IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO: 1403/16

In the matter between:

MAKHOSAZANE EUNICE SACOLO

(NEE DLAMINI) **1ST APPLICANT**

WOMEN & LAW SOUTHERN AFRICA-SWAZILAND **2ND APPLICANT**

And

JUKHI JUSTICE SACOLO **1ST RESPONDENT**

MINISTRY OF JUSTICE AND

CONSTITUTIONAL AFFAIRS **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

Neutral Citation: *Makhosazane Eunice Sacolo (nee Dlamini) and Another vs. Jukhi Justice Sacolo and 2 Others (1403/16) [2019] SZHC (166) 30th August 2019*

Coram: **Q.M. Mabuza PJ, N.J. Hlophe J, T.M. Mlangeni J.**

Heard: **23rd July 2019**

Delivered: **30th August 2019**

Flynote: *Family Law – common law marital power of the husband – whether it is in violation of the Constitutional right to equality before the law and the*

right to dignity as enshrined in Sections 18, 20 and 28 of the Constitution.

Constitutional Law – whether sections 24 and 25 of The Marriage Act 1964, in reference to the word ***"African",*** *are discriminatory on grounds of race and therefore liable to be struck down.*

Statutory interpretation – meaning of ***"African"*** *in The Marriage Act 1964 – whether the word is sufficiently vague to be declared void for vagueness – issue discussed but not decided.*

Held: *The common law doctrine of marital power is discriminatory against married women and offends against the constitutional right to equality before the law and the right to dignity, and therefore declared invalid.*

Held, further: *Section 24 of The Marriage Act is declared invalid, save for the first portion which reads as follows: -* ***"The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law".***

Held, further: *Section 25 of The Marriage Act is declared invalid in its entirety.*

No order as to costs.

JUDGMENT

MLANGENI J.

BACKGROUND

[1] The history of this matter is long and eventful. It is common cause that the First Applicant and the First Respondent are husband and wife. What became the subject of an intense dispute between them was the legal regime of their marriage – i.e. whether they are married in terms of civil rites or Eswatini Customary Law. Because this aspect was the fulcrum to the relief sought by the First Applicant, this court directed that oral evidence was to be heard by a single judge in order to resolve this dispute. In compliance with the order, a great deal of oral evidence was heard but before it was finalized, the First Applicant withdrew her application.

[2] In the application the First Applicant sought orders in the following terms:-

2.1 declaring the common law doctrine of marital power to be unconstitutional in so far as it is inconsistent with Sections 18, 20 and 28 of the Constitution of Eswatini, being Act No.1 of 2005.

2.2 declaring that sections 24 and 25 of the Marriage Act of 1964 are unconstitutional and invalid in that they are inconsistent with sections 20 and 28 of the Constitution of Eswatini;

2.3 declaring that spouses married in terms of the Marriage Act of 1964 and in community of property have equal capacity to administer marital property;

2.4 that the First Applicant is authorized to administer the marital assets accruing to her marriage with the First Respondent.

2.5 Costs of suit.

[3] The application was obviously based on the premise that the two main protagonists were married in terms of civil rites and in community of property. Once the legal regime of their marriage became the subject of

dispute, it became a threshold issue that needed to be resolved before dealing with the constitutional issues.

[4] The Second Applicant made common cause with the First Applicant in respect of the first three prayers, and in doing so it relied largely on the pleadings of the First Applicant. The Second Applicant is a non-profit making organization whose key functions **"include providing information on women's legal rights, improving research skills of women's law researchers and representing and defending disadvantaged and abused women in any court of law in Swaziland……"[1].** Because the application relied mainly on the pleadings of the First Applicant, her withdrawal effectively removed the substratum of the application. In realization of this, the Second Applicant sought and was granted leave to file a supplementary affidavit in which it canvassed, on its own account, the averments necessary to sustain prayers 1, 2 and 3.

[5] Initially, the First Respondent raised two points in *limine* relating to *locus standi,* one of which was that the Second Applicant did not have a direct and substantial interest in the matter. Once the application against him was withdrawn, this point effectively fell away as between them. The Second and Third Respondents had not raised this point in their papers and, appropriately, it was not canvassed at the hearing of legal arguments on the matter. The result of this is that the parties who have remained in the matter accept that Women and Law Southern Africa – Swaziland, does have a direct and substantial interest in the matter.

