

Catering for Nguni customary law in the modern world

June 13, 2013 Maya Fisher-French

Financial Planner Mkhululi Ngxumza explains the issues around inheritance within Nguni law and how this can be catered for through a proper financial plan.

The Nguni people, AmaXhosa in particular, have a system of primogeniture as an instrument which is used to evaluate whether one is eligible to inherit or to become a trustee. Primogeniture is where the right of succession belongs to the first-born.

In a typical Xhosa family unit, the father would build his estate with the assistance of his wife and the father would have two homes, one in an urban area and one in the rural. The assets would also include arable land, which is passed down from generation to generation through the doctrine of primogeniture, cows and personal effects.

Primogeniture dictates that the beneficiary or the trustee does not just receive or inherit a benefit, the benefit comes with a burden, namely that if the father should die leaving responsibilities, the eldest son must step into the father's shoes as far as those responsibilities are concerned.

The eldest son becomes the custodian of all his father's assets. The purpose of this is for the father to delegate powers to his son to keep these assets for the benefit of his mother, sisters and brothers and their offspring. More often than not, however, this system is abused, and whoever receives the assets through the principle of primogeniture enriches himself and does not take care of his siblings as required by the Nguni customary law.

Under the rules of the Pension Fund Act, the wife would, however, receive the husband's employee benefits but in most cases this does not last as it is insufficient and often poorly invested.

Nguni customary law still commands a lot among the Nguni people but it is susceptible to abuse, where the eldest son through the application of the doctrine of primogeniture finds himself above the other offspring of his father and enriches himself. In other words, he acts not as a trustee but instead as a sole beneficiary.

The reason Nguni customary law has reached this current state is that it was marginalised and never given space to develop and evolve. It has not been developed to fit in with our changing society.

Primogeniture is, in its true form, a good principle that came from the great thinkers of the old Nguni people. It places a duty on the eldest son to take care of his siblings. This duty is placed on the eldest son even if the father did not leave any assets. This duty is extended in the Nguni people; if there is no son among the children, the extended family members are duty-bound to care for the children of the deceased. This is why orphanages and old-age homes are not known to the Nguni people. It is also why insurance such as life cover and disability cover are not popular. Funeral policies are seen as more important as this would ensure that the father is transported to his place of birth for burial.

A place for financial planning in Nguni Law

The question whether primogeniture is unconstitutional remains unanswered by the Constitutional Court. This doctrine could be regarded as unconstitutional because it discriminates between the children of the deceased – only the first-born male child is eligible to become a trustee through primogeniture. Therefore, there is discrimination based on gender as well as the accident of birth in terms of the order in which the children were born. The normal rules of intestate would apply if you died without a will and the assets would be distributed between the wife and siblings.

In the eyes of many indigenous Africans, financial planning is eurocentric. Financial planners have not won their trust to the fullest, yet primogeniture can be incorporated in the will of a Nguni man. Certain assets can then be dealt with in terms of Nguni customary law. By providing a legal framework to carry out his wishes, and not just relying on the moral fibre of his son, primogeniture can continue to build and maintain the father's legacy.

When financial planning is done through purchasing of life cover or by just drafting a will for the distribution of assets after the death of the testator, it results in a smooth transfer of assets from the deceased to the beneficiaries.

In order to honour the true intention of the Nguni law, Nguni people need to do proper financial planning which does not just include funeral cover, but allows the testator to leave a legacy that will survive long after he is gone.

Ngxumza Financial Services is a Cape Town based financial advisory firm specialising in Nguni Law.

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