

# ANALYSING THE ROLE OF CHRISTIANITY IN THE CORONATION OF KING MISIZULU: THE RECOLONIZATION OF SUCCESSION TO TRADITIONAL LEADERSHIP

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## ABSTRACT

*KwaZulu Natal has historically remained a province that has embraced indigenous identity and remains the only province to keep a decolonial name in post-apartheid South Africa. The problem today is the disappointment of recolonising the way in which Misizulu was coronated as the new king of the Zulu nation following the death of his father, king Zwelithini. This article critically analyses the role of Christianity as part of king Misizulu's coronation ritual. This article will further argue that reliance on the will to appoint a king is problematic because it brings a measure of legal uncertainty to the lineage of the KwaZulu Natal traditional leadership. References will also be made to judicial pronouncements where a similar fate of unsettling traditional leadership with legal uncertainty was enabled in a mission to achieve gender equality. The article will discuss the impact of such recolonization with particular reference to the limitation of the King's option to marry more than one wife. It will be argued that courts must employ the true laws of indigenous communities and not effect distorted versions of indigenous law. Embracing African indigenous culture has been a topical issue in South Africa, sparking decolonial conversations. The article thus analyses topical issues that emerged in king Zwelithini's saga, such as the recolonization of traditional leadership, the role of Christianity, the prime minister, and wills.*

## 1. INTRODUCTION

Tracing the earliest origins of indigenous law can prove difficult, largely because African communities have historically lived independently of one another, observing norms and practices that differ from one community to the next.<sup>1</sup> The Bantu speakers, Khoi and San, were able to maintain mutual interactions. During this era, Africans lived according to values such

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<sup>1</sup>C Rautenbach, *Introduction to legal pluralism in South Africa* (5<sup>th</sup> ed Lexis-Nexis, 2018) 9.

as communal belonging, collective ownership of assets, and communal life, which characterised African tradition. All these elements developed into an African normative system that cared for justice and human rights.<sup>2</sup> An individual did not exist independently but was defined in a group context. This discipline was instilled in each person to understand that an individual had no independent existence from the group to which they belonged. These values did not change after contact with colonialism; however, many Africans changed through the conversion to Christianity and colonial subjugation.<sup>3</sup> The colonial crusade had the effect of dividing the indigenous people of Africa into two groups: those who accepted colonisation and converted to Christianity and those who rejected it.<sup>4</sup> Those who rejected it continued to observe indigenous practices. Regrettably, this group has historically been marginalised because of their rejection of westernization. The colonists used Christianity as part of the colonial crusade to achieve their mission of colonising Africa. Christianity did not have much of an impact; as the colonial navigators and priests returned to Europe, they reverted to their traditional practices.<sup>5</sup> It was only when slaves repatriated to Africa who preached Christianity that Africa saw large-scale conversion to Christianity in the 19th century.

The colonists were accustomed to the written words in Europe and viewed oral law as primitive.<sup>6</sup> They were able to use the African legal system for their political and economic advantages. The conversion of Africans into Christians was more prevalent in the Warri areas of pre-colonial Nigeria and Benin in the 15th century, as European navigators accompanied by Christian priests roamed the area.<sup>7</sup> Given the role of Christianity in the colonisation of South Africa and other African countries, it is problematic that a king in South Africa can today be coronated using Christianity. It is argued that this is a form of recolonization of succession to traditional leadership and the people of KwaZulu Natal. The AmaZulu king Misuzulu ka Zwelithini was offered a coronation ceremony rich in traditions of the Christian faith. This article examines the role of will in determining succession to traditional leadership. It also examines the significance of naming and culture in setting the analysis in motion.

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<sup>2</sup> L Juma, 'From repugnancy to Bill of rights: African customary law and human rights in Lesotho and South Africa' (2007) 27 (1) *Speculum Juris* 88.

<sup>3</sup> DD Ndima, 'The African Law of the 21<sup>st</sup> Century in South Africa' (2003) 36 (3) *CILSA* 329.

<sup>4</sup> *Ibid.*

<sup>5</sup> GJ Van Niekerk, 'The interaction of Indigenous law and Western law in South Africa: A historical and comparative perspective' LLD thesis, Unisa (1995) 19.

<sup>6</sup> DB Dennison, 'The resonance of colonial era customary (code) in contemporary Uganda' (2019) *PELJ* 2.

<sup>7</sup> SA Fatokun, 'Christianity in Africa: A historical appraisal' (2005) *Verbum et Ecclesia* 364.

