kuzo. Ngenxa yoko, le ngxelo ibonia ukhomo athi urhulumente akhusele ngawo ubomi babantu abaphila ngemithetho yesintu, ize iphinde iqwalasele nendlela imigaqo ekuMgaqo-siseko ethotyelwa ngayo. Iziphumo zethu zibonisa ukuba ngenxa yezizathu ezininzi, le mithetho ayiphunyezwa ngokufanayo okanye kakuhle. Izizathu zixutyushwa kula macandelo alandelayo. Siza kucebisa neendlela ekungaphuculwa ukuphunyezwa kwale mithetho.

1.3 *Ingxoxo ekule ngxelo*

Eyona ngongoma iyintloko yale ngxelo kukub urhulumente unembopheleleko kungekhona nje eyokuqinisekisa ukuba imigaqo yokulingana ngesini kwimiba yomtshato, ukuqhawula umtshato kunye nokwabiwa kwamafa, kodwa okubaluleke kakhulu, unembopheleleko yokuxhasa abantu ukuze bakwazi ukufikelela izixhobo zokuzixhasa ebomini. Njengoko u-Mnisi Weeks waqaphelayo, nangona kwakufanelekile ukulwela nokufuna amalungelo asemthethweni, ukuqhubeka kokubanga le nto inye, kwenza imiba ebalulekileyo iphele ingaqwalaselwa.⁴ Ukucikoza ngamalungelo nokufumana amalungelo, akuqinisekisi ukuba amaqabane omtshato asemngciphekweni namalungu entsapho ekufuneka abe nesabelo kwipropati, angakwazi ukwenza njalo. Ngokubekele phaya, umthetho unganikeza amalungelo, kodwa ukuba urhulumente akabancedi abantu ukuba kubangwe loo malungelo, loo malungelo awathethi nto. Ukufumana amalungelo asemthethweni kwenza kube lulala kakhulu imiba epphixeneyp enokwenza negunya yaye ingabangela kubekho uluvo lokuba urhulumente wenze okwaneleyo ukususa loo mahluko kwigunya. Isibakala sokuba abasetyhini bekwazi ngoku ukufaka isimangalo sokuqhawula umtshato baze babange ipropati yomtshato, asinqandi imithetho engamiselwango nokuchithwa kwemitshato yesintu. Nangona oku kungasoloko kunjalo, amaqabane axhomkeke kwamanye awasoloko ewaqonda amalungelo awo.⁵ nangona kungasoloko kiunjalo kwezinye iimeko; ngapha koko, kungenxa yokuba umthetho namaziko awulawulayo aphatha abafazi namadoda ngathi ngabantu abachaseneyo, bengakhange baziqwalasele iimeko ezibanzi ezikhoyo zezoqoqosho kunye nobume bentlalo yolwalamano lwalo maqabane. Ukulawulwa kwemiba yomthetho wesintu kumele kusoloko kujonge kwimeko “yokwenne” yabantu abaphila ngawo. Simi ngelithi, iingcebiso esizenzileyo kule ngxelo ziyimfuneko ukuze kuphuculwe ukufikelela kwabantu kwizixhobo nokungakumbi ukukhusela ukuphila kwabo, kungekhona nje ukuphucula ukufikelela kumalungelo asemthethweni okanye okulingana.

2. *Iziphumo ezibanzi*

Kweli candelo kuza kuxutyushwa ubuninzi beziphumo neengcebiso ezibanzi ngokuphunyezwa kwale mithetho mitsha. Ngoko siza kuxubusha ukuthobela neemko apha kukho ukungangqinelani nale mithetho mitsha kwiinxalenye ezininzi zomthetho eziye zaphandwa, size sinike iingcebiso ngendlela yokujamelana nemiqobo eye yafunyaniswa.

⁴Mnisi Weeks ‘“Take your rights then and sleep outside, on the street”: Rights, fora, and the significance of rural South African women’s choices’ (2012) 29 *Wisconsin International Law Journal* 288.

⁵Mnisi Weeks (n 4) 290.

2.1 Ulwazi ngale mithetho

Kuzo zonke iinxalenye zophando lwethu abathathi nxaxheba baye babonisa ngokucacileyo ukungabi nalwazi ngenkqubo yomthetho, amaziko omthetho nakarhulumente kwakunye namanye amagama nemigaqo yomthetho.

Kwiimeko eziininzi, abathathi nxaxheba bebengayazi ukuba bayakwazi ukukhetha indlela abanokuwubhalisa ngayo umtshato wabo - ukutsho oko oluphi uhlobo olusemthethweni - babonakalise ukungayazi ukuba kukho umahluko phakathi kwemiphumela yokubhalisa imitshato kwamantyi nokutshata ngokomthetho wesintu. Oku kuswela ulwazi lwenze kwabakho ukubhideka ngokuba umtshato umele ubhaliswe kwiinkokheli zomthonyama nakwiSebe leZekhaya (DHA) kwakunye nenkolelo yokuba i-DHA ibhalisa imitshato yakwamantyi kuphela. Ezinye zezi ngxaki zazibonwe kuphando lwantlandlolo olwenziwa msinya emva kokuqalisa kwe-RMCA. Emva kweminyaka eyi-15 kwawiswa lo Mthetho, ezi ngxaki zisekhona. Oku kubonisa indlela urhulumente aye wasilela ngayo ukutshintsha umtshato wesintu.

Kwezinye iimeko, abathathi nxaxheba bebengakwazi ukwahlula phakathi kohlobo lomtshato abanokulikhetha, baze ngenxa yoko bangazi ukuba kukho imphumo eyahlukahlukeneyo ebakho ukuba umtshato uyaphela xa kukhethwe ezi ntlobo zomtshato. Lo mahluko wokuqonda iinkqubo zomthetho unemiphumo ebaluleke kakhulu. Ngokomzekelo, abafazi abafumana amaphepha okuqhawula umtshato baye batyikitye “amaphepha” bengaqondi imiphumo esemthethweni yezenzo zabo. Omnye umzekelo, ngowomfazi oshiyiweyo nongasazi ukuba umyeni wakhe uphi,, kodwa wayengayazi ukuba angaqalisa inkqubo yoqhawulo mtshato.

Ingxaki yokungawazi umthetho ingaconjululwa ukuba urhulumente uqhubeka efundisa ngokubanzi abantu malunga notshintsho kumthetho kunye neempawu ezithile ze-RCMA nomthetho olawula ukwabiwa kwamafa. Indlela esebenzayo kukuba kubekho ipowsta ezimalunga notshintsho kumthetho wokwabiwa kwamafa owabakho ngenxa ye-*Bhe*, kwiindawo zokungena ze-ofisi yoMphathi weNkundla Ephakamileyo. Iziphumo zethu zibonisa ukuba amalungu oluntu aya kumaziko karhulumente ahlukahlukeneyo efuna ulwazi malunga namalungelo awo. Urhulumente angenza le nkcazelo ifumaneki ngokusebenzisa amaziko karhulumente ahlukahlukeneyo.

2.2 Indlela engachananga yokuchaza imithetho yesintu kunye neziganeko

Uphando lufumanise ukuba i-RCMA ne-*Bhe* rules khangela zikwazi ngokwaneleyo ukubonisa indlela imithetho eqhelekileyo eye yadityaniswa kuyo esebenza ngayo kwimithetho yesintu. Iingcamango ezifana ne ‘in community of property’, ‘antenuptial contracts’, ‘joint estate’, ‘accrual system’, ‘inheritance’, ‘matrimonial home’, njalo-nalo zibeka ingcaciso kwiziganeko zomthetho wesintu yaye azichananga.⁶Ngokomzekelo, umthetho oqhelekileyo wokwabiwa kwamafa kujongwa oza kuqala ngaphezu ‘kweemfuno’ njengesizathu esiyintloko sokugqiba ngeenzuzo kwipropati yentsaphi phantsi komthetho wesintu. Ngaphezu koko umtshato wendlela yokulingana kwepropati awuqondakali kwi

⁶Jonga kunye ne-Mamashela ‘New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act’ (2004) 20 *South African Journal on Human Rights* 616.

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meko apho abantu abaninzi abaza kuxhamla bengamahlwempu. Ngaphezu koko, le ndlela yenkqubo yepropati, ayisoze isebenze kumtshato wesithembu ngokuba ifuna ukuba iqabane ngalinye lifumane izibalo kwizinto ezingokohlulwa kuyo yonke ipropati ekhoyo aza namatyala amaqabane omabini ohlulwe phakathi.

Imiphumo yokunganikeli ingqalelo kwe-RCMA neBhe rules ngendlela imithetho eqhelekileyo esebenza ngokuluncedo ngayo kwimithetho yesintu ibonakala ngemibuzo abantu ebebe nayo ngokumayela, ukwenza umzekelo iintlobo zomtshato ezikhoyo. Abathathi nxaxheba kuphando lwethu, bebengaqinisekanga ukuba ngubani onokubanga ikhaya lomtshato, ingakumbi xa elo khayo ibe likhoyo elifunyenwe ngumyeni ngokwabelwa ilifa. Ngenxa yoko, oko kuboniswa kolu phando nakolunye⁷ kukuba akuphelenga nje ekuthini kongezwe indlela zoncedo lomthetho oqhelekileyo kumthetho wesintu ngaphandle kokutshintsha ngokuthe gabalala izinto eziqheliselwa kiulo mthetho. Ukuze kulungiswe le ngxaki, i-RCMA nemithetho yokwabiwa kwamafa, imele itshintshwe yaye zimele zithathe iinxalenye ezithile ezifunyanwa kumthetho wesintu osetyenziswa ngabantu. Sekunjalo, esi sicombululo, siza kufuna uphando olungakumbi ukuze kubonwe iindlela ezicacileyo nezifanelekileyo zokuphumeza le njongo.⁸

2.3 *linkqubo ezifanayo zomthetho ezimiselweyo nezingamiselwanga zokujongana nemiba yesintu*

Uphando lufumanise ukuba kukho iinkqubo zikarhulumente neenkqubo ezingamiselwanga ziyafana ngendlela zokulawula imitshato yesintu, uqhawulo mtshato kunye nokwabiwa kwamafa ziyasetyenziswa. Ngokomzekela, kukho abasemagnyeni abangamiselwanga nokwe-RCMA (abazinkokheli zomthonyama) abaye babhalise imitshato kodwa iingxelo zabo bangazisi kwiSebe leZekhaya, loo nto yenze kubekho iinkqubo ezimbini zobhaliso. Ngokufanayo, imitshato iqhubeka ipheliswa ngendlela engamiselwanga ngokuchaseneyo namalungiselelo oMthetho, kwangendlela efanayo, amafa alawulwa ziintsapho ngaphandle komgaqo nkqubo we-*Bhe* rules. Inxaki enkulu kukuba ukusebenza kwezi nkqubo zifanayo akulungelelaniswanga yaye urhulumente akakazamkeli. Akubangeli ukubhideka kuphela kubantu abahlukahlukeneyo oku kodwa, njengakwezinye iimeko, urhulumente ubekela bucala iinkonzo zasekuhlaleni kunye nezicombululo zabantu bokuhlala ebezinokukwazi ukwanelisa imfuno zabantua, ngokukodwa abantu abahlala emaphandleni. Ngenxa yezi zizathu sicebisa ukuba, ezinye iinxalenye zezi nkqubo zifanayo zamkelwe zize ziququzelelwe kunye neknqubo karhulumente ekhoyo. Amandla alo mthetho nokuphunyezwa kwemithetho emitsha angenziwa ngecono zezinye iintlobo zokufikelela ekuhlaleni, kuze ngaloo ndlela umthetho ukwazi ukwandiselwa kumanye amaziko karhulumente. Ngokomzekelo, urhulumento anganika igunya, abantu abathile e-DHA nakwiNkonzo yesiPolisa yaseMzantsi Afrika ukuba abantu banikwe inkcazelo echanileyo emalunga ne-RCMA nemiphumo yayo. Siza kubuyela kumacebiso mayela nokwamkelwa kwendawo ezithile zemithetho efanayo kwimixholwana ekwicandelo elilandelayo.