THE ISSUES FOR DETERMINATION

[6] The legal issues for determination are canvassed in the supplementary affidavit of one Colani Hlatjwayo. In the opening paragraphs she puts forth the perspective that I adumbrated above, in the following terms:-

[1] Para 2.2 of the Second Applicant's main affidavit at page 18 of the Book of Pleadings (the Book)

"Since reliance on the application has been put mostly on the facts enunciated on the founding affidavit of the now withdrawn Makhosazane Eunice Sacolo……it became necessary to file this affidavit so as to substantiate the factual background of the applicants position as well as to convert the applicants affidavit into a founding affidavit, which leave has already been granted by the court."[2]

[7] The Applicant avers that the Common Law vests marital power in men, that this marital power infringes on the right of equal treatment before the law as given by Chapter 3 of the Constitution Act No.1 of the 2005, in that it gives men a more important status than women when it comes to assets of the marital estate. The Applicant further avers that this doctrine of marital power infringes upon the Constitutional rights of equality before the law, equal treatment with men and the right to dignity. Since these limitations do not affect men, this marital power is discriminatory against women.

[8] Out of the Applicant's averments captured in paragraph (7) above, what crystallises is the following crisp submission on marital power: –

8.1 it infringes on the constitutional right of equal treatment before the law;

8.2 it accords men a more important status than women in respect of the marital estate;

8.3 it infringes the right of married women to dignity;

8.4 it is discriminatory against women;

8.5 in respect of married women it restricts the consequences of attaining majority status.

[2] At para 2 of the Applicant Supplementary Affidavit.

MARITAL POWER

[9] What is marital power? It has been ably defined as **"……..the right of the husband to rule over and defend the person of his wife, and to administer her goods in such a way as to dispose of them at his own will, or at any rate to prevent his wife dealing with them except with his knowledge and consent".**[3] The Applicant suggests, rightly so, that in this country the marital power of the husband was restricted by the judgment in the case of SIHLONGONYANE v SIHLONGONYANE[4] but was not abolished. The main issue raised in that case was the constitutionality of marital power in so far as it denied married women *locus standi* to sue and be sued in their own name. It was held that denial of *locus standi* to married women was inconsistent with the constitutional right of equality of all persons before the law as enshrined in Section 20 and 28 of the Constitution. It was therefore declared void in terms of Section 2(1) of the Constitution. Similarly, the crisp issue for determination in the case of ATTORNEY-GENERAL v DOO APHANE[5] was the constitutionality of the prohibition upon women married in community of property to register immovable property in their own names, per Section 16 (3) of the Deeds Registry Act 1968[6]. The Supreme Court held that this limitation was discriminatory against married women and a violation of their right to equality before the law as provided for in Sections 20 and 28 of the Constitution.

[10] So clearly, although the landmark judgments referred to above provided a much needed watershed regarding the rights of women in the country, the Applicant argues that because they applied to specific instances only, they did not go far enough. We cannot agree more. To a larger extent the marital power of the husband is alive and well in this country, pervasive in its discriminatory shackles.

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[3] Wessels, J.W. (1908): History of Roman-Dutch Law, Grahamstown - African Book Company, pp 450-453

[4] (470/2013A) [2013]SZHC 144 (18TH July 2013)

[5] (12/2009) SZHC 32

[6] This clause is in the following terms – "**In immovable property, bonds or other real rights shall not be transferred or ceded to, or registered in the name of a woman married in community of property …….**"

THE RELEVANT CONSTITUTIONAL PROVISIONS

[11] Below I capture the Constitutional provisions upon which one leg of the Applicant's case is predicated.

11.1 Section 20 is headed **'Equality before the law'.** Clauses relevant to this matter are the following:-

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."**

20 (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.**

20 (3) **For purposes of this section 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race……".**

11.2 Section 28 is headed **"Rights and freedoms of Women".** At 28.1 it provides as follows:-

"Women have a right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities."

[12] In paragraph 8 above I attempted to unpack the Applicant's case as we understand it. The points that are raised and argued bear no elaboration and I will treat them in that manner.

EQUAL TREATMENT BEFORE THE LAW

[13] In this jurisdiction marriage is sanctioned between two consenting adults of opposite sexes. In the case of women below the age of majority, once consent is given on their behalf and they get married, at common law they thereby attain the status of majority. The Applicant argues that despite attaining majority, the married woman remains a minor in as far as management of the joint estate, thanks to marital power. She cannot deal with marital assets without the knowledge and consent of the husband, and yet he is allowed to do so without seeking and obtaining her approval. It cannot be denied that experience has shown that this right that the common law accords men in marriage is often abused to the prejudice of the other spouse. It can also not be denied that this has the potential to create a sore point in marital relationships, and often does so. This, the argument goes, is a stark example of inequality before the law, and it is in violation of the constitutional provisions per Sections 20(1) and 28(1).