## 2. COLONIAL ROLE IN SUPPRESSION OF AFRICAN IDENTITY AND CULTURE

Colonialism was largely a struggle for natural and human resources, power, and control of developing nations.<sup>8</sup> Prior to the colonial conquest, the Berlin conference was organised and held under the auspices of Otto von Bismark to decide on the sharing of Africa. The conference can be viewed as a pinnacle of competition for the scramble for Africa.<sup>9</sup> The first conqueror of South Africa went to the Netherlands from 1652-1795 and 1803-1806, whereby Roman-Dutch law was implemented. Great Britain was conquered between 1795-1803 and 1806-1961.<sup>10</sup> The period from 1961 marks the transition phase, when South Africa became a republic and continued white Afrikaner domination until the dawn of the constitutional era in the early 1990s. Conquests centred on control of financial means of production, such as property, during which many Africans were dispossessed of their property based on the principle of *terra nullius*.<sup>11</sup> This was also done because the colonists had little regard for the legal systems of developing nations, including South African indigenous law, which they regarded as barbaric and uncivilised. They believed that their western legal systems were more advanced and needed to be implemented than those of the conquered people.<sup>12</sup>

A standout feature amid the colonial crusade is that the people of KwaZulu Natal were able to resist the colonial onslaught. KwaZulu Natal should be viewed as a beacon of hope in colonial conversations, as it remained the only province to retain its indigenous name in post-apartheid South Africa.<sup>13</sup> Other provinces changed their colonial identity or names in the post-1996 era to detach themselves from their colonial heritage. Naming plays an important role in the construction of power and privileges in the world's social order.<sup>14</sup> It is a way of claiming the landscape and ownership of identity. The colonists employed names as a means of

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<sup>8</sup> M Craven, 'Between law and history: the Berlin conference of 1884-1885 and the logic of free trade' (2015) 3 (1) *London Review of International Journal* 32.

<sup>9</sup> *Ibid.*

<sup>10</sup> AN Allott, 'What is to be done with African customary law? The experience of problems and reforms in Anglophone Africa from 1950' (1984) 28/ 1&2 *JAL* 59.

<sup>11</sup> The principle of *terra nullius* entailed that if a piece of land was not productively used by the occupier of that land, then the land was regarded as unoccupied. On such basis the Khoi, the San and black people were dispossessed of their land. In furthering their objective colonists recognised also that they may have to afford limited recognition to African systems of law not because they believed in their self-determination but because this accorded with their selfish interest and this of course was done through the repugnancy clause where a colonial ruler had the ultimate power to determine what is to be accepted of African laws (Church J, 'The place of Indigenous law in a mixed legal system and a society in transformation: A South African experience' *Australia and New Zealand Law and History E Journal* at 96-98.

<sup>12</sup> *Ibid.*

<sup>13</sup> MB Ramose, 'In Memoriam: Sovereignty and the 'new' South Africa' (2007) 16 (2) *Griffith Law Review* 324.

<sup>14</sup> Ramose (2007) *GLR* 323.

controlling and denigrating the political identities of conquered people and their nations.<sup>15</sup> This was essential because it entailed a relationship based on power and conferring a form of identity.<sup>16</sup> Okere argues that in oral societies, names are used as a way of ensuring that rewriting history is perpetuated and immortality is also conferring immortality.<sup>17</sup> Therefore, it is no surprise that the colonists ensured that they renamed everything, particularly in cities and countries. As Modiri posits, in the context of South Africa,

‘The very idea and name of South Africa is a construct and artefact of colonial sovereignty having been imposed on this land by its two conquering powers in the union of 1910 as part of a larger project of remaking the entire territory in the image of Europe into what would be called ‘white South Africa’.<sup>18</sup>

Thus, there is a close association between the past and present, as demonstrated by the name of the country.<sup>19</sup> Naming is important in the African context and speaks to the construction of a social reality from which the individual or country is placed in the order of the world. It is for this reason that today one is disappointed with the development in KwaZulu-Natal, whereby king MisiZulu was coronated through Christianity, which was a powerful tool that the colonists used to dominate African people. In South Africa, the gun and the Bible complimented each other during the colonial invasion. The Bible was used to steer national fear to encourage timidity, victimhood, and helplessness.

The achievement of the colonial crusade had to focus on the spirituality of the indigenous people in the country and their culture. Anta Diop wrote:

“Imperialism, like prehistoric hunters, first killed the being spiritually and culturally, before trying to eliminate it physically. The negation of the history and intellectual accomplishments of black Africans was cultural, mental murder, which preceded and paved the way for their genocide here and there in the word”.<sup>20</sup>

This is similarly echoed by the revolutionary Amilcar Cabral when he stated that:

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<sup>15</sup> T Okere, ‘Naming as building blocks of an African Philosophy’ in Theophilus Okere (ed), *Identity and change*, Nigerian Philosophical Studies, Council for Research in Values and Philosophy 1996) 147.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> J Modiri, ‘Race, history, irresolution: Reflections on *City of Tshwane Metropolitan Municipality v Afriforum* and the limits of “post” apartheid South Africa’ (2019) *De Jure* 46; MB Ramose, ‘Reconciliation and reconfiliation in South Africa’ 2012 (5) *Journal of African Philosophy* 33.