⁷ Ibid.

⁸ The ongoing empirical studies by postgraduate students on various aspects of the RCMA and the Reform of Customary Law of Succession and the Regulation of Related Matters Act under the auspices of the Chair will contribute to this endeavour.

3. Iziphumo zemiba eyahlukahlukeneyo

Kweli candelo sithetha ngeziphumo zokuphunyezwa kwemithetho emitsha kwimiba ethile yesivumelwano somtshano, uqhawulo mtshato, ukwabiwa kwamafa kunye nokucombulula ukungavisisani.

3.1 Isivumelwano somtshato wesintu wesintu

Uphando ngesivumelwano somtshato lugxininise kwimilinganiselo efunakayo ukuze umtshato wesintu ube ngokomthetho xa kutshatwe emva komhla oqala ngawo uMthetho, ubhaliso lomtshato, isithembu nokulingana kwamaqabane omtshato.

3.1.1 Imilinganiselo eyintloko ukuze umtshato ube semthethweni ngokweenkundla zomthetho nangokwasekuhlaleni

Uphando lufumanise ukuba iinkundla zifuna kuqalwe kukhutshwe *ikhazi* aze umakoti asiwe emzini ukuze kube kukho isivumelwano somtshato. Kwezinye iimeko, ukuyikhupha ngokuyinxalenye okanye liphelele *ikhazi* yinto yokuqala ejongwayo ukuze kubekho isivumelwano somtshato osemthethweni, ngoxa isivumelwano sokuyikhupha siye sanele kwezinye iimeko. Ezi mfaneleko ziyafana nezokuphila phantsi komthetho wesintu. Ngoko ke, nakuphi ukutolika amasoloty e-RCMA okungaquki ukukhutshwa kwe*khazi* njengemfuneko yomtshato osemthethweni akuhambisani kokubini noqheliselo lweenkundla kunye nomthetho weintu. Uphando luye lwaphinda lwafumanisa ukuba amadoda nabafazi bakujonga ukukhutshwa kwe*khazi* njengento ebaluleke kakhulu. Olu gwebo luxhasa uphando olukhoyo.⁹ Ukubaluleka kwe*khazi* kwinkqubo yokuzakuzakunxalenye ezininzi ezibalulekileyo okunxilumene nako, nxalenye ezo ezinentsomi yokwenza namalungelo olungu, ingakumbi abafazi abajonga *ikhazi* njengophawu lentlonelo.

Imbono yokuba yintlawulo efunekayo ukuze umtshato ube semthethweni yongezelela kwisibakala sokuba umtshato unezigaba, nto leyo yona eyenza kubekho izithintelo nemiqobo kubatshati. Ezinye izithintelo zichaphazela ngokwesini, yaye zichaphazela abafazi ngakumbi. Oku kuba yingxaki ngakumbi xa kufunwa ubungqina bomtshato. Ikwayingxaki ngenxa yekhazi elifunwayo xa kukhutshwa *ikhazi*, khazi elo amanye amadoda angakwaziyo ukulikhupha kangangethuba elide. Ukuze kuncitshiswe ezi ngxaki sinembono ethi sivumelwano sokukhupha *ikhazi* sanele ukuze kube kukho umtshato osemthethweni. Ukuvumelana ngokuba kuza kukhutshwa *ikhazi* kumele kugqalwe njengexalenye yomthetho wesintu, ovisisisana neenjongo, nomoya waMalungelo Oluntu (s 39(2) yoMgaqo-siseko). Sekunjalo, le mbono isekelwe ekuqondeni ukuba abatshati nezamalane zabo bakhululekile ukuba bamisele imimiselo yesivumelwana nokuba loo mimiselo imele ithotyelwe.

Kukho nobungqina bokuba eyona nto ingundoqo kumtshato, kukuba umfazi asiwe emzini aze aziswe kwizalamane zomyeni wakhe.

Lo ndoqo ucacileyo uyimfuneka ukuze umtshato ube semthethweni ngowona umela umthetho wesintu ekuphilwa ngawo. Ngoko kwamkelekile ukuba iinkundla zi

⁹Shope ‘“*Lobolo* is here to stay”: Rural black women and the contradictory meanings of *lobolo* in post-apartheid South Africa’ (2006) 20 *Agenda* 64–72.

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qinisekise le ntalnganisela yemigangatho ngokuphuhlisa umtetho wesintu njengoko kulungiselelwe kwi s 39(2) yoMgaqo-siseko.

3.1.2 *Ilobola njengomfuziselo wentlawulo*

Olu phando luqinisekisa uphando olusele lwenziwa ngokubaluleka kwekhazi njengomthombo wentlawulo yomfuziselo nangokunxulumana kwengcamango yamalungelo abafazi okuphathwa ngesidima nentlonela njengoko kujongwa njalo ngabafazi abaqhelisela esi sithethe.¹⁰ Nangona abafazi abantsundu bengelo qela elinye elinezimvo ezifanayo ngekhazi, olu phando luye lwabonisa ukuba kukho iqela labafazi elahlukileyo elingakhange liviwe yi-South African Law Commission kwakunye nabalwela amalungelo abantu, ebebesithi mayipheliswe imfuneko yekhazi njengenye yeemfuneko zomtshato kumalungiselelo e-RCMA.¹¹ Olu gwebo lukhomba kwimbaluleka yokumelwa ngokufaneleyo kwakunye nokuthatha inxaxheba kwakhe wonke umntu xa kutshintshwa iinkqubo zomtetho wesintu, ngakumbi abafazi ngenxa yokuba 'basenzulwini yosukuzwano olungqonge ukuba yintoni isithethe' .¹²

3.1.3 *Umngcipheko wokungakhuseleki kwabantwana emitshatweni*

Uphando lufumanise kukho imbono exhasa ukubakho kweenkqubo ezimbini zomtshato wabantwana. Le mbono ithi, abantwana bangatshata ngokomtetho wesintu baze babhalise umtshato wabo ngukusekelwe kwi-RCMA emva kokuba befike kwiminyaka yobudala. Kucacile ukuba le mbono ayiphelile ekuphikisaneni nalo Mthetho, ongavumeli ukuba kubekho iinkqubo ezimbini ezifanayo zomtshato, kodwa ivumela ukutshatiswa kwabantwana, nto leyo eyophula eminye imithetho yelizwe njengcandelo 3 le-RCMA noMthetho waBantwana.¹³

3.1.4 *Izinto ezintle nezimbi ezenziwa ziinkundla*

Uphando lufumanise kukho uqheliselo oluhle nolubi olwenziwa ziinkundla ngendlela ezitolika ngayo amalungiselelo omtetho mayela neemfaneleko zomtshato osemthethweni. Uqheliselo lokuqala lumayela nemvume yomtshato wababandakanyekileyo njengoko i-RCMA isithi yimfuneko. Uphando lufumanise iinkundla zenza ingqikelelo ezimbini xa kufuneka sihlale le mfaneleko, kodwa zombini zisenokungadibani noko kwenziwayo ekuhlaleni. Uqikelelo lokuqala kukuba imvume yentsapho ithetha ukuba abatshati bayvuma nabo. TEyesibini yingqikelelo yokuba ukuthath'inxaxheba kwabatshati kuzakuzo lomtshato kubonisa ukuba bayavuma ukutshata.¹⁴ Sekunjalo, uqikelelo lokuqala luyalibala ukuba kufuneka kuvume bobabini abantu abaza kutshata ngomtshato wesintu kuze neentsapho zabo zinike imvume yomtshato ukongezelela kweyabo. Ngokuphathethelele ingqikelelo yesibini, olu phando lufumanise ukuba abatshati, abaye babe nenxaxheba xa kuzakuzelwa ikhazi, elinye inqanaba elibalulekileyo elikhokhelela kwi

¹⁰ Shope (n 9).

¹¹ South African Law Commission (Project 90: The Harmonisation of the Common Law and the Indigenous Law) *Report on Customary Marriages* (August 1998).

¹² Shope (n 9) 65.

¹³ Act 38 of 2005. Kumele kuqatshelwe ukuba loMthetho uyasebenza nakubantwana abazelwe phantsi komtshato wesintu.

¹⁴ Bona iJustice College *Customary Marriages Bench Book* (February 2004) 3–16.

sivumelwano sokutshata ngokomthetho wesintu. Ngoko akukho sizathu sivakalayo sokwenziwa kolu thekelelo. Oku kukhokhelela kwicebiso lokuba urhulumente makanikele ingqalelo kumba wemvume phakathi kwababandakanyekileyo emtshatweni ukuze kuqinisekwe kukhuselwa amalungu entsapho asemngciphekweni kuquka abantwana ukuba bakhuselwe ekutshatisweni ngenkani.

Okwesibini, kukho ubungqina kwiziphumo zokuba izithuba ezikumthetho oqhelekileyo nakumthetho omiselweyo wesunti ziqhubeka zivela ekuzinzisweni kwamabango emva kokuwiswa kwe-RCMA. Ngokomzekelo, kwamanye amatyala asemva kokuwiswa kwe-RCMA, iinkundla ziye zasaBenzisa inkqubo yokujonga obekukhe kwenzeka ngaphambili ngendlela efanayo naxa bezijonge ityala phantsi komthetho oqhelekileyo apho le nkqubo ithathwe khona. Kwamanye amatyala, iinkundla ziye zathembela ngeemeko ezandulelayo zaphambi kwemitshato ye-RCMA, ngalo ndlela zingenisa iimeko zaphamvi kokuwiswa okusemthethweni komthetho wesintu kumthetho we-RCMA. Iinkundla kufuneka ziyiqonde ukuba kukho iindlela olu qheliselo lwazo ezinokuthi ngayo zingathobeli i-RCMA. Kufuneka ziqonde ukuba inkqubo zomtshato wesintu, nezithethe zahlukile kuhlana ngalunye lwabantu abantsundu. Kwezi meko, iinkundla azinakusoloko zisebenzisa into ebiyenzeke kwityala elidluleyo zize ziyikake kwelo liphambi kwazo.¹⁵ Okwesithathu, kwamanye amatyala, iinkundla ziye zajonga impembelelo yezithethe zseNtshona 'njengxalenye encinci yemisitho'. Iinkundla zimele ziyiqonde into yokuba umthetho wesintu awumanga ndawonye, uyatshintsha yaye nenkqubo yokutshintsha kwawo uchats hazelwa nalifuthe lezithethe zezinye iintlanga. Iinkundla zimele zikhuthazwe ukuba zifunde kwezinye iinkundla eziye zaqonda ukuba kukho ingcamango yokuba umthetho wesintu uyatshintsha. Kule nkalo, uphando lufumanise ukuba ezinye iinkundla ziye zathembela kumba wokuba umthetho wesintu uyaphila zaza zenza izigqibo ngeemfuno zokutshata ngomthetho wesintu ngokusekelwa kutshintsho kubume bentlalo, nobezoqoqosho ezifana nezo zibangelwa yimpucuko

Okokugqibela, uphando lufumene izigqibo ezingumzekelo ezinokuxeliswa ziinkundla. Enye yazo ithi *Southon v Moropane*,¹⁶ tyala elo elimayela nokunikela ingqalelo kwejaji kwiinkcukacha ezenza umtshato wesintu ube semthethweni. Eminye imizekelo zizigqibo zeNkundla yoMgaqo-siseko ku *Gumede v President of the Republic of South Africa*¹⁷ naku *Mayelane v Ngwenyama*,¹⁸ ezixhasa umgaqo wokulingana emitshatweni yesintu. La matyala angumzekelo amele asetyenziswe 'njengomthetho olungileyo'.

