IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL NO. 12/2010**

In the matter between:

THE ATTORNEY – GENERAL **APPELLANT**

VERSUS

MARY-JOYCE DOO APHANE **RESPONDENT**

CORAM: RAMODIBEDI CJ

FOXCROFT JA

EBRAHIM JA

MOORE JA

TWUM JA

FOR THE APPELLANT VILAKATI M.M.

FOR THE RESPONDENT MOTSA K.

JUDGMENT

SUMMARY

Section 16 (3) of the Deeds Registry Act, 1968 declared unconstitutional – Remedies for infringement of Constitutional Rights – Remedies of severance and reading in not the appropriate remedy in this case – Appropriate remedy to be determined by Parliament.

MOOREJ.A

OPENING

[1] The controversy in this case is about the appropriateness or otherwise of the order made by the court a quo to correct what both the Appellant and the Respondent agree are unconstitutional elements contained in Section 16 (3) of the Deeds Registry Act, 1968. The judge in the High Court sought to purge the legislation of its unconstitutionality by a process of **"severing**" and "**reading in**." The Appellant's contention is that Her Ladyship should have refrained from usurping the function of the legislature by making the order which she did. He submitted:

1. that the court a quo should have merely confined itself to declaring the impugned Section 16 (3) to be inconsistent with Sections 20 and 28 of the Constitution and therefore invalid.

1. that the declaration of invalidity be suspended for a period of twenty-four months to enable Parliament to correct the inconsistency that has resulted in the declaration of invalidity; and

1. Pending the enactment of legislation by Parliament, the Registrar of Deeds is authorised to register immovable property, bonds and other real rights in the joint names of husband and wife married to each other in community of property.

(iv) Should Parliament fail to remedy the unconstitutionality in the section declared to be

inconsistent with the Constitution in terms of paragraph (i) above within the period referred to in paragraph (ii) above, the Applicant is granted leave 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.

[2] By an amended notice of appeal, the Attorney General prayed that this court set aside the order made by the High Court that:

> *'(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.'*

[3] The Respondent for her part, prays that the instant appeal be dismissed with costs.

BACKGROUND

[4] This case is but the latest in a continuing series brought in many countries of the world by women in their attempts to redress 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.

[5] In the case before us, the Respondent Ms. Mary-Joyce Doo Aphane has been married in community of property to her husband Mr.

Michael Mandla Zulu for well over two decades. Her Marriage Certificate (Civil Rites) in Terms of Section 29 (1) of the Births, Marriages and Deaths Registration Act (Chapter 131 of the Laws of Swaziland) has been certified a true copy of the entries made in the Register of Marriages (solemnized according to Civil Rites under The Marriage Act).

[6] The Respondent's name and maiden surname are shown as Mary-Joyce Aphane. She was a Bank Clerk at the time of her marriage and gave her own consent to being married to her husband whose occupation was shown as computer controller. After joining in matrimony, both spouses have been using, without legal or social difficulties, the names which they have used continuously and by which they were known prior to, and at the time of their marriage. Evidently, they both decided that the wife would not follow a practice which is widely adopted in many parts of the world where, upon her marriage, the wife discontinues the use of her maiden surname, and adopts that of her husband.

[7] The Respondent is an adult Swazi woman. She is undoubtedly proud of that fact. She now holds the office of Director of the Lutheran Development Service. Rightly in my view, she sees herself as an accomplished woman, citizen and person. Her status of wife should not in her judgment, detract from the rights, privileges and standings enjoyed by persons generally. As a wife, she claims the entitlement to be treated in the same way as her husband is treated rather than being regarded in any way as being a mere appendage of her husband.

[8] She argues further that the constitution, through Section 20 - Equality before the law – seeks to advance the human rights of all persons especially women, and embraces the sentiments expressed in the excerpt from a judgment of the Constitutional Court of the

Republic of South Africa in the matter of the *President of South Africa and Another v Hugo 1997 4 SA (1) (CC*) which stated that:

"At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."

[9] The Respondent and her husband entered into an agreement to purchase property. They hoped to do so jointly using the names by which they had been known respectively since the time of their marriage. The experiences which they encountered are best described by reference to the relevant segments of her founding affidavit which are reproduced here:

'(i) <u>Memorandum of Agreement of Sale ("Memorandum")</u>

> *7.1 "On the 24th November 2008 I and my husband signed the aforesaid memorandum with Luso Swazi Investments (Proprietary) Limited for the purchase of certain Lot NO. 36 Entabeni Township Extension No. 1 situate in the urban area of Mbabane, Hhohho District. A copy of the memorandum is annexed hereto marked "D3".*

- *I and my husband agreed that the purchase of the immovable property was to be in our joint names namely "Mary-Joyce Aphane and Michael Mandla Zulu". Since we were married we have been using our names in this manner without any difficulties.*

> *(ii) <u>Payment of the deposit and events leading to the furnishing of the guarantee</u>*

7.3 As required by the Memorandum we duly paid the required deposit of E24 500.00 to Mbabane Estate Agents ("the Estate Agents") representing the seller.

