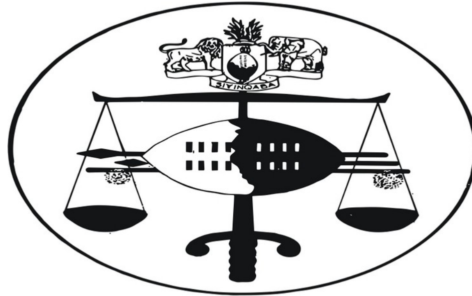

# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CIVIL CASE NO. 383/2009

In the matter between:

MARY-JOYCE DOO APHANE APPLICANT

And

THE REGISTRAR OF DEEDS 1ST RESPONDENT
MINISTER OF JUSTICE AND CONST. AFFAIRS 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT

CORAM : Q.M.MABUZA - J
FOR THE APPLICANT : MR. K. MOTSA OF ROBINSON BERTRAM
FOR THE RESPONDENT : MR. M. VILAKATI AND MR. MKHALIPHI OF THE ATTORNEY GENERAL'S CHAMBERS

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JUDGMENT
23/02/2010

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[1] The Applicant herein seeks to invalidate and declared to be null and void section 16 (3) of the Deeds Registry Act 37/1968 ("Deeds Registry Act") and Regulations 7

and 9 of the Deeds Registry Regulations ("the regulations") on the basis that these impugned laws are inconsistent with sections 20 and 28 of the Constitution of the Kingdom of Swaziland no. 1/2005 ("the Constitution.)

[2] The Applicant further seeks an order that Lot No. 36, Entabeni Township Extension No. 1 situate in Mbabane be registered in the joint names of Michael Mandla Zulu and Mary- Joyce Doo Aphane.

[3] The Applicant seeks costs in the event that the application is opposed; further and alternative relief.

[4] The Respondents are opposed to the grant of prayer (1) and (3) to the Applicant. They do not oppose the grant of prayer 2. The challenge to regulation 7 and 9 of the Deeds Registry's Act fell away during argument consequently, there will be no order with regard thereto.

[5] The Applicant and Michael Mandla Zulu are married in community of property. On the 24 November 2008 the Applicant and her husband entered into a deed of sale for the purchase of certain immovable property described as Lot No. 36, Entabeni Township Extension

No. 1, Mbabane. The deed of sale reflects both their names as purchasers. Naturally they wished to have the property registered in their joint names. But this was not to be. They were informed that because they were married in community of property, the property would have to be registered in the sole name of Michael Mandla Zulu as required by law, in particular section 16 (3) of the Deeds Registry Act; thereby excluding the Applicant's name.

[6] The Respondents were agreeable that the parties register the immovable property in the joint names of the Applicant and her husband, Michael Mandla Zulu. They made an offer to that effect. It is Mr. Vilakati's contention that there is nothing in section 16 (3) which prohibits immovable property from being registered in the joint names of two spouses who are married to each other in community of property. Mr. Vilakati further states that the prohibition is confined to the registration of real rights in the sole name of a woman married in community of property. It is his further submission that the Applicant ***in casu*** is not affected by the prohibition because she does not want to register the immovable property in her sole name.

[7] Mr. Vilakati further argues that the provisions of section 44 (1) of the Deeds Registry Act fortifies his argument because it provides that:

> "If immovable property or a bond is registered in the Deeds Registry in the name of the survivor of two spouses who were married in community of property or in the *name of the joint estate of such spouses* and such survivor has lawfully acquired the share of the deceased spouse in the property or bond, the Registrar shall on written application by the Executor in the estate of the deceased… (Mr. Vilakati's emphasis)

[8] Mr. Vilakati submits further that the above italicized words indicate that the legislature did not intend to prohibit the registration of immovable property or a bond in the joint names of spouses married to each other in community of property. This, he states is a possible construction of section 44 (1) read with section 16 (3) of the Deeds Registry Act.

[9] The Applicant rejected the offer made by the Respondents to have the immovable property registered in the couple's joint names. Mr. Motsa submitted that joint registration was only possible once section 16 (3) has been declared to be inconsistent with sections 20 and 28 of the constitution and declared null

and void. This he says can only be done with the intervention of this court. He contends further that the Applicant cannot lawfully register the immovable property into the joint names of the Applicant and her husband because a woman married in community of property has no capacity to contract unassisted and hence immovable property is registered in the name of the husband in his capacity as the administrator of the joint estate.

It is Mr. Motsa's further contention that if the Respondents argument is accepted by this court, it will mean that the long existing common law principle will be abrogated even when Parliament has not passed any legislation to that effect. This argument is sound to me.

[10] Mr. Motsa gave an example from South Africa which he says is different for the following reasons:

- Marital power has been eroded by statute in particular, section 1 of the Matrimonial Affairs Act 88/1984. This subsection allows a woman married in community of property to hold property in her name; and

- Section 17 of the Deeds Registry which was similar to our section 16 has been amended by section 29 of the Matrimonial Affairs Act and now reads as follows:

> "17(1) From the commencement of the Deeds Registries Amendment Act, immovable property, real rights in immovable property and notarial bonds which would upon transfer, cession or registration thereof form that part of a joint estate shall be registered in the name of the husband and the wife, unless that transfer, cession or registration takes place only in the name of a partnership, and the husband or wife is involved therein only in the capacity of partner in that partnership.