3.1.5 Indima yentsapho xa kusenziwa isivumelwano somtshato

Kuyabonakal ukuba kokubini kwizigqibo zenkundla ezihliliweyo noqheliselo lwabantu ekuhlaleni ukuba kukho ubungqina bokuba ukufikelela iimfaneleko zokutshata ngesintu phantsi kwe-RCMA kuquka kungekuphela nje abatshati kodwa kwakunye nezalamane zabo. Ukubandakanyeka kwezalamane kungundoqo xa kuzakuzelwa umtshato, ngakumbi kumbandela wekhazi, nokusiwa komtshakazi kwikhaya le ndoda. Ukubandakanyeka kwentsapho

¹⁵ Jonga kwano Himonga & Pope 'Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications' 2013 *Acta Juridica* 318–38.

¹⁶ Case No 14295/10 [2012] ZAGPJHC 146 (18 July 2012).

¹⁷ 2009 (3) BCLR 243 (CC); 2009 (3) SA 152 (CC).

¹⁸ 2010 (4) SA 286 (GNP).

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nendima enkulu edlalwa yiyo kuzakuzo kunendima yabatshati ibonakala kwisibakala sokuba akukho namnye kumaqabane omtshato athatha inxaxheba ekuzizakuzeleni, beshiya le nkqubo ngokupheleleyo kwizandla zezalamane nabantu abadala bentsapho. Ngokwembono ejonge indima edlalwa zizalamane, njengoko kufunyaniswe lolu phando, uluvo olukhoyo kuphando olusele lwenziwe lwelokuba abatshati bangazitshintsha iimfanaleko zomtshato osesikweni alunankxaso.¹⁹ Sekunjalo, sime ngelithi umtetho wesintu emele uphuhlise ngokumayela necandelo 39(2) loMgaqo-siseko ukuze kuvunyelwe abatshati abanomnqweno wokubandakanyeka kuzakuzo lomtshato wabo, ingakumbi mayela nekhazi, benze njalo, ngaloo ndlela bakwazi ukusebenzisa ilungelo labo lokuvuma ukutshata ngokupheleleyo njengoko kuyimfuneko ngomtetho we-RCMA. Mhlawumbi, umba wemvume uvuselela ilungelo elikumgaqo-siseko lokuphathwa ngesidima, lungelo elo abatshati abamele balifumane.

Ngenxa yokuba ikhazi ingundoqo emtshatweni, oku kuveza ukubaluleka kwayo kubungqina bokubakho komtshato. Sekunjalo, abaza kutshata - ekungabo ekufuneka ngamanye amaxesha beze nobungqina bokuba semthethweni komtshato wabo, ingakumbi ngezizathu zokubanga ilifa - babelwa phandle kwinkqubo yozakuzo egqiba ngentlawulo emele ikhutshwe nokwamkelwa kwayo. Le nxalenye ekumtetho wesintu ophilayo yenza mandundu ngakumbi imeko yokngazi emayela nokubakho komtshato ngokusesikweni. Kwiimeko ezininzi, oku kususithintelo kubafazi okanye abahlolokazi okanye ababangi bezixhobo nezinto zomtshato xa kuqhawulwa umtshato. Lo mtetho wesintu ophilayo kufuneka ke ngoko uphuhlise ukuze ukwazi ukuncedisa kubukho bobungqina bokuba umtshato usemthethweni.

3.1.6 *Indima yeenkokheli zomthonyama xa kuzakuzelwa umtshato*

Uphando ufumanise ukuba iinkokheli zomthonyama bezingabandakanyekanga xa bekuzakuzelwa umtshato kodwa kwiimeko ezininzi bezichazelwe emva kokuba kugqityiwe. Kwiimeko ezimbalwa, iinkosi zidlale indima yokuba ngamangqina xa bekuzakuzwa nasekuqunjelweni kwako ngokuthi zibekho xa kubhaliswa okanye kuhlolwa iinkomo zekhazi apho kuye kwaziswa iinkomo zekhazi ukuze kuphunyezwe le njongo. Le ndima yenza ukuba iinkokheli zomthonyama zibe ngumthombo wobungqina kwimiba efuna ubungqina bokuba umtshato usemthetheni naxa loo mtshato bebengamangqina okuzibonela okanye abaziswe ngawo kukho impikiswano mayela nokuba usemthethweni. Eyethu imbono yeyokuba iinkokheli zomthonyama zingadlala indima eluncedo kwezinye iinxalenye zokuphunyezwa kwe-RCMA.

3.1.7 *Iindlela ezahlukahlukeneyo zokungqina ubukho bomtshato-zomtshato wesintu*

Iziphumo zolu phando ngendlela imitshato ezakuzelwa ngayo ngokwesiqhelo, ingakumbi ukubandakanyeka kwezalamane, zibonisa ukuba iSebe leZobulungisa (lisebenzisa *iBench book*) limele lalathise inkundla ukuba zinikele ingqalelo ekhethekileyo kwindima edlalwa zizalamane

¹⁹ Ngokomzekelo jonga, Nongogo 'Recognition of Customary Marriages Act' News and Views for Magistrates (August 2001) cited as *Customary Marriages Bench Book* Justice College, Department of Justice and Constitutional Development (2004) 17.

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kwimiba enxulumene nobungqina bokuba sesikweni komtshato. Ngaphezu koko, ukuba iinkundla bezinikela ingqalelo ekubeni umtshato sisiganeko esisekahleni, beziya kubiza amangqina amaninzi ukuze azokungqinisa mayela nokuba semthethweni komtshato.

3.1.8 Ingqokelela yezithethe ezahlukehlukeneyo

Okokugqibela, uphando lufumanise ukuba, kwiimeko zasekuhlaleni apho amasiko nezomthetho zihamba kunye, njengaseMzantsi Afrika, kusoloko kungenzeka ukuba amasiko nezithethe ezinye iintlanga nemilinganiselo eyahlukeneyo apho abantu badibanisa izithethe nemilinganiselo yezomthetho. Kule nkalo, abanye abantu badibanisa iinkalo zezithethe zomthonyama kunye neznkolo, ubuKrestu nezithethe zaseNtshono kunye nemithetho karhulumente xa besenza imitshato yabo. Ngoko ukubakho kwengqokelela yemilinganiselo elawula imitshato ekuhlaleni yinto engacingelwanga ngurhulumente, nemigaqo kqubo yezomthetho. Ngoko uphando kwakunye nokujonga indlela abantu abaqhuba ngayo imitshato yabo, kubalulekile ukuba urhulumente ufuna ukuphumzea iinjongo zokuwisa imithetho yokutshata ngesintu. Urhulumente umele akhuthaze endaweni yokuthintela uphando.

3.2 Ukubhalisa umtshato wesintu

Uphando lufumanise iingxaki ezininzi mayela nokubhaliswa kwemitshato, ngxaki ezo ezifuna ingqalaselelo ukuze kuphuculwe inkqubo yokubhaliswa kwemitshato. Ezi ngxaki nendlela yokuzisombulula kuthethwa ngazo ngokulandelayo.

3.2.1 Ukudideka mayela neentlobo ezahlukehlukeneyo zemitshato

Kukho ukubhideka kubantu abatshatileyo, nakwamanye amagosa ase-DHA ngomahluko okhoya phakathi komtshato wesintu nomtshato wakwamantyi nendlela inkqubo yokubhalisa kwanendlela umthetho oyilawula ngayo le mitshato. Okubaluleke ngakumbi kukuba ukubhalisa umtshato e-DHA, kujongwa njengokusondele kakhulu nemitshato yakwamantyi, yayae imitshato yakwamantyi ijongwa njengemitshato enika ukhuseleko olungakumbi ngokwasemthethweni. Ezi ziphumo, zenza kubekho umbuzo mayela nokuba amagosa aseDHA abeka phambili ukubhalisa imitshato yakwamantyi endaweni yemitshato yesintu.

Iziphumo zikwabonisa ukuba abatshatise ababhalisa umtshato abahluli phakathi kokubhalisa umtshato wesintu nokubhalisa umtshato wakwamantyi. Ukuba umtshatise omnye ubhalisa yomibini imitshato, oku kubhideka kungenzeka kuqhubeka. Sicebisa ukuba kumele kubekho ukwahluka okukhulu phakathi kwezi nkqubo zokubhalisa yomobini ezi ntlobo zemitshato. Kumele kubekho iinkqubo ezahlukeneyo zokubhalisa, kunye neerejista zomtshato wesintu ezahlukelelo kumtshato wakwamantyi. Oku kuya kuphelisa ukubhideka kwabasebenzi.

Uphando lukwafumanise ukuba nangona olu iluluvvo lwabantu jikelele, amagosa abhalisa imitshato yesintu awayazi ukuba iimfaneleko zokubhalisa umtshato wesintu zithini. Khange sikwazi ukufikelela kwiDHA, ngoko asikwazi kuqinisekisa le mbono ngokoluvo lwamagosa abhalisa imitshato. Sekunjalo, kucacile ukuba imitshato yesintu ayibhaliswa ngendlela efanelekileyo. Ukubhaliswa kwemitshato yesintu (nemitshato yakwamantyi) kufuna abasebenzi abanesakhono sokubhalisa imitshato yesintu,

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Nabaziqondayo iimfaneleko zokubhalisa umtshato wesintu, ngokwahlukileyo ekubhaliseni umtshato wakwamantyi.

Sicebisa ukuba, urhulumente aqeqeshe amagosa abhalisa umtshato asebenza kwezi nkqubo ukuze akwazi ukubona nokubhalisa umtshato ochanileyo. Sikwacebisa ukuba i-DHA imele inikezele abaphandi ukuba bafikelele kuzo zonke iinkqubo ezikhoyo zokubhalisa imitshato yesintu.

3.2.2 *Indima yeenkokheli zomthonyama namalungu entsapho*

Uphando lwethu lufumanise indima ebalulekileyo edlalwa ziinkokheli zomthonyama (amagosa angamiselwanga e-RCMA) ekwenzeni iinkqubo 'zobhalis' ukuze kukhuselwe ikakhulu amaqabane anagamabhinqa akwimitshato yesintu. Ezi ziphumo zikhuthazayo, zisikhokhelela ekuncomeleni ukuba iinkokheli zomthonyama nendima yazo ekubhaliseni umtshato imele igunyaziswe ngokusemthethweni. Ukusebenza kwabo, kuza kufuna kudityaniswe nenkqubo eyintloko yobhaliso. Umthetho we-RCMA awutsho phandle ukuba ngubani onokuba ligosa lobhaliso. Njengokuba kucacile ukuba iinkokheli zomthonyama kunye neecawa zidlala indima ekubhaliseni imitshato yomthonyama, bekungayinzuzo ukwakhela phezu kwesi siseko. Nangona besinokukhuthaza abantu baye kwinqubo eyintloko, akunakwenzeka oko, ngokusekelwe kwiziphumo zethu zokuba le nkqubo inokuquka abantu abaphila phantsi komthetho wesintu.