7.4 On the 25th November 2008 the estate agents instructed attorney Stanley Mnisi ("Mr. Mnisi") of Robinson Bertram to carry out the conveyancing required to have the immovable property registered in the name of my husband and myself. A copy of the letter is annexed hereto marked "D4."

7.5 Mr. Mnisi wrote to my husband and myself wherein;

7.5.1 he confirmed receipt of the instructions from the estate agents;

- *enclosed his debit note in respect of the transfer costs;*

7.5.3 urged us to liaise with Swaziland Building Society to expedite the issuance of the guarantee and

7.5.4 advised us that as soon as the guarantee has been furnished he will call us to have a birth affidavit prepared and to furnish him with our identity numbers. A copy of the letter is annexed hereto marked "D5".

- *On the 5th of December 2008 we were advised that Swaziland Building Society (SBS) had forwarded the guarantee of the balance of the purchase price to Mr. Mnisi and duly paid the transfer costs. Copies of the guarantee and proof of payment are annexed hereto marked "D6" and "D7".*

(iii) <u>Birth Affidavit and Registration of Property in the name of my husband</u>

- *After guarantee had been furnished and the transfer costs paid I called Mr. Mnisi's office to find out if the birth affidavit had been prepared so that I could come and sign it and I was advised that it was ready.*

- *In early January 2009 I visited Mr. Mnisi's office wherein I liaised with his Secretary Zodwa Nhlapho. I was shown a birth affidavit which read "Mary-Joyce Doo Zulu (born Aphane) married in community of property to Michael Mandla Zulu". A copy of the birth affidavit is annexed hereto marked "D8".*

- *This surprised me as my name is Mary-Joyce Doo Aphane not Mary-Joyce Doo Zulu and hence I insisted on talking to Mr. Mnisi himself on this issue. Mr. Mnisi advised me as follows;*

- *In terms of Section 16 (3) of the Deeds Registry Act the immovable property mentioned above could not be registered either in our joint names with my husband or in my name. The immovable property had to be registered either in our joint names with my husband or in my name. The immovable property had to be registered in the name of my husband as required by the aforesaid section and hence the Deeds Registry Office will not accept the registration of the property in our joint names; and*

- *He further mentioned that in terms of Regulations 7 and 9 of the Deeds Registry Regulations along with an established practice of the Deeds Registry Office he had correctly prepared the birth affidavit mentioned above. In other words, the birth affidavit could not read "Mary-Joyce Doo Aphane, married in community of property to Michael Mandla Zulu."*

[8] <u>My Reaction</u>

- *I was appalled by what Mr. Mnisi advised me of as my husband and I had been married for years and I have always used the name "Mary-Joyce Doo Aphane" not "Mary-Joyce Doo Zulu", and hence it was for*

that reason that we agreed that the Deed of Sale should reflect the way we use our names, and that the property should be registered in both our names not only that of my husband.

- *I therefore believe that the provisions of Section 16 (3) which prohibits the registration of immovable property and bonds over immovable property by women married in community of property not only undermines my dignity but is also discriminatory of myself and other women married in community of property in Swaziland."*

[10] The purchase of property by spouses in their joint names is a practice which is widely followed in the common law world. Indeed, in some jurisdictions, this practice is mandated by law in order to protect the interests of both parties.

[11] The Respondent deposed that as she complied with the usual formalities and other requirements associated with the purchasing procedures, she encountered a disturbing and unexpected roadblock. To her complete chagrin she was given unsettling advice by attorney Mr. Stanley Mnisi, hereinafter Mr. Mnisi, who had been instructed to conduct the conveyancing on her behalf. That advice has already been reproduced in paragraphs 7.9.1 and 7.9.2 of her founding affidavit.