[14] Of course, the common law authority of the husband can be restricted contractually, through an ante-nuptial contract that excludes community of property. The Applicant argues that the availability of this option to women intending to get married by civil rites does not make the situation less discriminatory. This is particularly so when one considers that marital power restricts the rights of married women only whereas the ante-nuptial contract serves both spouses equally. The Applicant made reference to a United States Supreme Court judgment where the court observed that **"absence of an insurmountable barrier will not redeem an otherwise constitutionally discriminatory law[7]".** In other words, the fact that the party discriminated against can adopt certain measures in mitigation of his or her plight is of no relevance to the determination whether a rule of law or statute is discriminatory or not. In the American case of KIRCHBERG v FEENSTRA[8] the Supreme Court held that a statute that gave the husband the

[7] Kirchberg v Feenstra, 450 US 455 at 461

[8] See note 7 above.

unilateral right to dispose of jointly owned marital property was against the equality provisions of the United States constitution in that it was discriminatory on the basis of gender. I observe, for the avoidance of doubt, that gender is specifically mentioned in Clause 20(2) of the constitution of this kingdom.

[15] The judgment referred to in paragraph 14 above, and the reasoning therein, effectively puts to rest the Respondent's argument that since women have an option to exclude marital power through the ante-nuptial contract, the husband's marital power cannot be impugned. In simple terms, it is not fair that women must put in place certain measures in order to attain equality. The applicant has put this argument succinctly well in the terms that I quote below:-.

> **"Wives should not have to go through the burden of an additional legal step just to preserve their constitutional right to equality, especially since husbands do not have to take this legal step to preserve their rights."[9]**

[16] The Applicant has a further argument based on Clause 18 of the Constitution. Section 18.1 states that the dignity of every person is inviolable. It has been posited that dignity **"relates to human value and the requirement to respect others."[10]** Quoting Misra C.J.[11]., Leburu J. asserts that:-

> **".....life without dignity is like a sound that is not heard. Dignity speaks..... It is a combination of thought and feeling.....It has to be borne in mind that dignity of all is a sacrosanct human right and sans dignity, human life loses its substantial meaning."[12]**

[9] Applicant's heads of argument, para 6.4
[10] Letsweletse Motshidie Mang v Attorney General and Another, MAHGB -000591-16, 11TH June 2019.
[11] In Navtej Singh Johar and Others v Union of India, Ministry of Law and Justice (writ petition No. 76 of 2016, Supreme Court)
[12] See note 10 above

[17] The essence if this argument is that dignity is an essential element of respect and honour, **"the state or quality of being worthy of honour."**[13] By being subjected to marital power, goes the argument, married women are reduced to the status of perpetual minority within the marital regime and beyond, thus denying them the constitutional right to dignity.

[18] No submission was made to counter this argument. Not on the Respondents' papers and not at the hearing of legal arguments on the matter.

SECTIONS 24 & 25 OF THE MARRIAGE ACT NO. 47/1964

[19] Another pillar of the Applicant's case is that Sections 24 and 25 of The Marriage Act No. 47/1964 are discriminatory against those who go into marriage in accordance with the Act. Many of those who will get to read this judgment probably understand the meaning of the word **"discriminatory".** For those who do not, it is an adverb of discriminate, which is often used in the phrase **"discriminate against".** According to the Concise Oxford English Dictionary, to discriminate against is to make an unjust distinction in the treatment of different categories of people, especially on grounds of race, sex or age. It could even be based on religion or other categories. The key word is **"unjust".** It is proper to capture Sections 24 and 25 fully, and I do so hereunder.

> **"24. The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law, as varied from time to time by any law, unless both parties to the marriage are Africans in which case, subject to the terms of Section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi Law and custom."**
>
> **25. (1) If both parties to a marriage are Africans, the consequences flowing from the marriage shall be**

[13] Collins English Dictionary,Feb.1979

governed by the law and custom applicable to them unless prior to the solemnization of the marriage the parties agree that the consequences following (sic) from the marriage shall be governed by the common law.

(2) If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the marriage officer shall endorse on the original marriage register and on the duplicate original marriage register the fact of the agreement; and the production of a marriage certificate, original marriage register or duplicate original marriage register so endorsed shall be *prima facie* evidence of that fact unless the contrary is proved.

At common law the proprietary consequences are equitable in that the spouses have equal rights to the marital estate, unless there is an ante-nuptial contract that spells otherwise, and upon dissolution of the marriage the net estate is shared equally between them. The situation is somewhat different in jurisdictions that have adopted the so called **"accrual system"**, which is not applicable in this Kingdom.

[20] For a long time the average person living in this country was likely to see his or her choice of marriage regime in a perfunctory manner, as being simplistically between civil rites and customary rites, without at all reflecting upon the proprietary consequences that flow from each. And, of course, in the euphoria of the moment this is by no means the preserve of the semi-educated only. Indeed, it is well documented that many couples married under the Act have been astounded and disillusioned to learn that, for the lack of endorsement, the proprietary consequences in their marriage are not governed by the common law.