Iziphumo zikwabonisa ukuba ingokuqhelekileyo, inkokheli zomthonyama aziye zibe ngamngqina ezivumelwano zomtshato. Kumaxesha amaninzi, ezi nokokheli ziye zaziswe ngomtshato kamva, kodwa azikhange zibe ngamangqina endlela oqhutywe ngayo. Ngoko sicebisa ukubai-DHA ayimele ifune ukuba iinkokheli zomthonyama zibe ngamangqina okuqhutywa komtshato osemthethweni ukuze kuphunyezwe iinjongo zokubhalisa. Ukongezelela, ukulindela iinkokheli zomthonyama ukuba zihambe namalungu asekuhlaleni ukuya kumaziko karhulumente okubhalisa kuthetha ukubeka imithetho engqongqo kakhulu. Oku kulibazisa le nkqubo kuze kubangele abantu bachithe imali ngokungekho ngqiweni. Kwanele ukubakho kwamalungu entsapho ngoba ngabo ababandakenye ngokungqalileyo ekuqkunjelweni komtshato. Amalungu entsapho kungacelwa abekho ukuze angqine ukuba umtshato usemthethweni. Ngale ndlela oko kwenzekayo ekuhlaleni, kungahambisana nenkqubo yokubhalisa.

Ekubani ingengabo bonke abathathi nxaxheba abaye bafumana ikhazi ngexesha umtshato ubugunyaziswa ngawo, iileta zokukhutshwa kwekhazi azimele zifunwe ngamagosa ukuze kubhaliswe umtshato. Ukufuna abantu babe neeleta zokukhupha ikhazi ngexesha lokubhalisa umtshato kufana nokubeka imilinganiselo yokubhalisa umtshato engekho ekuhlaleni. Le milinganiselo ingathintela ukubhaliswa kwemitshato yesintu. Ingxelo kanozakuzaku eya kumagosa echaza ubume bokukhutshwa kwekhazi imele yanele. Le ngxelo imele ibe sisivumelwano esithile mayela nokuba ikhazi kuye kwavaunyelwana njani ngalo, ukutsho oko, bavumelene ngantoni oonozakuzaku, kungekhona ingxelo yokuba ikhazi likhutshiwe. Ingxelo ngamalungu entsapho imele yanele yaye ingaba sisivumelwana sokuba ikhazi limele liphathwe njani.

3.2.3 Ubhaliso namanqanaba emvelo omtshato wesintu Iziphumo zibonisa ukuba nangona umtshato wesintu uye ubonakale ngathi unamanqanaba, kuyavunyelwana ukuba ngexesha elithile, umtshato angabhaliswa, njengoko uye ugqalwe njengosemthethweni ngabatshati, izalamane zabo kunye nabantu basekuhlaleni. Iziphumo zibonisa ukuba, ngamanye amaxesha, kufikelelwa kweli nqanaba xa (a) kuvunyelwene ngekhazi, naxa (b) umfazi esiwe emzini wakhe. Kwabanye eli nqanaba lifikelelwa xa (a) ikhazi likhutshwe ngokuzeleyo naxa (b) umfazi esiwe emzini. Abanye abantu banxulumanisa ukubhaliswa komtshato kunye nokukhutshwa kwekhazi. Njengoko ukukhutshwa kwekhaazi kudlala indima ebalulekileyo, nesibakala sokuba ukugqiba ukukhupha lonke ikhazi kungathatha ixesha elide, ukufuna kubekho ixesha elingqongqo lokuba umtshatwe ubhaliswe kubangela ingxaki. Abanye abantu abakwazi kuwufikelela lo mlinganiselo. Okwangoku akukho sohlwayo ukuba umtshato awubhaliswanga kwiinyanga ezintathu emva kokuba kutshatiwe. Akucaci ukuba yintoni ephunyezwa kukunyanzelisa ukuba umtshato ubhaliswe kwiinyanga ezintathu kutshatiwe. Ezi ziphumo zibonisa ukuba le mfaneleko ayikho ngqiqweni njengoko abanye abantu benxulumanisa ubhaliso lomtshato nokuphelela kwekhazi baze ngenxa yoko bangakwazi ukufikelela lo mlinganiselo. Sicebisa ukuba iPalamente iphinde iqwalasele ixesha lokubhalisa ize yenze utshintsho oluya kwenza kungabikho xesha limisiweyo lokubhalisa umtshato kwi-RCMA. Sime ngelithi, kukho izinto ezibaluleke ngakumbi kwinkqubo yomtshato kunokubhaliswa nje kwawo, yaye ukubangela imiqobo kubhaliso akuphumezi injongo yalo mlinganiselo.

3.2.4 Imfuneko yemvume yamaqabane omabini ukuze ubhaliswe

Kusekho ukungafani phakathi kokufunwa nguMthetho ngemvume yabatshati ukuba ubhaliswe umtshato wesintu kunye nemilinganiselo yase-DHA. Kusekho kwakhono nokungafani phakathi koMthetho, iwebhuseaythi ye-DHA, kwakunye ne-Bench Book ngokumayela nokuba ngubani ongabhalisa umtshato. Sicebeisa ukuba iqabane eliunye limele likwazi ukubhalisa umtshato. Ubhaliso aluthethi kuthi umtshato usemthethweni okanye akunjalo. Kukutsho nje ukuba kukho 'into' eyenzekileyo; ayibobungqina obungenakuphiswa kokuba semthethweni komtshato. Abantu ababandakanyekileyo basenokuza nobungqina bokuba kukho imilinganiselo engekafikelelwa.

3.2.5 Ukubhalisa imitshato yaphambi kweRCMA

Kubonakala ngathi izetifiketi zemitshato yangaphambi kwe-RCMA azivunywa ngamanye amaziko kuquka iinkampani ze-inshorensi. Simi ngelithi imitshato yangaphambi kwe-RCMA eyayibhaliswe ngokweenkqubo ezazikhona ngoko (umz. iMithetho yase-Transkei neyaseKwazulu Natal) , nenezetifiketi zomtshato imelwe yamkeleke. Abantu abanezi zatifikethi abamelwe bohlaye ngento edluleyo. Ngokuthe jikelele, iziphumo zibonisa ukuba ukuza nobungqina bomtshato osemthethweni kwiinkampani ze-inshorensi kuba yingxaki.

3.3 Ukulawula imitshato yesithembu

Kukho imiba emibini evelayo mayela nokulawulwa kwemitshato yesithembu. Le miba iba kukubhaliswa komtshato e-DHA nesivumelwano sokulawula imfanelo zomtshato.

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3.3.1 *Ubhaliso*

Ukubhalisa imitshato yesithembu kuhambisana nendlela abantu basekuhlaleni abayijonga njengendlela efanelekileyo yokulungelelanisi imicimbi phakathi kwendoda nabafazi abakumtshato wesithembu. Abathathi nxaxheba kuphando bebhokolelwa kukuba urhulumente umele abe nendima ayidlalayo ekulawuleni le micimbi yaye kukho ukuvumelana gabalala lokuba imitshato yesithembu imele ibhaliswe. Sekunjalo, iziphumo zethu, ezifananobungqina bophando osele lwenziwe, zibonisa ukuba abayeni abayibhalisi imitshato yesithembu. Ngokukodwa, sifumanise ukuba umfazi wokuqala udlala indima eyintloko kule nkqubo yobhaliso.

I-South African Law Commission iye yasilela ukuqwalasela ukuba kungathetha ntoni oku xa kuphenyezwa i-RCMA. Ngokukodwa, isilele ukuqwalasela ucelo mngeni lokufumana imvume yomfazi wokuqala nomphumo onokubakho kumalungelo omfazi wesibini nabanye abafazi besithembu. Ngokusekelwe kwiziphumo zethu, ingqwalasela ebaluleke ngakumbi imele inikelwe kwindima yomfazi wokuqala, njengoko oku kunemiphumo ebaluleke kakhulu. Iziphumo zibonise ukuba, kwezinye imeko, ngumfazi wokuqala oye abe nembopheleleko yokufunela umyeni wakhe umfazi wesibini. Kwezi meko, ngaba ukwamele abe kwanembopheleleko yokubhalisa umtshato wesibini? Impendulo yalo mbuzo ifuna uphando olungakumbi njengoko iveza imiba entsokothileyo ngamalungelo abafazi (umfazi wokuqala nabanye abafazi abalandelayo).

3.3.2 *Isivumelwano sokulawula ipropati yomtshato*

Uphando lubonisa ukuba iinkqubo zobhaliso zamaqabane akumtshato wesithembu ziye zanefuthe elincinci. Ezi nkqubo ziquka iimfanelelo zecandelo 7(6), elinyanzelisa umyeni afumane isivumelwano sokulawula ipropati yomtshato esigunyaziswe yiNkundla Ephakamileyo. Zimbalwa kwezi zivumelwano ezibhalisiweyo.

Imiba emayela nenkqubo ka 7(6) ibonisa ukuba le nkqubo ayimele isuswe kwaphela kwiinkundla. Endaweni yoko, ezinye iinkalo zolu qheliselo lwasekuhlaleni sele zilawula imitshato ngendlela exhasa i-RCMA, le nkqubo imele iyekwe ithathe indawo ngaphandle kweenkundla zomtshato. Ngokomzekelo, umntu ofuna ukutshata isithembu, angatshata e-DHA, lize elibhalisayo libe nembopheleleko yokuqinisekisa ukuba kukho isivumelwano esiqukunjelwayo ngelo xesha. Ngexesha lokubhalisa umtshato, igosa elibhalisa umtshato lingenziwa libe nembopheleleko yokuqinisekisa ukuba abatshati bayadibana ukuze bathethe baze benze isivumelwano. Esi sivumelwano simele sibhalwe kwisetifikiti size sibe sisihlomelo kwiingxelo zokubhalisa umtshato.

Kwimeko yezivumelwano ezifunyenwe ngokwenkqubo yeenkundla, ngumyeni kuphela onembopheleleko yokuza nesicelo kwinkundla ukuze kubhaliswe isivumelwano. Abafazi banelungelo lokuqukwa kuphela kwisicelo. Le ndlela, ibeka igunya elininzi kwizandla zomntu ongazukulahlakelwa nto ukuba akukho isivumelwano siqukunjelweyo, yaye asixhasi abo basemngciphekweni - kule meko, abafazi. Ngoko, sicebisa ukuba umthetho utshintshwe ukuze uvumele enoba ngowuphi kubafazi (kubafazi abakhoyo

kanye lo uza kungena emtshatweni) ukuba akwazi ukufaka isicelo sesivumelwano enkundleni aze acele siqukunjelwe.

3.4 Ukulingana emtshatweni

Ukukhuselwa komgaqo wokulingana ngesini emtshatweni yinjongo eyintloko ye-RCMA. Kukho iziphumo ezintathu zokulingana ngokwesini ezimele ziqwalaselwe. Okokuqala, abantu abatshatileyo abasayini sivumelwano saphambi komtshato, nomphumo wokuba yonke imitshato yesintu iye ibe phantsi kwe-community of property kunye ne-profit and loss ngokuzenzekelayo. Sekunjalo, abatshati abaye bathethe nzulu ngenkqubo yokulawula ipropati yomtshato.

Le meko ibangelwa ngabo baza kutshata abangenalwazi ngeendlela ezahlukeneyo zokulawula ipropati yomtshato xa kutshatwa, kwakunye nokungabikho kweenkonzo zenkxaso ezifanelekileyo ukuba ncedisa. Kwezinye iimeko, amaqabane omtshato abhalisa imitshato yabo, afumana inkcazelo ngendlela yokulawula umtshato kumagosa ase-DHA, kodwa le nkcazelo ayiye ibe yeyaneleyo ukubanceda benze isigqibo esinolwazi ngokhetho lwendlela yokulawula ipropati yomtshato okanye bathathe amanyathelo afanelekileyo ukubanga amalungelo abo xa kuyimfuneko. Olu celo mngeni lubangela abafazi baphulukane neenzuzo zabo xa kuqhawulwa umtshato okanye xa iqabane lomtshato lisifa, yaye lenza buththaka ukhuseleko lomgaqo-siseko olucetyelwe ukuzuza kwabafazi ngokumayela namalungelo abo epropati.

