# IN THE HIGH COURT OF SWAZILAND

## JUDGMENT

**REPORTABLE**
Case No. 470/2013A

In the matter between

**NOMBUYISELO SIHLONGONYANE** **Applicant**

and

**MHOLI JOSEPH SIHLONGONYANE** **Respondent**
(The Attorney General intervening)

**Neutral citation:** *Nombuyiselo Sihlongonyane v Mholi Joseph Sihlongonyane (*470/2013A) [2013] SZHC 144 (18 July 2013)

**Coram:** **ANNANDALE, MABUZA and MAMBA JJ.**

**Heard:** **20 June, 2013**

**Delivered:** **18 July, 2013**

[1] Civil Law – Law of Marriage – Roman Dutch – Couple married in terms of civil rites and in community of property and of profit and loss – wife under marital power has no locus standi in judicio to sue and be sued in her own name.

[2] Civil Law – Law of Marriage – husband's marital power barring wife from suing and being sued in her own name – whether this consistent with equality provisions in s20 and 28 of the Constitution.

[3] Civil Law – Husband's marital power – denying wife locus standi to sue and be sued in her own name – such not consonant or consistent with constitutional right of equality for all before the law and therefore void to the extent of such inconsistency per s 2(1) of the Constitution.

[4] Constitutional Law and Procedure – declaration of invalidity – to take effect from date of filing of application to facilitate smooth transition to new constitutional order.

[5] Constitutional Law – Jurisdiction of the High Court – s 151 (2) – The court is empowered to hear and determine any matter of a Constitutional nature and has jurisdiction to enforce the fundamental human rights in the Constitution.

## JUDGMENT

## THE COURT.

[1] The applicant, Nombuyiselo Amanda Sihlongonyane, is an adult Swazi female and resides in Zakhele. She is a teacher by profession and is currently employed as such at Manzini Central School.

[2] The respondent is Joseph Mholi Sihlongonyane and was a pastor at the Free Evangelical Assemblies Church since 2003 but has since established a new church known as Kingdom Ambassadors Worship Tabernacle. This church is based in Manzini.

[3] The applicant and respondent married each other in terms of civil rites on 11 January 2003 and the marriage is in community of property and still subsists. The law governing the consequences of the marriage is the common law.

[4] The parties have their matrimonial home at Zakhele on the outskirts of the city of Manzini.

[5] On 25 January 2013, the applicant filed this application on an *ex parte* and urgent basis seeking *inter alia*, the following prayers;

> 'That a rule nisi do issue with immediate and interim effect calling upon the respondent to show cause on a date to be appointed by this Honourable Court, why an order in the following terms should not be made final:
>
> 3.1 The respondent causes the following people to leave the matrimonial home with immediate effect;
>
> (a) Thokozane Gamedze
>
> (b) Thembinkosi Ntjwebe Dube
>
> (c) King Siphelele Mkhonta
>
> (d) Nhlakanipho Maziya
>
> (e) Noncedo Maziya
>
> 3.2 The respondent does not instruct any other persons to reside in the matrimonial home without the consent of the applicant.
>
> 3.3 Alternatively, the respondent relinquishes his rights and powers as administrator of the joint estate to the applicant.

3.4 Costs of suit.'

[6] The couple is experiencing very serious difficulties in their marriage and this has been going on for sometime. The cause of these difficulties, says the applicant, is the respondent's infidelity. The applicant states that the respondent has been involved in adulterous relationships with a number of women including one Gugu Faith Gwebu, with whom he now lives at Sihlahleni area in Ngwane Park, also on the outskirts of Manzini.

[7] According to the applicant, the respondent is also guilty of unlawfully and unilaterally transferring their joint estate to his girlfriends or mistresses. Some of the expenditures by the respondent are unknown to the applicant and these are not to the benefit of the common household. The applicant avers that the respondent is dissipating and diminishing the assets of their joint estates and that he is generally mismanaging the estate.

[8] When the respondent left the matrimonial home to live at Sihlahleni, he left some of his relatives and members of his church at the parties'

matrimonial home. (These persons, we believe, are those listed in prayer 3.1 above). Applicant states further that '… these individuals are physically and emotionally abusing me and my two children, clearly on the instruction of the respondent. They hail insults at me and my children and the respondent condones their actions.' Because of these abuses, the applicant feels threatened in her own home and now finds it unsafe for herself and her children to live there together with the said persons. It is for these reasons, that she wants them to leave the matrimonial home.

[9] Again, it is in view of the respondent's alleged maladministration of the joint estate that she wants him removed as the administrator thereof and that she be put in charge instead. She avers further that she is fully capable and fit to properly administer the said estate.

[10] Upon hearing the application, the court (per Maphalala P.J.) granted the application and the rule nisi was made returnable on 12 April 2013.