[21] The Applicant's argument is that the word **"African"** in the said clauses is discriminatory. The limitation or restriction applies to Africans only and not to non-Africans. For non- Africans, the consequences are in terms of the common law and for Africans they are governed by Eswatini Law and Custom unless there is an endorsement to the contrary.

[22] The first glaring problem is that the word **"African"** is not defined in the Act. The Act defines only one word, **"Minister".** Period. It takes no ingenuity to know that there are indigenous Africans and non-indigenous Africans in this continent. North Africa is dominated by indigenous Africans of Muslim culture and who, in all probability, have no inkling what is entailed in eSwatini customary practices. Unavoidably, we are bound to speculate that **"African"** was probably intended to mean **"indigenous Swazi".** Could it be that the two sections are void for vagueness? This question, although not canvassed by the Applicant, looms like a collossus.

VOID FOR VAGUENESS

> **"……the law maker, in crafting and enacting law, must speak with irresistible clarity, lucidity and certainty. Such public policy imperative is informed by the nature of Law, which is an edict for societal regulation[14]."**

[23] In the case of GRAYNED v CITY OF ROCKFORD[15] Marshall J. put the position in the following manner:-

> **"…….if arbitrary and discriminatory enforcement is to be prevented, Laws must provide explicit standards for those who apply to them. A vague law impermissibly delegates basic policy matters to policemen, judges (and) juries for resolution**

[14] Per Lebure J. in Letshweletse, Supra, at para 85,page 47
[15] 408 US 104 (1972)

on an *ad hoc* basis, with the attendant dangers of arbitrary and discriminatory application."

[24] Closer to this jurisdiction, the doctrine of **'void for vagueness'** is embraced by Ngcobo J. in the case of AFFORDABLE MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH AND ANOTHER[16]. Is a naturalized LiSwati who is born an American to be classified as an **"African"** for purposes of the Act? What about an Egyptian who weds LiSwati in terms of the Act? Is it fair that in the event that there is no endorsement he finds himself or herself saddled with the consequences of a custom that he or she may hardly know or understand?

[25] There is no doubt that the word **"African"** in Sections 24 and 25 of The Marriage Act No. 47/1964 has sufficient vagueness to justify it being struck down for voidness. However, because this aspect was not raised and canvassed by the parties in *casu*, we must refrain from making the momentous pronouncement, and leave it for another day and time.

[26] What was argued on behalf of the Applicant, with much gusto, is that the word **"African"** in the two sections of the Marriage Act are discriminatory on the basis of race in that it imposes upon African spouses the customary consequences of marriage while non-African spouses automatically have the benefit of common law consequences. Africans may go the extra mile of opting out and, as was observed earlier in this judgment,[17] the fact that this option is available does not make the sections any less discriminatory.

[27] Applicant's counsel submitted that the first portion of Section 24 of the Marriage Act is not offensive and need not be struck down. For the avoidance of doubt, the portion is that which is in the following terms:-

[16] 2006 (3) SA 247 CC
[17] See Note 7 above.

"The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law."

The entire Section 25, it was argued, is to be struck down.

[28] In ending this discourse, I quote the succinct and erudite words of Aguda J.A. in the case of ATTORNEY- GENERAL v DOW[18]:-

"The Constitution is the Supreme Law of the land and it is meant to serve not only this generation but also generations yet unborn. It cannot be allowed to be a lifeless museum piece; on the other hand the courts must continue to breathe growth and development of the state through it……"

[29] Much of the argument of the Applicant was based on International treaties and conventions. However, there is no need to resort to international law where the issue in question can be effectively and conclusively resolved on the basis of domestic law. In *casu,* this is the position. The cases of SIHLONGONYANE AND DOO APHANE, supra, have shaped the law in an unmistable direction.

ORDERS

[30] The following orders are made:-

30.1 Common Law marital power is hereby declared unconstitutional on the basis of being discriminatory against married women.

30.2 Spouses married in terms of the marriage Act 1964 and in community of property have equal capacity and authority to administer marital property.

30.3 Section 24 of The Marriage Act No. 47/1964 is hereby struck down, except for the first portion which reads:-

[18] [1992] BLR 119 (C.A.) at p 166 A

“The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law.”

30.4 Section 25 of The Marriage Act No. 47/1964 is struck down in its entirety.

30.5 The orders are with effect from date of this judgment.

30.6 No order as to costs.

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Q.M. MABUZA P.J.

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N.J. HLOPHE J.

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T.M. MLANGENI J.

For the Applicant: Mr. M.S. Dlamini

For the Respondent: Mr. M.Mashinini