Okwesibini, nangona kokubini umtehto nezigqibo zenkundla ziye zazama ukukhusela ukulingana emtshatweni, ubume bontu kunye neemfanelo zomtshato, kodwa ngokwesiqhelo oku kuseliphupha nje.

Okwesithathu, indlela ukulingana ngokwesini okujangwa ngayo, akufani. Nangona abanye abathati nxaxheba bexhasa ukulingana ngokwesini, abanye abakuxhasi. Imbono yaba bokugqibela, ibonisa iingcamango ezithintela abafazi ukulawula okanye ukuba nenxaxheba ekwenzeni isigqibo, kuze kuvumele umyeni abe negunya elilodwa lokwenza izigqibo ngemicimbi yosapho.

Ezi ziphumo, ingakumbi esokuqala nesesibini, zibonisa imfuneko yeendlela zokwenza uluntu jikelele ngobume bendlela yokulawula umtshato wesintu eye yafakelelwa kwi-RCMA, ukuze abantu ngabanye ababange amalungelo abo okulingana ngokwesini aqinisekiswa nguMgaqo-siseko. Kukwakho nemfuneko yokwenza kubekho iinkonzo zokuncedisa abantu abafuna ukutshata ngesintu benze izigqibo ezinolwazi ngendlela yokulawula ipropati yomtshati abamele bavumelane ngayo. Akuncedi ukuba urhulumente enze kubekho inkqubo eiphixeneyo yomtshato ngokumayela nepropatu yomtshato aze alindele amahlwempu, abantu abanemfundo ephantsi ukuba bafumane inzuzo xa bejonga ezi ndlela zisemthethweni zokulawula ipropati.

3.5 Ukuphela komtshato wesintu

Umtshato wesintu uqale uphele ekuhlaleni, phakathi kwabatshati naphakathi kweentsapho zabo. Oku kulandela umzekelo owawuphambi kokuwiswa kwe-RCMA, apho ukuqhawula umtshato kwakusenzeka ngokuvumelana

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phakathi kweentsapho zabatshati.²⁰ Emva kokulandela inkqubo yokuphelisa umtshato ekuhlaleni, abanye baye bathathe lo mba bawuse enkundleni. Iziphumo zibonisa ukuba kokubini ekuhlaleni nakurhulumente, imiphumo yokungaphunyezwa kwe-RCMA ngendlela enokucombulula ukuphela komtshato ngokuvumelana neenjongo ze-RCMA. Iziphumo zibonisa ukuba kukho imiqobo emininzi ekumele badlule kuyo abo babandakanyekileyo ngaphambi kokuba bade bafikelele ezinkundleni, ngoxa uphando lwethi kwiifayile zenkundla zibonisa ukuba, iinkundla azisoloko zisebenzisa imigaqo yomthetho echanileyo xa zinika imiyalelo yoqhawulo mtshato kubantu abafikelela iinkundla. Nganona sichaza indlela iinkundlela ezinokudlula ngayo kule miqobo xa ziphumeza i-RCMA, sikwacebisa ukuba urhulumente umele abhenele nakwamanye amaziko asekuhlaleni ukusasaza inkcazelo nokuncedisa iinkundla ukuze ziphumeze i-RCMA. Iziphumo zophando lwethu zemitshato engaphakathi nangaphandle kweenkundla ziyalandela.

3.5.1 *Ngaphandle kweenkundla*

Nangona sele kudlule iminyaka eyi-15 emva kokuwisa kwe-RCMA, abantu baqhubeka bengaphelisi imitshato ngokumiselweyo besebenzisa iinkqubo zenkundla. Okubangel'umdlu kukuba, ezi ziphumo ziqinisekisa ubungqina bophando olwenziwe ekupheleni kweminyaka yoo-1980 nasekuqaleni kweminyaka yoo-2000 yaye zibonisa ukuqhubeka kokupheliswa komtshato ngendlela engamiselwanga kwisithuba esingaphezu kweminyaka engamashumi amathathu.²¹ Iziphumo zibonisa ukuba abantu bafuna uncedo nenkxaso kwiindawo ezahlukahlukeneyo, ndokuxhomekeka kwiinkalo ezibandakanyekileyo kuloo mpikiswana. Abanye abantu 'bayonelswa' yindlela engamiselwanga yokulawula ukuphela komtshato. Sekunjalo, ubuninzi botshintsho lomthetho oluziswe yi-RCMA ukuqinisekisa ukulingana ngokwesini nokufikelela izixhobo zokuzixhasa ziluncedo kuphela ukuba abo babandakanyekileyo baphelisa umtshato wabo enkundleni. Ukuba abantu abatshatileyo baqhubeka belawula ngokungamiselwango ukuphela komtshato, abayi kuzuza kwimithetho elawula imiphumo yokupheliswa komtshato. Uphando lufumanise ukuba abantu abayinanzi into yokunxulumana koqhawulo mtshato nemiphumo yako. Bajonga uqhawulo mtshato njengombandela wentsapho, ngoxa bejonga imiphumo yezezimali yoqhawulo mtshato njengomba omele ojuongwe ziinkundla.

Urhulumente unembopheleleko yokuqinisekisa ukuba omabini amaqabane kwityala lokuqhawula umtshato anethuba elilinganayo lokufikelela kwizixhobo nezinto zomtshato, kodwa iziphumo zophando zibonisa ukuba abantu basetyhini abaninzi abaqhawule umtshato khangela bafumane sabelo kwipropati yomtshato, into ebonisa ukuba lo mthetho mtsha awuzifikeleli iimfuno zamabhinqa aqhawule umtshato.

Uphando lufumanise ukuba kukho ukungabi nalwazi okuninzi ngeengcamango eziswe yi-RCMA ezifana nezo zimayela neenkqubo zepropati yomtshato. Le miphumo ibonisa ukuba inkcazelo nolwazi, nokuvumelana nokuba le mithetho mitsha ayikafikelele kuluntu jikelele yaye ayikamkelwa ngabathathi nxaxheba abaninzi. Ngokumayela nesibakala sokugqibela, kwezinye iimeko, iinkokheli zomthonyama zinembono yokuba

ukucombulula

²⁰ Mbatha et al 'Culture and religion' in Bonthuys & Albertyn (eds) *Gender, Law and Justice* (2007) 183

²¹ Burman 'Marriage break-up in South Africa: Holding want at bay?' (1987) 1 *International Journal of Law, Policy and the Family* 206; Mamashela (n 6).

iimpikiswano ngendlela yesintu kumele kusetyenziswe. Sekunjalo, olu qheliselo alubambeleli kwimigaqo ye-RCMA, yaye ukuqeqeshwa okungakumbi kubalulekile lunikezwe iinkokheli zomthonyama ukuze zazi ngalo mthetho.

Sicebisa ukuba urhulumente umele agunyazise amanye amaziko karhulumente okanye ii-arhente (njengamapolisa ne-DHA) ukuze zincele ngolwazi olumayela ne-RCMA. Ezi knqubo zenkxaso zingadinga ukuba zenziwe inxalenye yeenkqubo zoqhawulo mtshato karhulumente ukuze iinkundla zikwazi ukuwuphumeza kakuhle. Eli cebiso alunanjongo yokujongela phantsi ukubaluleka kweenkundla okanye umthetho. Kodwa lizama ukuphucula ukulawulwa nokuphunyezwa komthetho ngezinye iindlela ekuhlaleni.

Okukugqibela, abaphandi bafumanise ukuba kukho ukungqinelana phakathi kwemigaqo ye-RCMA nomthetho wesintu ophilayo kumanqanaba amabini ayintloko. Elokuqala kukuba umthetho wesintu uye walungiswa ngendlela yokuba ukwazi ukuquka nezwi lomntwana kwimiba emayela nokuba umele ahalale nabani. Elesibini, kukuba ukuya enkundleni ukuze kuconjululwe imiba yempikiswano ngesondlo kubonwa njengendlela efanelekileyo yokuziinzisa ezo mpikiswana.

3.5.2 Ngaphakathi kwiinkundla

Kumatyala abalulekileyo, afana nelika *Gumede*, kukho ukuqwalaselwa okungakumbi yijaji ngemiba yetyala elo. UMoseneke J, wacacisa ukuba 'inkundla imele iqwalasele zonke iimeko ezinokuthanani nomtshato wesintu othile nokuba ipropati leyo iye yafunyanwa, yalawulwa yaza yasetyenziswa njani ngaloo maqabane omtshato'. Kumatyala afana neli, ingcaciso yemiba nezizathu ezipheleleyo zesigwebo ziyafumaneka kwabo babandakanyekileyo ngaphandle kokuba kufuneka babe neendleko ezongezelelekileyo. Kodwa akunjalo kwiifayile zamatyala ezininzi esiye sazihlola, apho bekukho ingcaciso encinci yezizathu okanye izigwebo eziwisiweyo. Amaqela afuna ingxelo yetyalala lonke, kwezzo make kufuneka bakuhlululele ngokwabo ukukhutshelwa ityala, ngaloo ndlela kunyuka iindleko zamagqwetha.

Ukongezelela, kwamanye amatyala, iinkundla khange zikhuphe zigwebo ezifanelekileyo okanye zisebenzise iindlela zenkqubo yomtshato ezichanileyo kulo matyala ziwachopheleyo. Inkundla imele ibe yeyona ndawo ifanelekileyo yokunyanzelisa ukuphunyezwa kwe-RCMA. Ingxaki yokungaqinisekisi ukuba imigaqo ye-RCMA ihlala ithotyelwa yenziwa nzima ngakumbi xa ummangalelwa engenagqwetha limmeleyo. Ekubeni iziphumo zethu ngokuthe gabalala, zibonisa ukuba abantu abasoloko benxulumanisa iinkqubo zomthetho nokukhuselwa umdla wabo wobuqu, sicebisa indlela eyahlukileyo yokugweba kwimibandela ebandakanya iintsapho apho kungekho mmeli wokukhusela ummangalelwa. Endaweni yoko, inkundla idlala indima kasompempe, imele 'ingenelele kweli bala' ize idlale indima yokuphanda engakumbi, ukutsho oko, izibuze ukuba yeyiphi eyona nto ifanelekileyo kumntu ongenaye ummeli. Ngale ndlela, inkqubo yezobulungisa iza kuqinisekisa ukuba kukho inkuselo engakumbi yamalungu entsapho.

Ngokubhekele phaya, indlela babandakanyekileyo abaphumeza ngayo 'ukwabelana ngepropati' ayijongwa, yaye le nto ibangela kubekho ukuthandabuza mayela nokuba i-RCMA iwakhusela ngokusengqiqweni amaqabane omtshato aqhawula umtshato. Iinkundla zimele zithathe inyathelo lokuqala ekuncediseni ababandakanyekileyo ukwahluleni ipropati yabo.