<sup>19</sup> I Pikirayi, ‘The kingdom, the power and forevermore: Zimbabwe culture in contemporary art and architecture’ (2006) 32 (4) *Journal of Southern African Studies* 756.

<sup>20</sup> Africa and the politics of education, 2017 September. The Herald. <https://www.herald.co.zw/africa-and-the-politics-of-education/> (accessed 20 July 2023).

“History teaches us, in certain circumstances, it is very easy for the foreigner to impose his domination on a people. But it is likewise teaching us that, whatever the material aspects of this domination, it can be maintained only by the permanent and organized repression of the cultural life of the people concerned”.<sup>21</sup>

During the fight against colonialism and in the effort of resistance, the Native African people maintained the liberating elements of the Bible and used them as themes of the national liberation movement. The progressive faith-based movement played a significant role in strengthening the resistant spirit of fighting colonialism. The movement was motivated by the need to fight for self-reliance and social justice activism. It mushroomed into churches, which were opportunistic and had no interest in the people at heart. They were motivated by the need to become rich and encouraged African people to pray and believe in miracles. This weakened their spiritual tenacity to withstand the hardships brought about by the colonial crusade, where people were divided between those who believed in Christianity and those who did not.<sup>22</sup> This culture was developed among the indigenous people of Africa and is now entrenched in how many of them arrange their daily lives.

Culture is responsible for shaping relationships between people and their interrelationships with the rest of humanity.<sup>23</sup> It determines the mood of people in a community and asserts confidence. It is the foundation upon which people can build their identity and national dignity.<sup>24</sup> If the people of a nation start speaking to each other in a foreign language, for example, it then follows that this affects the teaching and education of that nation and will influence civic relations and moral compass, amongst other things. For a community to gain independence, it will require awakening and a nation, and it will therefore fail to gain independence if it cannot ascertain its cultural identity.<sup>25</sup> Colonists, on the other hand, were able, in most cases, to suppress African culture, which was key to ensuring the development of a foreign national identity while ensuring a lack of development and creation of an African national consciousness for Africans.<sup>26</sup> The African Charter on Human and Peoples’ Rights states that “all peoples shall have the right to their economic, social and cultural development

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<sup>21</sup>Amilcar Cabral, ‘National liberation and culture (1970) [\(https://www.blackpast.org/global-african-history/\(1970\) Amilcar Cabral, "National Liberation and Culture" • \(blackpast.org\)\)](https://www.blackpast.org/global-african-history/(1970) Amilcar Cabral, ) (accessed 21 July 2023).

<sup>22</sup> Ndima (2003) *CILSA* 329.

<sup>23</sup> Pikirayi (2006) *Journal of Southern African Studies* 756.

<sup>24</sup> M Pieterse, ‘It’s a black thing: Upholding culture and customary law in society found on non-racialism’ (2001) 17 *SAJHR* 392.

<sup>25</sup> T Nhlapo, ‘Customary law in post-apartheid South Africa: constitutional confrontations in culture, gender and ‘living law’ (2017) *SAJHR* 12.

<sup>26</sup> J Church, ‘The place of Indigenous law in a mixed legal system and a society in transformation: A South African experience’ (2005) *Australia and New Zealand Law and History E Journal* 96-98.

with due regard to their freedom and identity and in the equal enjoyment of the common heritage of humankind”.<sup>27</sup> This bold normative declaration continues to be elusive for the majority of the people in South Africa. To borrow from Hommi Bhabha’s “*The World and the Home*”, the majority of dispossessed in South Africa continue to be “unhomed”, not only in the sense of being homeless but also in the sense of being forced to renegotiate their spirituality and culture in the world. Within this context, the nature of the coronation of king Misizulu raises concerns rooted in endless negotiations for the place of the indigenous people of South Africa in the world.