[11] On being served with the rule nisi, the respondent anticipated its return date and filed his opposing affidavit wherein he denied all the alleged acts of infidelity or abuse or the mismanagement and maladministration of the assets of the joint estate. He explained further that his acts of housing or giving shelter to the persons mentioned above was an act of charity or pastoral obligation on his part as a minister of religion and this had been explained to the applicant. He further explained that some of the persons involved were his relatives or members of his extended family and he had a social duty to look after them.

[12] We do not think it is either necessary or desirable to give a detailed account of the accusations and counter-accusations herein as we believe that these may be issues suitable for the court or judge that will finally hear the matter on its merits. Suffice to say that when the matter appeared before Maphalala PJ on the question of and on whether or not the applicant as a married woman had locus standi to apply for the reliefs above and in particular that in prayer 3.1 which involves the persons therein mentioned and after hearing both sides on the preliminary issues, the learned judge observed *mero motu* that:

> '…it is my view that the provisions of the Swaziland Constitution (sections 20 and 28) needs to be investigated thoroughly …whether the old position of the common law remains or whether the provisions of the Swaziland Constitution hold sway.'

He thus declined to decide this Constitutional question alone and he referred the matter to the Honourable Chief Justice who then duly constituted this court to hear and decide that particular issue. Later, the Attorney General successfully applied to be joined as an intervening party.

[13] Section 151 (2) of the Constitution empowers this court to generally, 'hear and determine any matter of a Constitutional nature' and specifically, 'enforce the fundamental human rights and freedoms guaranteed by the Constitution.' The has wide powers to determine the nature or type of the appropriate remedy in a given case. (See section 35 of the Constitution to which we shall refer presently).

[14] Both parties, including the intervening party, made very helpful and comprehensive heads of argument and submissions before us and the

court is grateful to them for their industry and sense of duty to the court and the legal profession in general.

[15] As a starting point, it is perhaps useful and indeed logical in answering the Constitutional question posed above to first briefly examine or restate the common law position regarding the locus standi or lack thereof of a woman married in terms of civil rites and in community of property to seek the reliefs sought herein.

The general principle of our common law is that where the marriage is in community of property, the husband has the marital power unless such power has been specifically excluded by an Ante-Nuptial Contract or some other act recognized or permissible in law.

HR Hahlo, *The South African Law of Husband And Wife (5 ed) at 161* states that:

> ‘The community of property and profit and loss of the old-regime differs in important respects from the community of property and profit and loss of the new one. The former is linked with the marital power. By virtue of this power the

husband administers the joint estate. The wife lacks contractual capacity as well as locus standi in judicio.'

See also PQR Boberg (1977), *The Law of Persons and The Family* at 190 where he states that:

'It is by virtue of the marital power that the husband assumes the office of administrator of the joint estate, and the wife finds herself subordinated to his guardianship, bereft of active legal capacity save where common law or statutory dispensations have been grudgingly granted. The husband's power to administer the joint estate as he pleases – buying, selling investing, donating or squandering its assets – is fettered at common law only be the rule that transactions in fraud of the wife will be set aside at her instance, and by the remedies of interdiction and boedelscheiding (both of which are available in severe cases of maladministration).' (Footnotes omitted by us.)

[16] It is common cause that there are, bar the constitution to which we shall presently refer, no statutory dispensations in our law that have interfered with the common law marital power. It is also common cause that in the instant case, the applicant herein has locus standi in

judicio based on her allegations in her founding affidavit, to apply for the relief sought herein as stated in paragraph 5 above, save for that relief stated in prayer 3.1 of the notice of motion.

[17] One of the key or primary principles of Constitutional adjudication is that the issue to be determined or question to be answered by the court must be a real and factual one and must be between real people rather than hypothetical, academic or moot; thus the need to set out the factual dispute between the parties herein. This principle, we think, has its origin in *Ashwander v Tennessee Valley Authority, 297 U.S. 288 (1936)* where the United States Supreme Court provided the first clarification or elaboration of the doctrine of Constitutional Avoidance. Brandeis J said the doctrine was made up of a series of seven rules; namely:

‘(a) The court will not pass upon the Constitutionality of legislation in a friendly, non-adversary proceeding…

(b) The court will not anticipate a question of Constitutional law in advance of the necessity of deciding it …

(c) The court will not formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied…

(d) The court will not pass upon a Constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed…

(e) The court will not pass upon the Constitutionality of a statute unless the plaintiff was injured by operation of the statute.

(f) The court will not pass upon the Constitutionality of a statute at the instance of one who has availed himself of its benefits… and

(g) Even if serious doubts concerning the availability of an act of congress are raised, the court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'.