[12] It is against the foregoing background that the Respondent sought the declarations and orders set out in the Notice of Motion which is reproduced hereunder;

"1. Declaring that the provisions of:

- *Section 16(3) of the Deeds Registry Act No. 37 of 1984: and*
- *Regulations 7 and 9 of the Deeds Registry Regulations promulgated under the above Act and the Deeds Office Practice which requires that a*

woman married in community of property assumes her husband's surname in the registration of immovable property

are inconsistent with the provisions of Sections 20 and 28 of the Constitution of the Kingdom of Swaziland No. 001/2005 are null and void;

2. Directing and authorising the First Respondent to permit the registration of an immovable property, being Lot No. 36, Entabeni Extension 1, situate in the urban area of Mbabane, District of Hhohho, to be registered into the joint names of:

2.1 the Applicant; and

2.2 Michael Mandla Zulu

As reflected in the Memorandum of Sale annexed to the founding affidavit and marked Annexure "D3",

1. *Ordering such Respondent as may oppose the relief sought herein to pay the costs of this application and in the event of more than one Respondent opposing the same, such Respondents who so oppose be ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved including certified costs of counsel in terms of High Court Rule 68;*

1. *Granting the Applicant such further and/or alternative relief as the above Honourable Court may deem fit in the circumstances."*

[13]The South African Law of Marriage confers upon a wife the rank and dignity of her husband. She is entitled, although not obliged, to assume her husband's surname. Most married women still assume their husband's surnames. But increasingly many women, particularly professional women, retain their maiden names after

marriage, or alternatively, assume a hyphenated or double-barrelled surname by combining their maiden names and the surnames of their husbands. The Respondent's complaint is that, having freely and with the concurrence of her husband, elected to continue to use her maiden name after her marriage, she is being forced against her wishes to assume a name which she does not care to share with her husband.

[14]Apart from the perceived affront to her dignity, the Respondent has not advanced any reasons for her insistence that the Deed of Sale should reflect the way that she and her husband have used their respective names ever since the time of their marriage. It does not appear to me that she is under any obligation to do so.

[15]But an interesting article appearing in the South African publication 2003 De Jure at pages 397 *et seq*, titled "Commentary on the Births and Deaths Registration Amendment Act 1 of 2002: An Anthropo-legal Perspective" does shed some light upon the matter as the following excerpts from the piece, written in a Southern African context, would indicate. At page 397 paragraph 1, the writer examines the socio-juridical importance of a person's name in this way:

> *'The socio-juridical importance of a person's name is clearly evident from the fact that the term "name" is used in many languages as a synonym for the concept "esteem" (see Pacheco "Latino surnames: Formal and informal forces in the United States affecting the retention and use of the maternal surname" 1992 Thurgood Marshall LR 12: Dannin "Proposal for a model name act" 1976 Journal of Law Reform 153 – 155). According to Munday, namegiving and namebearing practices do not only embody significant cultural and familial indicators, but the name of an individual "can both shape personality and influence others in the way they perceive the bearer of the name." ("The girl they*

named Manhatten: the law of fornames in France and England" 1985 Legal Studies 331 342.) Slovenko correctly observes that "names, like clothes, make a statement about the person, intentionally or unintentionally" ("Unisex and cross-sex names" 1986 Journal of Psychiatry and Law 249 255).

[16]Under the rubric "'surname" vis-à-vis Lineage and Clan names' the writer posits at page 402 paragraph 322 that:

'In African communities the equivalent of a surname is a lineage or clan name. Presently, Africans have for legal and administrative purposes been given their lineage or clan names as surnames. As will be explained below, the lineage and clan names have a distinct meaning and significance which differ entirely from the European concept of a surname. The lineage or clan name is virtually loaded with social and legal significance far beyond that of a European-type surname. The lineage or clan name, among others, determine the prohibited degree of consanguinity, the right to succession and the holder's relationship with the ancestors and descendants (see Labuschagne "Die bloedskandeverbod in die inheemse reg" 1990 (1) TRW 35).'

[17] Speaking of Praise/Courtesy Names the writer notes at page 403 paragraph 322 (c) that:

'*These names have a particular significance within the kinship structure because they record otherwise forgotten links and support claims to particular relationships. They serve as records of processes of fission and fusion. If a praise/courtesy name is common to more than one clan with different (clan) names, a marriage taboo exists between these clans. However, where different courtesy names distinguish segments of one and the*

same clan the relationship and intermarriage between the segments become possible. In this way, courtesy names assume the full functions of a clan name (Raum 44).

According to Pauw, clan and praise names are used to address a person and he/she feels flattered when he is called by his clan name (238). This is especially true in the case of chiefs where the praise name has a special significance: Ndabezitha, which is claimed as a mark of distinction(Raum 44).'

[18] At page 403 (d), Marriage and Clan names, the commentator gives an insight into the reason why some women retain their maiden surname even after their marriage. He explains that:

'Among the patrilineal Nguni-speaking groups, marriage does not alter the clan name of a woman. A woman retains membership of her father's lineage as well as his clan name. The fact that she moves into the sphere of authority of her husband's group does not influence her membership of her father's descent group (lineage/clan). Only in so far as the woman is under the guardianship of her husband, does she form part of his lineage. The introduction of identity documents has caused women to adopt the clan names of their husbands which conflicts with longstanding customs (Raum 44).'