### 3. CORONATION OF KING MISIZULU

The ceremony for handing over the certificate of recognition to AmaZulu king Misizulu Ka Zwelithini took place at Moses Mabhida stadium in Durban and was rich in both Christian faith and cultural traditions.<sup>28</sup>

The official proceedings commenced with an opening consecration observed by the Anglican Archbishop, Thabo Makgoba and other leaders of the Anglican Church.<sup>29</sup> During the homily period, it was indicated that the Zulu royal family had practised and professed Christian faith for centuries. The previous royal leaders of the Zulu nation, such as king Dinizulu and king Solomon, belonged to the Christian faith and served as Anglicans. It was further pointed out that the late king Zwelithini, who was Misizulu’s father, was a good Anglican. King Zwelithini was responsible for building houses of worship and was appreciated by the Church for his Anglican work. The Prime Minister, Mangosuthu Buthelezi, pointed out that “through the liturgy, the archbishop did what the prophets of the old did in the times of king David, even using the oil of anointing. This was wholly appropriate for a Christian king”.<sup>30</sup> Similarly, anointment with oil was done on king Misizulu; however, the use of oil was regarded as a concern by many people from KwaZulu Natal and other parts of South Africa and was seen as an unjustifiable practice by the king of a Zulu royal family. Members could neither understand nor provide an explanation in terms of what such practices symbolised.<sup>31</sup> In May 2023, the same ritual will be performed when king Charles III is crowned. The practices used could further be traced back to the Old Testament history, whereby the practices entailed the

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<sup>27</sup> Art 22(1).

<sup>28</sup> King Misizulu’s faith central to his coronation Awande Zwane | @SABCNews [King Misuzulu’s faith central to his coronation – SABC News – Breaking news, special reports, world, business, sport coverage of all South African current events. Africa’s news leader.](#) (accessed 12 May 2023).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

anointment with oil-consecrated kings, priests, and prophets to teach and govern the people of Israel.<sup>32</sup>

The ceremony was also criticized by members of the community for returning to colonialism when an attempt was made to walk away from it. The view was that there should be an attempt to affirm traditional Zulu culture.<sup>33</sup>

The opening ceremony was further marked by prayer, reading of biblical scriptures, and performance of a traditional Christian hymn.<sup>34</sup> The ceremony was labelled by a Think Tank, led by Reverend Professor Musa Xulu, Dr Makhosi Khoza and Dr Themba Fakazi, as an attempt at ‘recolonization’.<sup>35</sup> The term recolonization stems from colonization, which can mean different things to different people but largely refers to a return to colonization after a nation has sought to decolonize by detaching from its past.<sup>36</sup> There appears to be consensus at a basic level that decolonization can mean many things to different people, however, there appears to be some consensus that it entails gaining independence from colonialism. Withdrawal from colonial power was the political and economic command of the colonized people of the colonists from their geographical location and institutions. Equally important is that there must be mental emancipation from colonial domination, where the colonized people accept that they are not subservient and inferior to the colonists.<sup>37</sup>

It is important that colonized people return to their spiritual identity, culture, and authenticity free from the clutches of the west, it is only when this is achieved that a nation can argue to have decolonized.<sup>38</sup> One ought not to be premature in celebrating decolonization in a way that overlooks century-old spiritual and cultural hierarchies among others that have existed for centuries and do not sideline the context within which the colonial crusade occurred.<sup>39</sup> Ndlovu-Gatsheni argues for the ‘coloniality of power’ as a way forward, whereby one considers colonialism and decolonization beyond the takeover of power within the political

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<sup>32</sup> *Ibid.*

<sup>33</sup> D LebLanc, Zulu Critics Attack Coronation Rite as Colonialist 10 November 2022 [https://livingchurch.org/2022/11/10/Zulu\\_Critics\\_Attack\\_Coronation\\_Rite\\_as\\_Colonialist\(livingchurch.org\)](https://livingchurch.org/2022/11/10/Zulu_Critics_Attack_Coronation_Rite_as_Colonialist(livingchurch.org)).

<sup>34</sup> *Ibid.*

<sup>35</sup> S Mavuso, ‘Buthelezi explains Anglican ritual performed on king Misuzulu, and why he was excluded from post coronation gala dinner 01 November 2022 [https://www.iol.co.za/news/south-africa/kwazulu-natal/Buthelezi\\_explains\\_Anglican\\_ritual\\_performed\\_on\\_King\\_Misuzulu\\_and\\_why\\_he\\_was\\_excluded\\_from\\_post-coronation\\_gala\\_dinner\(iol.co.za\)](https://www.iol.co.za/news/south-africa/kwazulu-natal/Buthelezi_explains_Anglican_ritual_performed_on_King_Misuzulu_and_why_he_was_excluded_from_post-coronation_gala_dinner(iol.co.za))

<sup>36</sup> C Eze, ‘Decolonisation and Its Discontents: Thoughts on the Postcolonial African Moral Self’ (2015) 34 (4) *South African Journal of Philosophy* 408.

<sup>37</sup> K Hack, *International Encyclopedia of the Social Sciences*. Detroit: Macmillan Reference USA 2008) 255–257.

<sup>38</sup> Eze (n 36) 408.