[18] The above doctrine is of course part of our law. *Vide Jerry Nhlapo and 24 others v Lucky Howe N.O. (in his capacity as Liquidator of [VIF] Limited in Liquidation) Civil Appeal No. 37/07, Daniel Didabantu Khumalo v The Attorney General Civil Appeal 31/2010,*

*Lomvula Hlophe (On Behalf of Acting Chief Ntsetselelo Maziya v Office In-Charge, Big Bend Correctional Institution) and 4 Others, Civil Case 2799/08*. There is no doubt in our opinion that the rules applicable at this stage herein have been satisfied in this application. The matter is not moot. It is real and between real people. The applicant has not benefited from her lack of locus standi to sue and be sued in her own name due to the marital power and there is no other ground upon which this case may be decided, other than the Constitutional point raised.

[19] Quite apart from the Avoidance Doctrine, where a rule of the common law is being challenged as being inconsistent with a Constitutional provision, as in this application, the court approaches the issue differently from when the challenge is on a statute. As pointed out by Moseneke J in Thebus and Another v S, 2003 (6) SA 505 (CC), this is because 'the common law is its law [and the] courts are protectors and expounders of the common law [and] have always had an inherent power to refashion and develop [it] …in order to reflect the changing social, moral and economic make-up of society.'

[20] Section 20 of our Constitution provides that:

> ’20. (1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
>
> (2) For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.
>
> (3) For the purposes of this section, “discriminate” means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.
>
> (4) Subject to the provisions of subsection (5) Parliament shall not be competent to enact a law that is discriminatory either of itself or in its effect.’

And section 28 stipulates that:

> ’28. (1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.’

[21] Iain Currie et al in their book *The Bill of Rights Handbook (3 ed) at 182* referring to equality say:

> 'Equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the idea of equality is a moral idea that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should not be treated alike. For example, it is generally thought wrong to deny women the vote. This is because, when it comes to voting, men and women are in the same position; they are equally capable of exercising political choices. So, if men and women are alike, they should be treated alike. At the same time, it is generally not thought wrong to deny children the vote. This is because children and adults are not in the same position when it comes to their ability to exercise political choices. Because adults and children are not alike, a law restricting the franchise to adults is therefore usually thought to be justifiable….[And at 184 the Authors say] …[f]ormal equality simply requires that all persons are equal bearers of rights. On this view, inequality is

an aberration which can be eliminated by extending the same rights and entitlements to all in accordance with the same neutral norm or standard of measurement. Formal equality does not take actual social and economic disparities between groups and individuals into account. Substantive equality, on the other hand requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld.'

[22] On unfair discrimination the above learned authors (at 195) state that :

'Unfair discrimination is discrimination with an unfair impact. It has this impact where it imposes burdens on people who had been victims of past patterns of discrimination, such as women or black people, or where it impairs to a significant extent the fundamental dignity of the complainant. Where the discriminating law is designed to achieve a worthy and important societal goal it may make fair what would otherwise be unfair discrimination.'

[23] In examining or determining this application we can do no better than repeat what was said by Moore JA in *The Attorney General v Mary – Joyce Doo Aphane, Civil Appeal 12/2010* (unreported judgment delivered in May 2010) that;

> '[4] This case is but the latest in a continuing series brought in many countries of the world by women in their attempts to address what they claim to be discriminatory laws and practices which operated unfairly against women. These precepts and practices have deprived women of rights which were freely available to men, and kept women in a position of inferiority and inequality, in the various societies in which they live, work, pay their taxes, and raise their families, despite the fact that women contribute substantially to the growth and development of the communities and nations to which they belong. [At 25] …section 28 (1) is a pithy affirmation of women's rights to equal treatment with men in the activities enumerated there.'

[24] Marital power unlawfully and arbitrarily subordinates the wife to the power of her husband and is therefore unfair and serves no useful or rational purpose. Marital power is unfair discrimination based on sex

or gender inasmuch as it adversely affects women who have contracted a specific type of marriage but does not affect the men in that marriage in the same way, e.g. the inability to sue or be sued in their own name. In some jurisdictions the marital power has been specifically abolished. In South Africa for instance, it was abolished by Act 88 of 1984 (see H.R. Hahlo *ibid*) at 17.

[25] Whilst it is accepted that in terms of the common law, a married woman who is subject to the marital power may approach the court for leave to sue without the aid of her husband – *venia agendi* – Mr Vilakati, Counsel for the intervening party, submitted that this very notion or concept is discriminatory of such women inasmuch as it applies to such class of women and not men. He referred to it as an absurdity. A married man does not, under any circumstances, have to apply for such leave. We cannot disagree.

[26] The Constitutional provisions quoted above, appear to us to be clear and unequivocal in their meaning and import, and application. They decree that all persons or human beings should be treated equally

before and under the law in all spheres of life and "in every other respect and shall enjoy equal protection of the law."