[19]Interestingly enough, in the Canadian Supreme Court case of *Schachter v Canada [1992]. 2 S.C.R 679,* the opening sentence of the leading judgment of Lamer C.J. reads:

"The Respondent, Shalom Schachter, and his wife, Marcia Gilbert, were expecting their second child in the summer of 1958".

[20]The wife in that case was evidently using a surname other than of her husband."

[21] SECTIONS 20 AND 28 OF THE CONSTITUTION

Sections 20 and 28 of the Constitution of the Kingdom of Swaziland Act, 2005, Act No. 001 of 2005 are to be found in Chapter III which is entitled PROTECTION AND PROMOTION OF FUNDAMENTAL RIGHTS AND FREEDOMS. The caption to Section 20 reads: **Equality before the law.** Subsection (1) is a terse but powerful declaration of the fundamental rights which it lays down. It reads:

> *'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."*

[23] Notwithstanding the clarity of the above provision, its import is illustrated and its breath delineated in subsection (2) which is to the effect that:

> *"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."*

[24] By way of further illumination, and definitive interpretation, subsection (3) lays down that:

> *"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." Emphasis added.*

[25] The last century marked the beginnings of the emergence of women from aeons of abuse, discrimination, exclusion, oppression, mistreatment and disenfranchisement. The provisions of Section 28 which enshrine the rights of women are typical of provisions which have been included in nearly every post colonial written constitution. Section 28 (1) is a pithy affirmation of women's rights to equal treatment with men in the activities enumerated there. It declares that:

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

[26] Of equal importance generally as well as in the context of this case is subsection 3 which provides that:

> *"A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed."*

[27] <u>THE ARGUMENTS</u>

Counsel for the Appellant made it clear in the opening paragraph of his Heads of Argument that "This appeal is directed at the choice of remedy following upon the finding that Section 16 (3) of the Deeds Registry Act 37/1968 (the impugned provision) was unconstitutional and invalid." He then proceeded to develop his arguments in support of the appeal on the choice of remedy under the following heads:

1. The Court's Remedial Power
2. Choice of Remedial Options under Section 2(1) read with Section 35 (2)
3. Applying the law to the facts; and
4. Disposition

[28] Counsel submitted that the Constitution of Swaziland is devoid of a provision dedicated to remedies for its breach. In this regard, said he, the Swazi Constitution was similar to the Canadian Charter of Rights and Freedoms ("the charter") and the Canadian Constitution Act, 1982. He drew attention to Section 2 (1) of the Swaziland Constitution which establishes the supremacy of the Constitution over any other law in these terms:

> *"(i) This Constitution is the Supreme Law of Swaziland and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."*

[29] The Supremacy provision of the Canadian Constitution Act, 1982 cited by counsel is Section 52 (1) which is of similar import but not worded identically to the Swaziland Supremacy Subsection. The wording of the Canadian supremacy Section 52 (1) is:

> *"The Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the provisions of the constitution is to the extent of the inconsistency, of no force or effect."*

[30] Because of the Swazi and Canadian supremacy provisions are in such harmony with each other, counsel invited the court to treat relevant decisions of Canadian superior courts as being highly persuasive and worthy of adoption and application by this court. He cited the Canadian Supreme Court case of *Schachter V. Canada* and referred to the authoritative dictum of Lamer CJ at page 23 where the learned Chief Justice, under the heading "Reading in as a Remedial option under Section 52", defined the court's powers of action following a determination that a statute violates a constitutional provision. I respectfully adopt the dictum set out below and declare it applicable *mutatis mutandis* to this Court's powers in Sections 2 (1) and 35 (2) of the Swaziland Constitution. The passage reads:

'A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s.1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s.24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms …. Have been infringed or denied". In choosing how to apply s.52 or s.24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.'

[31] Counsel further submitted, and I agree with him, that in the exercise of its powers under Section 35 of the Swazi Constitution, The High Court, depending upon the circumstances of the particular case, could properly apply the remedies of:

1. striking down;
2. striking down and temporarily suspending the declaration of invalidity;
3. Readingdown;
4. Reading in, and
5. Severance
6. Such other remedies as may be appropriate and which lie within the competence of the court.