<sup>39</sup> SJ Ndlovu-Gatsheni, ‘Fiftieth Anniversary of Decolonisation in Africa: A Moment of Celebration or Critical Reflection?’ (2012) 33 (1) *Third World Quarterly* 74.

and judicial spheres.<sup>40</sup> This, according to Ndlovu-Gatsheni, is regrettably not decolonisation but merely a shift from ‘global coloniality’.<sup>41</sup> The post-South African state has not been fully decolonized but has only gained political and judicial independence. For this reason, one finds a state where the people of South Africa and, in this context, the people of KwaZulu Natal are in a space where their traditional leadership is recolonizing.<sup>42</sup>

The coronation was the observance of colonial culture, an immigration tradition that does not belong to Africa. A traditional leader is a custodian of his or her culture and must not resort to borrowed culture. Traditional leaders are responsible for maintaining confidence in the African indigenous value system. People are likely to lose confidence in their value systems when a traditional leader embraces foreign culture. An analogy is what happens when a thief knocks on a door. The head of the family must be the first to answer the door; however, if the head of the family runs away, all family members are likely to run away and follow the leader. If the family head fights, he represents the family with the opportunity to stab the thief from the back. It is also worth noting that, not only is traditional leadership recolonizing but there is also the maintenance of colonial titles such as Prime Minister in KwaZulu Natal.

### 3.1 Maintenance of Colonial Title

A leader such as Mangosuthu Buthelezi has a British title. His title was Prime Minister, and he did not find an African title that fits what the British one stands for. South Africa, as a country, moved on from the title of prime minister with the dawn of democracy after 1996. However, in KwaZulu Natal, Mr Buthelezi did not see the importance of moving on from a colonial title.

The term prime minister emerged as an abusive term rather than a descriptive role in an official capacity. The ‘Glorious Revolution’ of 1688 contributed to the emergence of a new balance of power in the English Constitution.<sup>43</sup> The term implied the rise of an individual subject above others in the royal circle, and it embodied a political institution imported from France, which was England’s biggest enemy.<sup>44</sup> The position of the prime minister could be seen as a transgression against which a person could be convicted, for example, Robert Harley,

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> SJ Ndlovu-Gatsheni, ‘Coloniality of Power in Postcolonial Africa: Myths of Decolonisation’ [e-book] 2013. Dakar: Council for the Development of Social Science Research in Africa. Available at [http://www.codesria.org/IMG/pdf/2-Coloniality\\_of\\_Power\\_Ndlovu\\_Chapter\\_2.pdf](http://www.codesria.org/IMG/pdf/2-Coloniality_of_Power_Ndlovu_Chapter_2.pdf) (accessed 20 April 2023) 63.

<sup>43</sup> S Pincus and JA Robinson, ‘What happened during the Glorious Revolution’ (Cambridge 2011) 190-193.

<sup>44</sup> *Ibid.*



who was impeached in 1715. Harley was charged with the transgression of being prime minister. In her article titled “Law’s Time, Particularity and Slowness” Professor Karin van Marle, relying on Julia Kristeva and Hannah Arendt, talks about “the damage of a society overtaken by law, human rights and constitutional discourse which results in a “complacent society where political action, thought, eternal questioning and contestation are absent and replaced by an understanding of freedom as mere commercial freedom and thought as calculated and instrumental”.<sup>45</sup> There is a hermetically sealed relationship between decolonizing knowledge, freedom of conscience, and seeking an independent path free of colonization.

Himonga and Diallo argue that a decolonization project is needed to heal South Africa from the ills of colonialism.<sup>46</sup> This will free the country from the Eurocentric epistemological concept of knowledge that is deeply rooted in colonialism, which has dominated African culture. Rautenbach also asserts that decolonization is vital for the survival of indigenous knowledge systems as an independent system that regulates the lives of millions of people. She further asserts that decolonization is important because it provides the basis for an alternative legal epistemology that can realize the truly transformative potential of law and knowledge in regulating the real-lived inequalities of people.<sup>47</sup> The future of South Africa is strongly influenced by the integration of the culture of its people. The threat has also been the re-imaging of the African legal system through Western lenses, which makes transformation necessary.<sup>48</sup>

The other concerning development in this saga is the reliance on the will to determine succession to traditional leadership when the use of wills is foreign to the African knowledge system.

#### 4. RELIANCE ON A WILL TO DETERMINE SUCCESSION

The late king Goodwill Zwelithini left a will to indicate who should succeed him after his death, however, this article argues that the writing of wills to determine succession to kingship is a distortion of indigenous law. This should not be allowed because it is contrary to the community’s interests. Under indigenous law, a person cannot determine in a will who should succeed them, nor can they decide what happens to their property after they pass away.<sup>49</sup> A

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<sup>45</sup> K Van Marle, ‘Laws time, particularity and slowness’ (2003) *SAJHR* 241.