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Kwityala lika *Gumede v President of the Republic of South Africa*,²² uMoseneke J wabhala wathi iinjongo ze-RCMA ziquka ukulawula imiphumo yendlela yokulawula umtshato kunye nokuqhawulwa kwawo *phantsi kokonganyelwa ziijaji*. Eli tyala linjajongwa njengomthetho wesintu olungileyo. IiJaji namagqetha zimele zigocagoce zize zixoxe ngobungqina nezibakala zetyala zize zongamele ngokufanelekileyo ukuqhawulwa komtshato nemiphumo yako, zibonise ukuba ziintoni ezijongwa ziinkundla xa ziwisa izigwebo mayela nemiphumo, ukuze kuzuze bonka ababandakanyekileyo.

Nangona kunjalo, indlela ezenza ngayo iinkundla ekulawuleni ipropati yomtshato iye isilele ngokucingela ukuma ngokwentlalo nomlinganiselo wemfundo yabame phambi kwayo nokuphixana kwemithetho emitsha. Urhulumente unembopheleleko yokwabela ngokufanelekileyo iinzuzo zepropati yomtshato nokuthobela umgaqo womthetho wokulingana kokuphathwa kwabafazi (okanye iqabane lomtshato elixhomekekileyo).

Ingxaki eyongezelelekileyo iye yaqwalaselwa kumatyala apho abamangali bebethembele kumthetho wesintu ngezizathu zokungalingani kwizabelo zepropati yomtshato. Oku kubonisa ukuba abameli abancedisi ekuphunyezweni kwe-RCMA ngokuqiniseka ukuba umthetho ochanileyo uyasetyenziswa. Le ngxaki ibonisa ukuba amagqwetha kula matyalo awaqoni amalungelo abo babandakanyekileyo phantsi kwe-RCMA. Ngoko ke, sicebisa ukuba kukho imfuneko enkulu kungekuphela nje ngenkcazelo yoluntu kodwa okubaluleke nangakumbi ukuqeqeshwa ngomthetho kwabo bonke ababandakanyekileyo ekuphumezeni i-RCMA - nokomzekelo, iijaji, amagqetha, amalungu oluntu - kwimigaqo nobuchungechunge balo Mthetho. Apho olu qeqesho lukhoyo, ngokomzekelo eJustice College, izifundo zimele ziphinde zihloliswe ukuze zinikele ingqalelo kwimiba evezwe kolu phando. Sikwagxininisa imfuneko yokuhlaziya i*Bench Book*, ekubonakala ngathi isetyenziswa zezinye iinkundla njengesikhokhelo sokuphunyezwa kwe-RCMA.

Uphando lukwafumanise ukuba kumatyala oqhawulo mtshato apho kuvela imiba yesondlo, loo matyala aye athunyelwa kwiinkundla zikamantyi. Olu qheliselo luyingxaki²³ ngezizathu ezininzi: (a) Imiba enokuthanani nemiphumo yokuqhawuka komtshato imele ijongwe njengemiba edibeneyo ize ichotshelwe ngexesha elinye. Ukulindela ukuba ababandakanyekileyo baye enkundleni yesondlo akukho ngqiqweni. (b) Imiba yesondlo idibene ngokusondeleyo nokwahlulwa kweempahla kunye nomyalelo wokufumana abantwana okanye ukufikelela kubo. (c) Kuyaqondakala ukuba ubungqina obufunekayo ukuze kubonwe imali yesondlo efunekayo kunzima ubufumana, kodwa sime ngelithi obu bungqina buyimfuneko ukuze kwahlulwe

²² 2009 (3) SA 152 (CC) isiqe 42.

²³ Ubungqina bophando olusukela ngoo1980s busilumkisa ngeengxaki ezimayela nokunika umyalelo wokuba abantu baye kwezinkundla ukuze bafake ibango lesondlo. UBurman (n 20) ku 215 unikela ingxelo yokuba adlene nabo indlebe kuphando lwakhe bafumanise ukuba le nkqubo ingafuna iintsuku ezimbini ezongezelelekileyo zekhefu emsebenzini yaye ibingenamiphumo ikwakruqula. Ukongezelela, uphando lufumanise ukuba, ngaphandle kokuba igqwetha liqeshiwe, igosa lesondlo elingenavelwano lingathintela abantu abaninzi ngaphandle kwabo bazimiseleyo ukuba bafake izicelo zabo.

ipropati yomtshato. Ngoko ke, nangona umnikelo obalwa ngepro rata ungatya ixesha (ukuba wenziwe kakuhle) oku kumele kufakwe 'kuphando' xa kuqhutywa inkqubo yoqhawulo mtshato nemiphumo yako. (d) Kunzima kakhulu (kukwatya ixesha nemali) kumzali onelungelo lokugcina abantwana, odla ngokuba ngumama, ukuba aphinde aye kwinkundla eyahlukileyo, ngomhla owahlukileyo ukuze afumane inkcazelo. Ngoko ke, inkqubo yokufumana isondlo eyahlukileyo kumyalelo wokuqhawula umtshato ingabangelo isithintelo kumabhinqa ngakumbi kunakumadoda.

Ngokufutshane, iinkqubo zokuqhawula umtshato zimele ziphumele kumyalelo oquka konke ofikelela zonke iinkalo zokufumana abantwana, ipropati kunye nesondlo. Ukudityaniswa kwale miba kuza kwenza kuthotyelwe iinjongo eziyintloko ze-RCMA.

Mayela nokufumana abantwana, uphando kumatyala ebiswaphanda, lufumanise ukuba umthetho wesintu othi abantwana ngabomyeni emva kokuba ekhuphe ikhazi awungomthetho oqhelekileyo nophilayo (njengokuba lo mgaqo usebenza ekufumaneni abantwana). Ezi ziphumo zibekho kumalungiselelo okufumana abantwana amiselweyo nangamiselwanga emva kokuqhawula komtshato wesintu. NgokweKomishoni yoMthetho, 'iinkundla zingathathela ingqalelo isithethe esibandakanyekileyo xa zigqiba ngekamva lomntwana'.²⁴ Khange sifumane bungqina bokuba ootata ngabo abafumana abantwana, kodwa sifumane amatyala amaninzi anokwenza nokufumana abantwana. Enyanisweni, uninzi lwamatyala okuqhawula umtshato ahlalutyiweyo bekuphikiswana, nto leyo ebonisa imfuneko yongenelelo lwamaqela angaphandle. Nongona ummeli wosapho eye wabandakanyeka kwamanye amatyala, khange abandakanyeke kuwo onke (17 kwayi-28 kuphela). Ngokusekelwe kwicandelo 4(1) lwe-Mediation in Certain Divorce Matters Act 24 ka 1987, ummeli wosapho umele aphande ngemeko yentsapho aze abhale ingxelo neengecebiso zokuba abantwana bamele bagcinwe ngubani ngokusekelwe kwezo meko. Noko ke, indlela imilinganiselo nemithetho yesintu, esetyenziswa ngayo ziinkundla ukuze kubonwe ukuba kokuphi okona kulungele umntwana akucaci.

Le ngxelo yommeli wosapho yenzelwe nokuncedisa inkundla yenze eso sigqibo. Noko ke, iingxelo esizihlolileyo kwiifayile zenkundla bezinenkcazelo encinci zaza zachaza kuphela inkcazelo emayela nendlela abantwana abahleli ngayo kunye nengeniso okanye inkcitho yabazali bobabini. Khange sikwazi ukubona indlela ummeli wosapho aqwalasela ngayo ulindelwe lwesintu oluchaphazelekayo xa esenza uncomelo ngekamva lomntwana. Iinkcukacha ezingakumbi ziyadingeka ukuze kubekho ukuqonda okungcono ngendlela ummeli wosapho anceda ngayo ekwenzeni isigqibo esithathel'ingqalelo okulungele abantwana, ingakubi kwimiba yomthetho wesintu, apho ukusondelelana nezalamane kubaluleke kakhulu.

Ngoko ke, scebisa ukuba uphando lommeli wosapho ludlule kwimiba eqhelekileyo nemiba yezemali xa kujongwa umzali omele afumane abantwana, kuze kuqukwe imiba echaphazela umntwana phantsi komthetho wesintu, ize inkundla yona idibanise okanye ikuthekelele okulungulel umntwana.

²⁴ South African Law Commission (Project 90: The Harmonisation of the Common Law and the Indigenous Law) *Report on Customary Marriages* (August 1998) 163.

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3.6 Ukufa kungekho myolelo ubhaliweo

Uphando lufumanise ukuba kukho izinto ezintle nezingentlanga ngoqheliselo lokulawula ukwabiwa kwamafa kwiimeko zokufa kungekho myolelo. Nangona i*Bhe* ingasanyanzeliswa, imithetho ye-Reform of the Customary Law of Succession and Regulation of Related Matters Act ka-2009 zibhalwe ngendlela efanayo, yaye ukuthetha ngeentsilelo zemithetho ye*Bhe* inganceda ngokuphunyezwa okungcono koMthetho.

3.6.1 Iziphumo Ezikhuthazayo

Kukho iziphumo ezikhuthazayo eziliqela ngoqheliselo lwe-Ofisi yoMabi Mafa nasekuhlaleni ukuphunyezwa kwemithetho ye*Bhe* kuyaqinisekiswa, kwakunye nokuphucula iinjongo zemithetho. I-Ofisi yoMabi Mafa, kuquka iindawo zeenkondo ezikwiinkundla zikamantyi, zizo ngoku ezilawula amafa abantu abantsundu, ngalo ndlela kufikelelwa iinjongo eziyintloko zesigqibo se*Bhe*. Iziphumo zethu ziqinisekise ukubakho kolwalathiso lokulawula amafa amakhulu namancinane. Inkqubo yale yokugqibela iyayiqonda imiba ephangaleleyo yobuhlwempu emakhaya apho abantu abantsundu abaninzi abaphila phantsi kwemithetho ye*Bhe* bakhoyo. Ukongezelela iziphumo zibonisa ukuba i-ofisi yoMabi Mafa imisela abantu abafanelekileyo (ukutsho oko iindlalifa okanye abameli abasemthethweni okanye abanyamekeli apho iindlalifa zingabantwana) njengabalawuli bamafa. Olu qheliselo luphucula ukuphunyezwa kwemithetho emitsha nangona ingaqinisekisi ukusebenza kwayo ukuze kungenelwe iindlalifa, njengoko oku kuxhomekeka kwezinye izinto.

Njengoko kukho ukiungazi ngomthetho neenkqubo zeomthetho okubanzi okuye kwachazwa kule ngxelo, ukubhenela kwabantu kuMabi Mafa, kungenziwa kukuba le ofisi iye yayasaza ngokubanzi imithetho ye*Bhe* ngokwenza iipowusta ezibekwa kwiindawo zikawonke-wonke kwii-ofisi zoMabi Mafa. Olu qheliselo lwe-ofisi yoMabi Mafa, luhle yaye lumele lukhuthazwe ukuba luqhubeke yay namanye amaziko karhulumente anembophelelko yokuphumeza le mithetho mitsha amele ayixelise.

Uphando lukwafumanise ukuba amalungu entsapho aye alwaula amafa ngendlela ebonisa ukuthobela iinjongo zemithetho ye*Bhe*, nangona ulawulo lwelifa lusenzeka ngaphandle komgaqo-nkqubo wemithetho ye*Bhe*. Ngokomzekelo, kukho inkxaso yokuba abantwana babelwe ilifa ngokulinganayo enoba iminyaka, isini okanye uzelwe njani, ngokuchasene kumgaqo ophelise ye*Bhe* wokuba ngamadoda afumana ilifa. Ngokufanayo, kwiindawo ezithile zelizwe, ngokomzekelo kwiindawo ezithile eMpuma Koloni, abahlolokaza bfaumana umzi njengelifa nangona oonyana abadala bekhaya bekhona (amaxsha amaninzi kuxhaswa zizalamane zomyeni). Olu qheliselo lubonisa inkqubela eyenzeka ekuhlaleni ebonisa ukuvumelana nalo mthetho mtsha. Sicebisa ukuba ezi ndlela zintle ziqheliselwayo zipapashwe ngokubanzi kwilizwe lonke, ukuze kukhuthaze ukuphuhliswa koMgaqo-siseko ohambelana nomthetho wesintu ophilayo, osetyenziswa ekuhlaleni. Olu phuhliso, luya kwehlisa, ukuba alunakuphelisa, ukuxhomekeka kumaziko karhulumente ngokuphunyezwa kwemigaqo yokulingana kwabantu noxabiso kwimiba yokwabiwa kwamafa.