[11] He argues further that such joint registration if allowed by this court will fall foul of the general prohibition mentioned in section 16 (3) and will have the effect of registering the immovable property into the name of the woman married in community of property. Section 16 (3) provides for three exceptions to the general prohibition and none is the joint name registration. Thus, says Mr. Motsa that ***in casu*** the exclusion of the joint registration means that joint registration is prohibited and has the effect that the immovable property may not be registered into the name of the woman married in community of property even in the

case of joint name registration. See Terblanche v South African Eagle Insurance Co. Ltd 1983 (2) SA 501 N.

[12] While Mr. Vilakati's arguments are very persuasive, I am more persuaded by Mr. Motsa's argument. Consequently, the best organ to resolve this impasse is Parliament and not the courts.

[13] I now turn to section 16 (3). Should section 16 (3) be expunged or not? Mr. Motsa thinks so and Mr. Vilakati thinks not; at least not yet. The consoling factor is that both Mr. Motsa and Mr. Vilakati agree that section 16 (3) is unconstitutional. I too agree that it is unconstitutional.

[14] Mr. Vilakati in his submissions concedes that section 16 (3) of the Deeds Registry Act is ***prima facie*** unconstitutional. He agrees with the Applicant when she states that women married in community of property have waited too long for section 16 (3) of the Deeds Registry Act to be brought into conformity with the constitution. He concedes with a simple: "That much is true." He admits on behalf of the Respondents that section 16 (3) trenches upon section 20 and 28 of the Constitution. He advanced the principle of avoidance which states that a court will not determine a

constitutional issue when a matter may properly be decided on another basis: See Jerry Nhlapo and 24 Others v Lucky Howe N.O. Civil Appeal no. 37/07. To fortify his argument he cited the case of S v Mhlungu 1995 (3) SA 867 (cc) in which Kentridge AJ articulated the principle of avoidance as follows:

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[15] Mr. Motsa on the other hand submits that the principle of avoidance has no application ***in casu*** because this principle does not apply where the Applicant cannot get a remedy without going the constitutional route; hence the challenge to section 16 (3). Section 16 (3) so the argument goes not only unfairly differentiates and discriminates but it also contains a general prohibition which prevents women who are married in community of property from holding property either individually or jointly with their husbands. Consequently, the Applicant can only get relief through the setting aside of section 16 (3).

[16] Mr. Motsa makes a compelling argument with which I agree. It is clear to me that something must be done

about section 16 (3) of the Deeds Registry Act. The Constitution was promulgated in July 2005 and there has been no overt move to bring this section into alignment with the Constitution by the Legislature.

[17] Section 151 (2) (a) of the Constitution states that the High Court has jurisdiction to enforce fundamental human rights and freedoms guaranteed by the Constitution. This includes the right to equality which is guaranteed by section 20 and 28 of the Constitution.

[18] I had envisaged certain causes of action open to the court in dealing with section 16 (3) of the Deeds Registry Act namely:

- To strike down the offending statutory provision; or

- To suspend the declaration of invalidity for a certain period in order to allow Parliament to rectify the situation and to pass the necessary legislation;

- "severing" certain words and or portions of the offending statute and/or "Reading in" certain words into the offending statute.

[19] As a backdrop to the decision ***in casu*** the court has to defer to general constitutional principles as a guideline. **Firstly,** the Kingdom of Swaziland is a constitutional state. It has incorporated the doctrine of the Rule of Law; such incorporation comprehends the principles of legality. See The Prime Minister of Swaziland & Six Others v MPD Marketing and Supplies (Pty) Ltd – Appeal case no. 18/2007 page 32.

**Secondly,** in terms of section 138 (2) of the Constitution of the Kingdom of Swaziland, the Judiciary has jurisdiction over matters relating to the Constitution; **and is only subject to this Constitution** (See section 141 (1). (My emphasis).

**Thirdly,** the High Court is enjoined in terms of section 151 (2) (a) of the Constitution to enforce fundamental human rights and freedoms guaranteed by the Constitution.

**Striking down the offending statutory provision.**

[20] The Applicant seeks the remedy of striking down section 16 (3) on the basis that it violates section 20 and section 28 of the Constitution. She contends that she is entitled to have it struck down as it discriminates

against her; it also seeks to undermine the protection of human rights by the Constitution.

[21] I had addressed a concern to Counsel for the parties as to what the repercussions of striking down section 16 (3) would be; and how the vacuum that would be left would be filled. The Applicants response ***inter alia*** is that the only interest of justice that this Court should consider is that in making such an order it might upset the transactions which are already registered in favour of men married in community of property. On the other hand if this Court fails to strike down section 16 (3) it will affect adversely women who are entitled in terms of the Constitutional order to have properties registered in their names despite their marital status.

[22] It is argued on behalf of the Applicant that the appropriate order for this Court to make is to strike out section 16 (3) with effect from this order, and in so doing transactions which are already registered will not be affected. To support this argument, the Applicant directed this Court to Brink v Kitshoff N.O 1996 (4) SA 197 (cc) (1996 (6) BCLR 752.