[27] The United Nations Human Rights Committee General comment 28 on the Equality of Rights between men and women (2000) states that the equality provision

> '…implies that all human beings should enjoy the rights provided …on an equal basis and in their totality. The full effect of this provision is impaired whenever any person is denied the full and equal enjoyment of any right …[All States] must take steps to remove all obstacles to the equal enjoyment of each such rights. The Committee also notes that inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. The subordinate role of women in some countries is illustrated by the high incident of pre-natal sex selection and abortion of female fetuses. States Parties should ensure that traditional historical religious and cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all covenant rights.'

[28] At paragraph 25 the report states that:

> 'To fulfill their obligations states must ensure that the matrimonial regime contains equal rights and obligations for both spouses, with regard to the custody and care of children, the children's religious and moral educations, the capacity to transmit to children the parent's nationality, and the ownership or administration of property, whether common property or property in the sole ownership of either spouse. States should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary. … Equality during marriage implies that husband and wife should participate equally in responsibility and authority within the family.'

[29] Our Country is a member of the United Nations and is signatory to the relevant convention or covenant. In enacting sections 20 and 28 of the Constitution, the country was fully appreciative or mindful of its own obligations to its people on this front and also of its international obligations under these international instruments.

[30] We have no doubt that section 20 of the Constitution read together with section 28 gives full effect to our own desires and ethos as a nation and also to these international instruments and jurisprudence. It is also plain to us that the marital power of the common law insofar as it prevents married women from suing and being sued without the assistance of their husbands is clearly inconsistent with the provisions of sections 20 and 28 of our Constitution. The Constitution being the Supreme law of the land, these tenets of the common law must perforce give way to it.

[31] Lastly, as to the appropriate order herein, Mr Vilakati in his heads of argument submitted that:

> 'A declaration of invalidity … to the date of coming into effect of the Constitution would have a disruptive effect on legal proceedings instituted in good faith by and against women subject to the marital power' before this application. We agree.

[32] Our Constitution came into effect on 26 July 2005. Section 35 (2) of the Constitution allows the Court to "…make such orders, issue such

writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this chapter." The right to equality, of course, falls under this chapter, ie, Chapter III. As to what may be an appropriate order or direction will obviously vary and depend on the peculiar circumstances of each case. In *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others, 1999 (1) SA 6 (CC)* the court observed that:

> '[94] The interest of good government will always be an important consideration in deciding whether a proposed order …is 'just and equitable', for justice and equity must also be evaluated from the perspective of the state and broad interests of society generally. As in Ntsele's case, it might ultimately be decisive as to what is just and equitable. …
>
> [95] The present is the first case in which this court has had to consider the retrospectivity of an order declaring a statutory or criminal law of offence to be Constitutionally invalid. The issues involved differ materially from those in cases where reverse onus provisions have suffered this fate. In the latter cases, an unqualified retrospective operation of the invalidity

provisions could cause severe dislocation to the administration of justice and also be unfair to the prosecution who had relied in good faith on such evidentiary provisions. In addition, the likely result of such an unqualified order would be numerous appeals with the possibility of proceedings having to be brought afresh. …

[97] An unqualified retrospective order could easily have undesirable consequences. Persons might act directly under the order to have convictions set aside without adequate judicial supervision or institute claims for damages. The least disruptive way of giving relief to persons in respect of past convictions for consensual sodomy is through the established court structures. On the strength of the order of constitutional invalidity such persons could note an appeal against their convictions for consensual sodomy, where the period for noting such appeal has not yet expired or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be

> reopened, it will in all probability not cause dislocation of the administration of justice of any moment.'

Bearing these factors in mind, we are of the view that the appropriate order of invalidity herein must be backdated to the date of filing of this application. Such a retrospective order will benefit the applicant in full and all other prospective litigants who are similarly situated as her.

[33] For the foregoing, we make the following declaratory order, per section 2 (1) of the Constitution:

> The common law concept of marital power insofar as and to the extent that it bars married women from suing and being sued without the assistance of their husbands is hereby declared to be inconsistent with sections 20 and 28 of our Constitution. This invalidity is with effect from 25 March 2013 from which date all married women subject to the marital power of their husbands shall have the right to sue and to be sued in their own names.

[34] The matter is remitted to the learned Principal Judge who made the original ruling herein for hearing on the merits. All the parties were in agreement that this being a Constitutional matter, the court should make no order as to costs and this is the order we make herein.

**MAMBA J**

**ANNANDALE J**

**MABUZA J**

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| **For Applicant:** | **Ms. Simelane** |
| **For Respondent:** | **Mr. Simelane** |
| **For Intervening Party:** | **Mr. M. Vilakati** |