3.6.2 *Iziphumo Ezingathandekiyo*

Nangona kukho iziphumo ezihle ezingaphezulu, kukho iintsilelo ezinkulu ekulungiseni imiba yokwabiwa kwamafa abantu abantsund abangenamyolelo phantsi kwemithetho *yeBhe*.

Okokuqala, indlela amanye amafa alawulwa ngayo emva kokuphuma kweleta yokumisela umlawuli welifa akuchatshazelwa kulwalathiso olukhoyo lukarhulumento lwendlela yokulawula amafa. Sicebisa ukuba uMabi Mafa, umele alawule aze ongamele ukulawulwa kwamafa ukongezelela ekumiseleni umalwuli mafa, ukuze kuqinisekwe ukuba intsapho ayiphumécaceni kwimithetho *yeBhe* nanini na kwinkqubo yokulawula ilifa.

Okwesibini, kukho ukucotha okubonakalayo mayela nokuthunyelwa kweengxelo kwiindawo zeenkondo (koomantyi) ukuya kwi-ofisi yoMabi Mafa xa kufuneka ihlolwe. Ngeli xesha, kukho umngcipheko wokuba umntu ofumana ileta yegunya kwindawo yeenkondo, angalaba ilifa ngokokubona kwakhe enganikela ngqalelo kwimithetho *yeBhe*. Kukho imfuneko, yokuba kuncitshiswe eli xesha; ukubuyiselwa ezinkundleni kumele kwenziwe rhoqo ngenyanga, yaye ezi ngxelo zibuyiswayo zimele zihlolwe ngamagosa xa zifunyanwa.

Okwesithathu, uqheliselo lokuza nesetifikiti somtshato salow uswelekileyo ngenjongo yokulawula ilifa lakhe kuvala abanye amathuba, nto leyo engenazizathu ngokomthetho. Oku kungenxa yokuba ukungabikho kwesetifikiti somtshato akuthethi kuthi umtshato awukho semthethweni; i-RCMA ayinyanzeli ubhaliso lomtshato ukuze umtshato ube semthethweni. Nangona le nguqulelo isebenziseka, indlela eyahlukileyo yokwenza izinto ukuze kungqinwe ubukho bomtshato xa kungekho sitifiketi somtshato, efana neleta yokukhutshwa kwekhazi okanye iintlangniso zentsapho ezibizwa ukuze kuqinisekise ubukho bomtshato, azibobungqina obuqinisekileyo nazo. Ukuzimela geqe kwazo akunakuqinisekiswa, yaye ngenxa yoko akunakuthenjela ngazo ukuze kukhuselwe iindlalifa xa umtshato uthandabuzeka. Sicebisa ukuba, uMabi Mafa umele akhuthazwe ukuba athumele imbambano mayela nemitshato enkundleni ngenjongo yokuqinisekisa ukuba semthethweni kwayo, yaye neenkundla zimele zixhotyiselwe ukuhlalela le mibandela msinya. Njengoko amanye amaqela aye anemitshato ethandabuzwayo beye bathunyelwa ezinkundleni bengaphindeli kwi-ofisi yoMabi Mafa ukuze bafumane ileta yokulawula ilifa, iinkundla eziye zacambulula le mbambano zimele zikuhambele phambili ukunceda la maqela ukuba abuyele kwi-ofisi yoMabi Mafa ukuze kugqityezelwe inkqubo yokulawula kwelifa.

Okwesine, imithetho *yeBhe*, ayilamkeli ilungelo labazali abaxhomekekileyo okanye izalamane, kuphela ngamalungu asondeleyo entsapho ukuba afumane inkxaso kwelifa. Iziphumo zethu zibonisa ukuba ukungaqakwa kwabazali okanye amanye amalungu afanelekayo phakathi kweendlalifa eziyintloko yindlela emfutshano yokucinga nokwenza izinto yalo mthetho *weBhe* yokujonga ukuba ngubani omele abelwe ilifa. Abazali abolupheleyo baye 'babe ngabaxhomekekileyo' yaye kusenokwenzeka ukuba basokola ngokulinganyo neqabana okanye abantwana bomfi. Le ndlela yokucinga kufutshane yokujonga intsapho neendlalifa ayilingani neemfuno zentsapho. Kukho imfuneko yokuqwalasela lo mbandela ngokunzulu xa kusetyenziswa imithetho yokwabiwa kwamafa phantsi kwawo nawuphi umthetho oqwalasela ukwabiwa kwamafa abantu abantsundu abaxabise izalamane zabo.

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Okwesihlanu, akukho ndlela isemthethweni yokuqinisekisa nokubeka ixabiso kumafa. Iziphumo zibonisa ubungqina bokubekwa kwexabiso eliphantsi kwamanye amafa. Le nkqubo ijongela phantsi igunya le-ofisi yoMabi Mali ekulawuleni amafa. Le ngxaki yenziwa nzulu ngakumbi kukuba i-ofisi yoMabi Mafa ikhupha iileta zegunya lokulawula ilifa ize ingaqhubeki isongamela inkqubo yokulawula amafa. UMabi Mafa kunye namagosa akhe anembopheleleko yokulawula amafa umele, aziswe ngale ngxaki, yaye umele abuze imibuzo mayela nokuba libekwa njani ixabiso kwiporpati kwiimeko ezithile.

Okokugqibela, uninzi lwamafa olulawulwa yintsapho ngaphandle kwenqubo yookumiselwa nokwalathiswa yi-ofisi yoMabi Mafa akuhambiselani nemithetho emitsha. Kukho ukungazi imithetho ye*Bhe* okubanzi kubathathi nxaxheba kwakunye nokungabi namkhamo wokwazisa ngokubanzi ngemithetho nenkqubo zasemthethweni. Imiphumo kukuba imisantsa yemithetho yesintu isekhona. Sicebisa ukuba inkqubo yokulawula inatyiswe ukuze kuncitshiswe umthwalo kumalungu entsapho alawula nahlula amafa. Kule nkalo, sicebisa ukuba iinkosi zomthonyama ziqeqeshwe zize zisetyenziswe ukuqinisekisa ukuba amafa ahlulwe ngokwemithetho ye*Bhe*. Ukuba iinkokheli zomthonyama zikhupha ileta yegunya lokwaba aze urhulumente aqeqeshe ezi nokkheli (ukuqiniseka ukuba zimisela indlalifa echanileyo) oku kungakhawulezisa le nkqubo ize yenze lula ukulawula amafa abo kwasekuhlaleni. Kunganciphisa namathuba okuba ubani onikwe ileta yegunya lokwaba ilifa asebenzise kakuhle elo gunya xa esaba ilifa ngendlela athanda ngayo, engabekwanga liso ngumantyi okanye uMabi Mafa. Inkokheli yomthonyama iza kube ikho ukuze iqinisekise ukuba lowo umiselweyo uthobela imithetho yokwaba ilifa. Sekunjalo, iintsapho zimele ziqhubeke zinelungelo lokuba ileta yegunya lokwaba ilifa iqhubeke ikhutshwa liziko leenkongo okanye i-ofisi yoMabi Mafa ukuba ithanda njalo yona.

Ngokubhekele phaya, ukuze kuqinisekise ukuba le nkqubo icetyiswayo isebenza kakuhla, sicebisa ukuba kumiselwe iindlela ezifanelekileyo zokuhlola. Sikwacebisa ukuba kuqale kwenziwe ulingo lweminyaka embalwa ngokukhetha iinkokheli zomthonyama ezithile ukuphumeza lenkqubo ibanzi ngaphambi kokuba le nkqubo isetyenziswe kwizwe lonke.

Ngokuhambiselana nale nkqubo ibanzi yokulawula amafa, urhulumente umele abe nephulo lokuqeqesha nokwazisa ukubalaselisa utshintsha oluchaphazelekayo kumthetho wesintu wokwaba ilifa.

3.7 Amaqonga okulungisa ukungavisisani

Kuninzi ekusele kuthethiwe mayela nendima yeenkundla ekulungiseni ukungavisisani xa kuqhawulwa umtshato. Kufyimfuneko ke ngoko ukuba apha, kungenwe ngokweenkcukacha kule nxalenye yokulungisa ukungavisisani. Eli candelo lijolise kwintlanganisele ebangaelwa luelo mngeni oludibene nesibakala sokuba zimbaleka iimbambano zentsapho eziye ziconjululwe ziinkundle, kwelinye icala, inkqubo engamiselwanga yokucombulula ukungavisisani.

3.7.1 *Ingxaki yokungalungiswa kokungavisisani kwamalungu eentsapho ezinkundleni*

Njengoko sele kutshiwo, inkqubo engamiselwanga yokulawula ukuqhawula umtshato isaqhubeka yaye kukho ucelo mngeni kwiinjongo ze-RCMA. Uphando lwethu lufumanise

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ukuba amaqela abandakanyekileyo asaebenzisa amaqonga amaninzi ukucombulula ukungavisisani kwiintsapho zabo. Ukungavisisani okuninzi kuye kwasiwa kwintsapho, yaye ukuya enkundleni bekungenziwa kakhulu. Ngokukodwa, abafazi baye bathetha nabayeni babo ukuze balungise ukungavisisani kwityeli lokuqala, kodwa kumaxesha amaninzi, ukungavisisani khange kukwazi ukuconjululwa kweli nqanaba njengoko amadoda bebengasebenzisani nenkqubo yokuza nesicombululo, emva koko ke, abafazi baye bathetha neentsapho zabo. Ngenxa yezizathu ezininzi kuquka ukungalingani kwegunya phakathi kwabafazi, amadado neezalamane zendoda²⁵ kwiintsapho ezikhokhelwa ngamadoda, izalamane nazo khange zikwazi ukucombulula ukungavisisani kwezibinir.²⁶ Oku kukhokhelela kwsigqibo sokuba amaqabane amaninzi omtshato awaxhaswa zizalamane okanye ngurhulumente ekucombululeni ukungavisisani ezintsatsheni zabo. Kukwabalulekile ukubonisa ukuba nangona uninzi lwabathathi nxaxheba olungamadoda okanye abafazi kolu phando (phantse sisiqingatha sabo baziinkokheli zomthonyama) bakholelwa yaye bayavuma ukuba abafazi bamele babhenele kurhulumente xa umyeni engasebenzisi indlela echanileyo yokulawula ipropati, ingakumbi xa betshate kwi-in community of property, kodwa khange kubekho namnye kubathathi nxaxheba ababhenele enkundleni ukucombulula ukungavisisani kwabo. Kukho ukuchasane kwenene nokwahluka phakathi koqheliselo nokucingelwayo.