[23] In striking out section 16 (3), it was argued by the Applicant this Court would not create any vacuum as

women married in community of property would now be entitled just like women married under Swazi Law and Custom as well as those married in terms of the ante-nuptial contract to register properties in their names and there would be no repercussions to the already registered transactions.

[24] The Respondents on the other hand are opposed to striking out section 16 (3). They argue that it is not absolutely necessary in the present case for the offending provision to be struck down. They contend that a consequence of an order of constitutional invalidity is that such order operates ***ex tunc,*** that is from the outset and not ***ex nunc,*** from now on. In short they say that an order invalidating the impugned law would operate from the date that the Constitution came into effect; that is 26 July 2005. This would mean that all bonds, immovable property or other real rights transferred or ceded to, or registered in the name of men after 26 July 2005 married in community of property are unlawful. Mr. Motsa suggests the transactions that worry Mr. Vilakati would not be affected if this Court makes the order to strike out section 16 (3) to operate with effect from this order.

[25] Mr. Vilakati further contended on behalf of the Respondents that a second consequence of striking down section 16 (3) would be that a vacuum would be created. There would be no statutory framework/provision to regulate registration of real rights of persons married in community of property. The vacuum created can only be filled by the Legislature. Mr. Vilakati proposed the suspension of a declaration of invalidity of the offending provision.

**Suspension of declaration of invalidity**

[26] Section 172 of the Constitution of South Africa contains an express provision empowering the court to suspend a declaration of invalidity and to refer the offending provision to Parliament for action by it within a time frame laid down by the Court. The Constitution of Swaziland does not contain such an express provision but section 35 (2) of the Constitution of Swaziland confers upon this Court such remedial power which is wide enough to include the suspension of a declaration of invalidity.

[27] The Respondents propose that the court suspend the declaration of invalidity for a period of two years to enable Parliament to remedy the constitutional breach created by section 16 (3). During the period that the

declaration of invalidity is suspended, the Registrar of Deeds should register real rights in the joint names of husband and wife married to each other in community of property.

[28] The Respondents further propose that the Applicant should be granted leave, in the event of Parliament not enacting within two years of the date of the order of invalidity remedial legislation in relation to section16 (3) of the Deeds Registry Act, to approach the Court on the present record, supplemented by such affidavits as may be necessary to seek such further order as the circumstances may require.

[29] To fortify the above submission the Respondents have cited the Lesotho case of Minister of Labour and Employment and Others v TS'EUOA (2008) 3 A11 SA 602 (Les CA). The wording of section 22 (2) (b) of the 1993 Constitution of Lesotho is substantially similar to the wording of section 35 (2) (b) of the Constitution of Swaziland. In the case cited above a full bench of the Lesotho Court of Appeal suspended a declaration of constitutional invalidity.

[30] The Applicant is opposed to the suspension of the declaration of invalidity.

**"Severing" and or "reading in"**

[31] The Applicant has suggested an alternative remedy to that of striking down section 16 (3) and or that of suspending the declaration of invalidity. She has suggested that the words ***"not"*** and ***"save"*** be severed from section 16 (3) and the word ***"even"*** be read in place of ***"save"*** in order to make it constitutional. The provision presently reads as follows:-

> "immovable property, bonds and other real rights shall "***not"*** be transferred or ceded to, or registered in the name of, a woman married in community of property, "***save"*** where such property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community."

After severance of ***"not"*** and ***"save"*** and reading in ***"even"*** in place of ***"save"*** the section would read as follows:

> "immovable property, bonds or other real rights shall be transferred or ceded to, or registered in the name of, a woman married in community of property, ***even*** where such property, bonds or real

rights are by law or by a condition of a bequest or donation excluded from the community."

[32] Parliament is enjoined to urgently put into motion the law reform process so that offending statutory provisions such as section 16 (3) are completely removed from our statutes. I am strongly persuaded by the submissions made on behalf of the Applicant to strike down section 16 (3).

[33] However, I am mindful of Mr. Vilakati's submission that some unforeseen confusion may arise without the proper legal framework in place and that this confusion should be avoided as much as possible. For the time being I prefer the alternative remedy of severing the words ***"not"*** and ***"save"*** from section 16 (3) and replacing save with ***"even".***

[34] On the other hand the Respondents have had sufficient time since the coming into effect of the Constitution to embark on aggressive legal reforms especially those relating to women who have been marginalized over the years in many areas of the law. It is therefore in order for me to award costs against them; in the hope that such sanction will galvanize them into the desired action.

[35] It would be remiss of me not to acknowledge Mr. Motsa, Mr. Vilakati and Mr. Mkhaliphi for the helpful research and the heads of argument they filed.

[36] The order of the court is as follows:

(a) The words ***"not"*** and ***"save"*** are hereby severed from section 16 (3) the word ***"even"*** is read in; in place of "***save"***; such order is effective as of today's date.

(b) The Applicant is granted costs of suit on the ordinary scale.

**Q.M. MABUZA -J**