<sup>46</sup> C Himonga, ‘The Constitutional Court of Justice Moseneke and the decolonization of law in South Africa: Revisiting the relationship between indigenous law and common law’ (2017) *Acta Juridica* 117.

<sup>47</sup> Rautenbach *Legal Pluralism* 56.

<sup>48</sup> T Nhlapo, ‘Human rights – The African perspective’ (1995) 6 (1) *African Law Review* 38.

<sup>49</sup> LS Ntsoane and TA Manthwa, ‘The right to bury the deceased in terms of customary law: Whose right is it? *Sengadi v Tsambo* (2019) 4 SA 50 (GJ) 2020 *THRHR* 614.

person does not own property in his/her personal capacity in terms of indigenous law but manages it on behalf of the community as a traditional leader.

Reliance on the will to decide traditional leadership succession is a bad precedence since every traditional leader may want to adopt this concept from Roman-Dutch law. When Roman-Dutch law became the imposed law of South Africa under colonialism, wills became common.<sup>50</sup> A letter or affidavit attesting to how and where the deceased wished to be buried could be used.<sup>51</sup> It remained key that the wishes of the testator were consistent with the public policy rules. A testator has the power to include any provision in his or her will about what is to happen to their personal assets.<sup>52</sup> It is, however, different from indigenous law, as it is rare for a person to regulate their estate through a will.<sup>53</sup> The drafting of a will to regulate who is to take over as a traditional leader is regarded as a bad omen.<sup>54</sup> People do, however, draft wills to regulate their estates, which arguably reflects the changing nature of society as influenced by socio-economic factors such as acculturation and urbanization.<sup>55</sup> Indigenous law is a consequence of how people adapt their lives to changing circumstances. Historically, customary law came about because of how people adapted their lives to changes brought about by colonization.<sup>56</sup> However, this does not mean that customary law is no longer a determining factor for who should succeed in the position of traditional leadership.

This is a problem whereby distortions of customary law can be allowed if the court does not address them. This is evidenced by a man who can claim ownership of a property that belongs to the family.<sup>57</sup> In a judgment such as *Bhe v Magistrate Khayelitsha*, whereby two daughters of a deceased male could not qualify as heirs in the intestate succession of their father, the father of the deceased claimed ownership of the home of the deceased and his estate. This is problematic and highlights how succession and intestate succession is distorted for selfish interests. The father was not supposed to claim the inheritance of his son's estate because it should not belong; he should not be taking ownership of it in his private capacity. The duty of care, which forms part of the responsibility of the head of the family, should befall

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<sup>50</sup> *Ibid.*

<sup>51</sup> J Jansen, 'Multiple marriages, burial rights and the role of *lobolo* at the dissolution of marriage' (2003) *Journal of Juridical Science* 120.

<sup>52</sup> M Slabbert, 'Burial or cremation – who decides?' (2016) *De Jure* 232.

<sup>53</sup> E Bonthuys and S Sibanda, 'Til death do us apart: *Thembisile v Thembisile*' (2003) *SALJ* 784.

<sup>54</sup> M Mokotong, 'In lieu of burial instructions: A legal exposition' (2001) *THRHR* 297.

<sup>55</sup> AC Diala, 'The concept of living customary law: A critique' (2017)49 *JLPUL* 158.

<sup>56</sup> K Mbye, *The Legal Systems of the World: Their Comparison and Unification: International Encyclopedia of Comparative Law: Volume II: Chapter 1: The Different Conceptions of the Law* Paperback – January 1, (1975) 140.

<sup>57</sup> IP Maithufi and GMB Moloi, 'Customary law of succession: *Bhe v Magistrate Khayelitsha* case 9489/02 (CC)' (2004) *THRHR* 515.

the grandfather but he consequently negated as the court opted to conclude that the two daughters inherit the estate and home of their father.<sup>58</sup>

The court concluded that the house was managed by the father of the deceased on behalf of the children. This is part of his responsibility in terms of customary law; this is to ensure that the house is not sold, resulting in women and children being homeless. As Maithufi and Moloi argue that the Constitutional Court could have placed an obligation on the succession of the deceased, such as maintenance, this could have included that the house should not be sold as part of intestate succession.<sup>59</sup> This would have ensured that the duties and responsibilities expected of one as head of the family, irrespective of gender, are complied with, ensuring that an individual is not enriched at the expense of the rest of the family. This is due to the distorted versions of customary law and the introduction of Roman-Dutch concepts such as private property ownership that today, people can be homeless as houses are owned in an individual capacity where they can be held in suretyship by the bank.