Siye satsho kwenye indawo²⁷ ukuba inkxaso karhulumente iyafuneka ukuze kuncedwe kwiimbambano zentsapho ezimayela nokuqhawula umtshato wesintu. Uluvo oluye lwavezwa ngabathathi nxaxheba kuphando blusithi, ngenxa yokungalingani kwegunya ekucingelwa ukuba lukhona phakathi komyeni nomfazi wakhe, abantu abasoze bakwazi ukufumana iziphumo ezilinganayo xa bezicombululela ukungavisisani ngokwabo. Kwelinye icala, iinkundla zikarhulumente bezijongwa njengezinegunya ngenxa yokukwazi kwazo ukunyanzelisa amaqabane angafuni kusebenzisana namanye ukuba aphumeze imbopheleleko yabo yobuzali neyomtshato. Iinkundla bezikwajongwa 'njengezikwaziyo ukuba liqonga lokucombulula ukungavisisani, nto leyo ekhusela abantu kwizalamane eziye zithathe icala kwiimbambano'.²⁸ Ngoko ke, iinkundla zikarhulumente bezijongwa njengezikwaziyo ukunciphisa ukungalingani kwegunya phakathi kwamalungu entsapho.

Siye sakwatsho ukuba izizathu zomahluko phakathi kolu luvo noqheliselo lwamaqela abandakanyekileyo ziquka imiqobo yokukwazi ukufikelela nokungafikelela abafazi basemaphandleni abajamelana nako, ingakumbi xa kufuneka base imiba ezinkundleni.²⁹ Le miqobo isenokuba kukungabi nalwazi nge-RCMA, kunye namalungelo ewadalaya phantsi kweendlela ezahlukeneyo zokulawula ipropati yomtshato, imiqobo

²⁵ See Moore 'Forms of femininity at the end of a customary marriage' *Gender & Society* (forthcoming).

²⁶ Ababhali bengxelo bayavuma ukuba khange baquke isampule yabantu abatshatileyo abaye banokungavisisani okuye kwalungiswa ngempumelelo zizalamane. Ngoko ububanzi nokusebenzisa izalamane njengeqonga lokucombulula ukungavisisani kufuna uphando olungakumbi.

²⁷ Ukutsho oko, uphando olusekelwe kwiziphumo zolu phando. Jonga u-Button et al 'South Africa's system of dispute resolution forums: The role of the family and the state in customary marriage dissolution' *Journal of Southern African Studies* (forthcoming).

²⁸ Ibid.

²⁹ Ibid.

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yezezimali, kunye nemiqobo yemigama ekude neendawo iinkundla ezikuzo okanye apho zinegunya khona.

Ngenxa yezi zizathu zibekiweyo, sicebisa ukuba urhulumente adlale indima ephambili ukuqinisekisa iindlela zokucombulula ukungavisisan ezifunwa yi-RCMA ziyasebenza ukuze zixhase amalunge eentsapho ekucombululeni iimbambano zabo. Amanathelo athathwayo amele aqoke ukususa imiqobo yokufikelela njengoko kuchazwe ngasentla. Urhulumente umele athathe amanyathelo ukususa le miqobo ngokufundisa uluntu jikelele aze asasaze inkcazelo emayela ne-RCMA kunye neenkqubo ezifunekayo ukuze amaqabane omtshato abange amalungelo akhoyo, kwakunye nokwenza kubekho iinkonzo zeenkundla apho bahlala khona abantu. Oku kusenokuba ziinkundla ezihambayo.

3.7.2 *Indlela yentsapho engamiselekanga yokucombulula ukungavisisani*

Ngokumayela nokucombulula ukungavisisani ngaphambi kokuqhawuka komtshato, uphando lwethu lufumanise ukuba iinkokheli zomthonyama okanye izalamane zamaqabane omtshato khangela zikwazi ukucombulula ngempumelelo ingxaki zemitshato ephelayo. Enyanisweni, urhulumente akanokukwazi ukwenza kubekho umthetho wosapho osekelwe kwi-RCMA apho ingaxhasi amaqabane omtshato ekucombululeni ukungavisisani kwao, enoba kusemtshatweni okanye ngexesha lokuwuhawula. Isibakala sokuba urhulumente, unika inkxaso kwizibini eziqhawula umtshato wesintu, ngenkqubo yezobulungisa kwanange-RCMA xa zibhenela kwiinkundla ukuze zancedwe, siyazibuza enoba urhulumente uye wanikeza inkxaso kwezi zibini sekukufutshane ekuqhawukeni kwaloo mitshato na. Ukucombulula ukungavisisani ngendlela engamiselwanga kufuna ukomelezwa. Ekubeni izalamane okanye iinkokheli zomthonyama zikwazi ukuyidlala le ndima, urhulumente umele aseke amaqonga okanye ii-arhente ezibonakala zizimele geqe nezingathathi cala ukuze amaqabane angavisisaniyo azisebnzise. Ngokwembono yethu, amalungiselelo e-RCMA, mayela noku, abanzi ngokwaneleyo yaye kukho ilungiselelo lokulamala ukungavisisani, enoba kukho inkqubo emiselweyo eqhubekayo okanye ayikho. Amalungiselelo awatsho nto kwicandelo lomthetho elimayela nokuqhawula umtshato enkundleni 'ukuba angajongwa njengalinganisela indima yomthetho wesintu, okanye nawuphi umntu, kuquka iinkokheli zomthonyama, kwinkqubo yokulamla, ngokumayela nomthetho wesintu kuko nakuphi ukungavisisani okubakho ngaphambi kokuqhawulwa komtshato wesintu yinkundla.'³⁰

Ngoko ke, nawuphi amalungu asekuhlaleni amkelwayo ngabahlali baloo ndawo njengabadlala indima ekulamleni ukungavisisani kweentsapho ngokumayelo nomthetho wesintu angadlala le ndima yomlamli kwimicimbi yentsapho njengoko i-RCMA ifuna njalo. Amalungu asekuhlaleni anokukwazi ukulamla ukungavisisani, angathi achongwe azeancedwe ukuze enze lo msebenzi ngokuthi aqeqeshwe mayela nemiba yokulingana ngokwesini ekucombululeni imiba yomtshato kunye nokwabiwa kwelifa ekuhlaleni.

4. **Umqokumbelo**

In 1998 urhulumente wawisa umthetho we-RCMA, owaqalisa ukusebenza ngo-2000. Lo mthetho wawunenjongo entlu-mbini yokuba kwamkelwe

umtshato wesintu kunye

³⁰ Icandelo 8(5) loMthetho.

nokutshintsha umthetho wesintu ukuze kuqinisekise ukulingana ngokwesini kuze kukhuselwe amalungelo abantwana emitshatweni yesintu. Eli phulo liphakamileyo lalandelwa lolunye ulingo lokutshintsha umthetho wesintu wokwabiwa kwamafa ngongenelelo lwezomthetho kwaza kwaphumela ekutshintshweni komthetho we-Intestate Succession Act ka 1986 (umthetho oqhelekileyo) kumafa ebekade elawulwa ngumthetho wesintu. Iziphumo zolu phando, ziphakamisa imiba ebanzi emayela nokusebenza kwemithetho yomthshato nokwabiwa kwamafa etshintshiweyo. Ulwazi olufunyenwe ngendlela kokubini abantu nabahlali abalawula ngayo ubomi babo kubonisa ukusebenza kwalo mthetho mtsha kwezinye iimeko. Kwezinye iimeko, uphando lubonise indlela abantu nabahlali abasabela ngayo kutshintsho lomthetho. Kubalulekile kule nkalo, ukuqonda ukuba indlela ekuqheliselwa ngayo ekuhlaleni kuyahambiselana. Iziphumo ziphucula indlela esikuqonda ngayo indlela utshintsho lwemithetho oluchaphazela ngayo uluntu, indlela olusebenza kukuhle ngayo, kuze okubaluleke nangakumbi, indlela onokuphuculwa ngayo ukuze kuzuze abo bantu bekulungiselelwa bona. Ukongezelela ekudaliseni eluvala ucelo mngeno olunxulumene nemixholo ethile ephandiweyo, ingxelo ibonise ukuba kukho iingxaki ekufuneka zijongwe xa kucingwa ngeyona ndlela yokukhusela abantu i-RCMA ne*Bhe* rules ezifuna ukubakhusela. Eziyi-4 kwezi zingachazwa.

Okokuqala, abantu kufuneka bafundiswe ngale mithetho mitsha. Kufuneka baqonde amalungelo abo nokhetho oluziswa ngulo mthetho xa ulawula iinxalenye zobomi babo. Iziphumo zibonisa ukuba kukho umahluko kubantu ngabantu, iSebe leZekahaya, amagosa enkundla neenkokheli zomthonyama, ngokungabi nalwazi mayela nokuqulethwe ngulo mthetho mtsha. Akwanelanga ukwenza abantu bazi ngalo mthetho mtsha. Ukuba abantu abakuqondi okuqulethwe ngulo mthetho kunye namathuba ahamba nawo, ukhetho okanye amalungelo akhoyo abazokwazi ukuwuphumeza ngokufanelekielyo baze bafumane iinzuzo ezicetyelwe bona. Ukongezelela, imithetho emitsha intsokothile yaye akumangalisi ukuba uphando lufumanise ukuba uninzi lwabathathi nxaxheba belungayazi okanye lungaqondi indlela elunokuyisebenzisa ngayo.

Okwesibini, kufuneka abantu bawazi umthetho omtsha baze bawazi namagunya ahlukahlukeneyo abanokuya kuwo xa befuna uncedo lokuphumeza imithetho elawula imithshato, uqhawulo mtshato nemiba emayela nokwabiwa kwamafa. Kukho amaziko amaninzi abandakanyekileyo kulalwamano lobuqu nobomi babantu abaphila ngemithetho yesintu. Iinkundla, i-DHA, iinkokheli zomthonyama, izalamane neecawa, zonke zidlala indima ekuncediseni abantu ukuba baphumeze iinkalo ezahlukeneyo zemithetho emitsha, kodwa akusoloko kucacile ukuba leliphil iziko elinembopheleleko yokujonga imiba eyahlukeneyo ebiqwalaselwa. Ngokukodwa, iimbopheleleko zamaziko ahlukahlukeneyo ziyashiyana. Ngoko akumangalisi ukuba kukho 'ukudideka okukhulu kwamaziko'. Noko ke, kukho nezinto ezimele ziqwalaselwe ukuze kuqinisekiswe ukuba abantu bayafikelela kumaziko ahlukahlukeneyo.

Okwesithathu, abantu kufuneka bamkele ukuba semthethweni kwemithetho emitsha, ukutsho oko, abantu kufuneka bavumelane nengcamango nemigaqo le mithetho mitsha eyikhuthazayo. Ukuphunyezwa kwale mithetho mitsha kuza kusebenza kakuhle ukuba

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utshintsho oluziswayo luhambelana noqheliselo (umthetho wesintu ophilayo) lwabantu basekuhlaleni, kodwa ke lumele luhambiselane nemilinganiselo kunye nemigaqo yamalungelo oluntu. Kule nkalo, kubalulekile ukuqonda ukuba eminye imilinganiselo ibonisa iinjongo zalo mthetho mtsha sele zikho ekuhlaleni, yaye kufuneka kunikelwe ingqalelo koku. Sime ngelithi, le milinganiselo imele yamkelwe njengoko izisa ukhuseleko olusebenza ngakumbi lwamalungelo oluntu lwasekuhlaleni, yaye kwiimeko apho abantu khona baziva kamnandi. Iziphumo zibonisa ukuba kukho iindlaki zokubeka iingcamango nezinto ezintsha kusetyenziswa le mithetho mitsha, yaye kungakho imiphumo engacetywanga.

Okokugqibela, imiba echazwe ngentla idibene yaye ifuna ukuba iqwalaselwe ngokuphangaleleyo ukuze kuphuculwe ukuphunyezawa kwalo mthetho.