

**W**INNIE Madikizela-Mandela went to court recently seeking an order reviewing and setting aside the Minister of Land Affairs' decision to extend Madiba's rural allotment.

This had been allowed as a token of appreciation to him for his services to the country.

However, the site at which this extension was to be made was one that had been allocated to Madikizela-Mandela in 1989, by the king and chiefs of the AbaThembu.

It appears to me that the minister's decision was unlawful as it disregarded Madikizela-Mandela rights.

The twist is based on the relationship between Winnie and Nelson.

They were married in 1958 in terms of customary law. Lobola of 10 cattle was paid.

On June 14, 1958 they entered into a civil marriage. The marriage was out of community of property. The marriage eventually deteriorated and, in April 1992, Nelson Mandela ended it.

The customary marriage was never ended, though, despite the dissolution of their civil marriage.

Lobola is defined in the Recognition of Customary Marriages Act, or the Recognition Act, as "property in cash or kind... which a prospective husband or head of his family undertakes to give to the head of a prospective wife's family in consideration of a customary marriage."

Lobola could consist of cattle, other animals or any other property as agreed to by the parties. In modern times, cash is the preferred lobola.

The validity of a customary marriage is based on the agreement to pay lobola. It is not necessary to pay lobola prior to a marriage, but it may be paid later.

Communities have different practices pertaining to the payment and nature of lobola.

Although the Recognition Act includes a definition of lobola, it does not state that it is a requirement for a valid marriage. Section 3(1)(b) only states that marriages must be "negotiated and entered into or celebrated in accordance to customary law."

The South African Law Reform Commission proposed that the parties should decide if they wish to negotiate and insist

# Winnie getting short end of the stick?

South Africa is shaped by years of exclusionary practices introduced by colonialism but formalised by the apartheid regime. **Andile Mcineka** believes a court battle over Nelson Mandela's property in Qunu failed to consider customary law and, in so doing, denied Winnie Mandela her constitutional right to legal redress



on the payment of lobola and that it should not be a formal requirement for customary marriages.

Under customary law, once a woman is married into a particular family, she becomes more important than a man. Her husband is a mere seed. This bond is a union between families and ancestors. The dissolution of marriage is not easily permissible.

Even death does not dissolve the marriage, as upon the

husband's death, other members of the family can continue the procreative process in the name of the deceased, through the concept of *ukungena*.

Based on this, one would assume that in fact Madikizela-Mandela's marriage continued to exist, as did her right to ownership of the original property.

Despite the Black Administration Act, making it impossible for a married woman

of colour to own property in her personal capacity, the issue of ownership rights, I believe, should be viewed in light of the Recognition Act, which has provided relief as it has brought about the protection of married women under customary law.

In court, Madikizela-Mandela had to explain the delay in seeking relief in court in respect of setting the minister's decision aside. It has been a long-standing rule under common law that a delay of three

years is permissible.

The court calculated the delay for Madikizela-Mandela from the end of 1997 and concluded that this delay was 17 years, which was excessive and could not be condoned.

The court said a reasonable person, in the position of Madikizela-Mandela, would have regarded recognition of her rights as a critical issue in the divorce proceedings and would have asserted her rights to the property

at that time.

Madikizela-Mandela provided reasons as to why she delayed launching these proceedings.

She said she had only become aware of the registration of the property in Mandela's name, and therefore the minister's decision, after Mandela's death when she became aware of the content of his will.

The court held that the explanation was unsatisfactory because at no time during Mandela's life had she laid claim to the property.

This I find very problematic, as it limits Madikizela-Mandela's right to access to the courts, provided for in the bill of rights as "a right to have any dispute resolved by application of law".

Both the common law rule and the court's decision not to proceed with hearing the matter and deciding otherwise, I believe, essentially serves as a time limitation, which prevents a party from instituting a legal claim if he or she does not do so within a specified period.

As such, I think it limits a person's constitutional right to access the courts.

The legal dimension of the concept of access to justice developed as an element of the fundamental principle that all people should enjoy equality before the law.

It proposes that each person should have effective means of protecting his or her rights or entitlements under the substantive law.

The concept of access to justice is understood in terms of legal rights, processes and procedures.

It denotes the situation in which state legal systems are organised "to ensure that every person is able to invoke the legal processes for legal redress irrespective of social or economic capacity" and "that every person should receive just and fair treatment within the legal system".

This view is based on the principle that the legal system should be structured and administered in such a manner that it provides everyone with affordable and timeous access to appropriate institutions and procedures through which to claim and protect their rights.

It is my opinion that in this case, access to justice refers to "the equity with which those from

differing backgrounds are able to gain from the justice delivery system".

The key issue to me, is whether the court's alleged limitation on Madikizela-Mandela's constitutional right to access to court is in fact reasonable.

I think in doing so, it must also be brought to light whether it afforded Madikizela-Mandela an adequate and fair opportunity to seek judicial redress. The limitation allows for speedy adjudication.

It cannot be stressed enough that decisions by our courts bind all people and must further assist people to enforce their rights.

Courts serve as a beacon of hope and must ensure the full achievement and realisation of justice in our society.

In their decisions and during adjudications, courts, I believe, should bear in mind that many people have worked to build our country as they suffered in the past for justice and freedom. As such, they should assist all those who come before court to seek redress, to heal the divisions of our past and establish a society based on democratic values, social justice and fundamental human rights.

As such I believe the decision by the court not to condone the delay in launching the claim was unreasonable and against public policy.

If I take a different approach, the court was unreasonable in not accepting the explanation by Madikizela-Mandela when she became aware of her rights to property.

Her explanation, I think, is acceptable and clear-cut under customary law, as she could not previously challenge the right to property.

Section 211(3) of the constitution requires the courts to apply customary law as a "must" when it is applicable, but subject to the provisions of the constitution given that the constitution is the supreme law of the land.

The court, in their reasoning, I believe, treated the applicability of customary law as an illegitimate child of our constitutional dispensation. It is upon this justification by the court that Madikizela-Mandela, in my opinion, got the short end of the stick - that stick being access to court as a fundamental right.

● *Andile Mcineka is a third-year law student at the University of KwaZulu-Natal.*