Similarly, by relying on the will to determine succession to traditional leadership, an outsider can be appointed as a king/queen if a deceased king appoints a successor through the will. In *Shilubana v Nwamitwa*, Mr Shilubana instituted proceedings in the High Court for a declaratory order that he and not Ms Shilubana should be successors to the chieftaincy.<sup>60</sup> The High Court and later the Supreme Court of Appeal ruled in his favour.<sup>61</sup> The High Court and SCA judgment were overruled in the Constitutional Court, where an argument was made that succession to traditional leadership is a birth right. A king is born and not democratically elected. The decision to approve the royal council's decision to elect Ms Shilubana was easy to justify on constitutional grounds; however, it was unsustainable in terms of customary law because it disrupted lineage. Cornell argues that the *Shilubana* judgment should be seen as an important step forward for customary law to recognize the power of a royal family to make laws.<sup>62</sup> The result, however, is that one may now have a king who is not of royal blood or Nwamitwa descent. This is problematic because it disturbs the sacred position for the purpose of achieving gender equality. Similarly, in *Ludidi v Ludidi*,<sup>63</sup> the daughter of the late Chief

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<sup>58</sup> F Osman, 'The administration of customary law estates, post the enactment of the Reform of Customary Law of Succession Act: case study from rural Eastern Cape, South Africa' *LLD thesis* 2017 University of Cape Town) 74.

<sup>59</sup> Maithufi and Moloi (2004) *THRHR* 515.

<sup>60</sup> *Nwamitwa v Phillia* 2005 (3) SA 536 (T).

<sup>61</sup> *Shilubana v Nwamitwa* 2007(2) SA 432 (SCA).

<sup>62</sup> C Cornell, 'The significance of the living customary law for an understanding of law: Does customary law allow for a woman to be hosi?' 2009 (2) *CCR* 407.

<sup>63</sup> *Ludidi v Ludidi* (2018 ALL SA 1 (SCA)).

Manzodidi was his only child, and the Chief shared a father with Chief Manzezulu, whose father was Chief Dyubhele Ludidi.

The qualifying person in the Venda traditional group was appointed by Makhadzi.<sup>64</sup> Chief Manzezulu passed away in 1978 and survived with his wife and only daughter, who was 12 years old when he passed away. Mr Ludidi challenged Ms Nolitha Ludidi as the Chief of the amaHlubi (the decision) by a member of the Executive Council for Cooperation, Governance, and Traditional Affairs, province of the Eastern Cape, MEC, pursuant to her identification with the Hlubi Royal family.<sup>65</sup> Mr Ludidi wanted the decision to appoint Ms Nolitha Ludidi as inkosi to be reviewed and set aside and for him to be recognized as the king of the amaHlubi. This was dismissed by the Eastern Cape's local division.<sup>66</sup> The SCA dismissed the Appeal, recognizing Ms Nolitha Ludidi as the rightful king. This article is not against the appointment of women in the nkosi position. However, it argues that the implications of such a decision should be considered in the lineage of Ludidi and other families. This refers to a situation similar to that in *Shilubana*, where certainty was disrupted.

While judgments such as *Shilubana* and *Ludidi* are customary law succession disputes, there is nothing African about the solution deployed by the court. The court ignores the importance of lineage in an African law context, which is priceless even from an ancestral perspective. Ramose explained the importance of this issue in the following terms:

'The community in African culture is an ethical entity comprising the living, the living dead and the yet to be born. The critical ethical concern is to recognize and abide by the obligation to maintain and preserve harmonious relations within these three dimensions of the community. For many of the indigenous conquered peoples, a name is an identity card that opens up the genealogy and history of the bearer of that name. As such it is the affirmation of connections and relations with the extended family, the living dead (ancestors) and the community from which the name-bearer originates'.<sup>67</sup>

The court did not have to destroy certainty in succession to traditional leadership but could have achieved gender equality without obliterating the African value systems. It could have appointed Ms Shilubana as a queen mother, which could have enabled a situation where the title would return to a male successor to the throne. There are cases in which kingships can be contested between siblings and cousins. An example of this is the case of king Sekhukhune

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<sup>64</sup> *Ludidi* paragraph 28.

<sup>65</sup> *Ludidi* paragraph 2.

<sup>66</sup> *Ibid.*

<sup>67</sup> Ramose (2007) *GLR* 323.

and king Mampuru. A norm developed in the Bapedi community allowing accession to kingship through bloodshed.<sup>68</sup> Although it could be argued that king Mampuru was the rightful king because he was trained or given birth by a *timamollo* (great wife),<sup>69</sup> king Sekhukhune was able to challenge him and eventually rule the Bapedi Kingdom. The President of South Africa appointed the Commission on Traditional Disputes and Claims, which found that this succession was part of the Bapedi custom. This highlights that a deviation from normal norms can be applied to recognize a different leader. However, such a deviation should come from the community itself, which is its African form.

The king Zwelithini matter could have suffered a similar fate if the will had nominated another heir than Misizulu or had nominated an outsider who was not born by a wife. This can result in a person being appointed as part of the royal family. Such an appointment disturbs the certainty of who is next in line to be a king.

#### 4.1 Impact on Lineage and Co-existence of Marriages

Certainty will be in doubt where customary law is clear about who is supposed to be next in line as a king, but a will is drafted appointing a different person as an heir. The question is, which law will prevail between customary law determining who should be heir and the wishes of the testator? In the king Zwelithini matter, it was not necessary to draft a will to determine who should be the successor because customary law provides that the son of the great wife is the one who succeeds as the heir. This indicates that the heir is Misizulu. One would have to imagine a scenario in which an outside person is appointed through a will. What are the implications of the appointment of an outside person to the position where the outsider is a commoner and marries another commoner with the result that the two cannot produce a successor of royal blood?<sup>70</sup> The KwaZulu Natal saga was brought in sharp contrast by the co-existence of customary and civil marriages. The question of whether civil marriage or customary marriage can coexist remains.

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<sup>68</sup> *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* 2015 (3) BCLR 268 (CC) paragraph 72.

<sup>69</sup> A *timamollo* is a woman who is chosen by a community to give birth to a king/queen for the community or the country. This practice is common among the Bapedi, where the son born of a *timamollo* qualifies to become a king/queen even if his father is not of royal blood. The community or members of the king/queen's council (Bakgoma and Bakgomana) are responsible for identifying a *timamollo*. She does not have to be married to a king. Even a queen can marry a *timamollo*.

<sup>70</sup> C Himonga and T Nhlapho, *African customary law in South Africa: Post-apartheid and living law perspectives* (eds) (2014).

It is sad to see the succession to the Zulu kingship decided in this manner because KwaZulu-Natal has been resistant to colonial structures.<sup>71</sup>

The first wife of king Zwelithini, Mrs Dlamini, initiated legal proceedings where she claimed 50% of king Zwelithini's estate, which is worth more than R71 million and includes the Ingonyama Trust, of which the king was the sole trustee.<sup>72</sup> She alleged that she and the late king were married in community of property under civil law in 1969 before the crowning of king Zwelithini as dictated by custom. Mrs Dlamini's contention was that she was the only legitimate wife of the king, as she was married under civil law, which only permitted monogamous marriage. What this entails is that the subsequent marriages concluded by the king would be void if the first marriage under civil rights was recognized as valid.

The case was a clash between 'two worlds' because historically, the conclusion of a customary marriage did not depend on whether a civil marriage was in existence.<sup>73</sup> It is argued that what the first wife was claiming was distorting customary law for her selfish interest: as a wife who has lived and been married to the king, she should know that the king must be able to have the option of having other wives. It is, therefore, not in the best interests of the community for a king/queen to marry by civil rights because this can go against the values of the community where they may want to marry a great wife. The option of a king marrying more than one wife is not for his interests but for the community as well. This indigenous norm should enjoy supremacy in determining the legitimacy of marriage.

## 5. CONCLUSION

This article argues that the role of Christianity in the coronation of Misizulu is problematic because it constituted the recolonization of KwaZulu Natal. KwaZulu Natal should embrace rich indigenous knowledge and identity. It has played a significant role in the fight against colonisation by keeping a decolonial name. It is concerning to see some of the developments in relation to its traditional leadership, whereby a will was drafted to appoint a successor to king Zwelithini. This is problematic as it embraces colonization rather than allowing rich indigenous knowledge to determine who should be the traditional leader. Reference was made

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<sup>71</sup> Ramose (2007) *GLR* 324.

<sup>72</sup> S Shoba, 'Goodwill Zwelithini's eldest wife says hers was the only legitimate marriage to late King- and demands half of his estate' (Daily Maverick) 2021. <https://www.dailymaverick.co.za/article/2021-05-04-goodwill-zwelithinis-eldest-wife-ayshers-was-the-only-legitimate-marriage-to-late-king-and-demands-half-of-his-joint-estate/> (accessed 15 July 2023).

<sup>73</sup> *Ibid.*

to other judicial pronouncements where it was stated that developments have the impact of impacting lineage and legal certainty. Courts and indigenous communities must effect indigenous culture and identity. Embracing African indigenous culture has been a topical issue in South Africa, sparking decolonialization conversations. One of the successes of colonialism was to obliterate the gamut of alternative modernities so that the colonised people saw it as the only way forward, resulting in thin African knowledge that required a different response.<sup>74</sup> African rituals were also observed in the coronation of ki Misizulu, however, the rich data and knowledge of KwaZulu Natal must be embraced independently of colonial attachment.

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<sup>74</sup> Ndlovu-Gatsheni (n 42) 63.