[32] The Appellant's submissions on the court's Choice of Remedial Options Under Section 2(1) Read with Section 35 (2) involved an examination of relevant cases and an analysis of the principles to be

deduced from these cases. Paragraph 9 of the Heads of Arguments reads:

> " In *National Coalition of Gay and Lesbian Equality v. Minister of Home Affairs 2000 (2) SA 1(CC); [2000] 4 LRC 292,* the South African Constitutional Court per *Ackermann J, stated that in fashioning a remedy a court must keep in balance two important considerations. The first is that the successful litigant, and similarly situated persons, must be given an effective remedy. Secondly,* ***the need to respect the separation of powers, and in particular, the role of Parliament as the body constitutionally empowered with the duty of enacting legislation.*** *(See National Coalition at par.* 65 – 66). *Similar sentiments were expressed by the Canadian Supreme Court in Schachter. (Schachter op cit at page 28 – 29)."* Emphasis added.

[33] It is common cause that Section 35 of the Constitution gives power to the High Court for the enforcement of its Protective Provisions. Under subsection (2) The High Court may:

> *"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 – Chapter III Protection and Promotion of Fundamental Rights and Freedoms."*

[34] The jurisdiction of the High Court, as set out in Section 15 1 (2) enables the court:

> *"(a) To enforce the fundamental human rights and freedoms guaranteed by this constitution; and*

1. *To hear and determine any matter of a constitutional nature."*

[35] Counsel for the Respondent submitted that:

> *"3.5 Section 24 of the Charter has similarity in wording with Section 35(2) (b) of our Constitution which states it "considers appropriate". The Canadian courts have held that the remedies which they may use and consider appropriate after declaring a law invalid in terms of Section 52 of the Constitution include severance and reading in.*

- *It is submitted on behalf of the respondent (and in agreement with the appellant) that even in interpreting Section 35(2) (b) of our Constitution, the appropriate remedies which our High Court can consider includes severance, reading in etc. In the case of Knodel v British Columbia (Medical Services Commission) (1999), 58 B.C.L.R (2d) 356 (B.C.S.C), at p.388, the court stated "as stated previously, once a person has demonstrated that a particular law infringes his or her Charter rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy … Accordingly, whether a court "reads in" or strikes out words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not the label used to arrive at the result."*

> *Schachter v Canada (1992) 93 DLR (4th) 1 pages 26 and 27.*

- *In view of the above, the respondent is in agreement with the appellant that the appropriate remedies which the High Court can employ where it finds that a law is invalid include severance, reading-in etc."*

[36] He listed The Constitutional remedies which were in his submission applicable to this case and from which the trial judge could have selected the appropriate remedy. These are:

1. a Declaration of invalidity
2. Severance
3. Readingin
4. Retrospective effect of orders of invalidity
5. Suspension of orders of invalidity
6. Deference to the legislature

[37] There is no serious debate between the parties concerning the range of remedies open to the court. As has been foreshadowed earlier in this judgment, the only live issues which remained in contention between opposing counsel concerned first, the appropriateness or otherwise of the order made by the court a quo and secondly, the potentially thorny matter of costs.

[38] THE SEPARATION OF POWERS

The Kingdom of Swaziland is a Constitutional Monarchical

Democratic state where the Separation of Powers is a cornerstone of the Constitutional Order. The Respondent cited the *Prime Minister of Swaziland and Six Others V MPD Marketing and Supplies (Pty) Ltd – Appeal Case No. 18/2007* as authority for the proposition as articulated by Steyn JA that:

> *'The Kingdom of Swaziland is a constitutional state. It has incorporated the doctrine of the rule of law by the enactment of the Constitution. Such incorporation comprehends the Principle of Legality. It is central to the concept of a Constitutional State that the law-giver and the Executive "in every sphere are constrained by the principle that they exercise no power and perform no function beyond that conferred on them by law."*
>
> *Federal Life Assurance v Great Johannesburg TMC 1991 (1) SA (CC) 400 at page 399 – 400.'*

[39] The making of laws is essentially the function of the legislature. This means that, in as much as what is known as judge-made-law may be constitutionally permissible, judge- made-law must be carefully confined to its proper limits, and courts should be astute not to intrude into the legislative sphere which is the preserve of the law-giver. At pages 28 – 29 of his judgment in *Schachter v Canada* Lamer CJ wrote under the heading "Respect for the Role of the Legislature":

> *"The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at page 288:*
>
> *Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purpose should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable purposes may give rise to entitlements which themselves deserve some protection.*
>
> *Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under the scheme."*

[40] Her Ladyship the Trial Judge was herself constrained to declare at page 7 paragraph 12 of her judgment:

> "*Consequently, the best organ to resolve this impasse is Parliament and not the courts."*

[41] Mabuza J observed at page 7 paragraph [13] of her judgment that:

> "*The consoling factor is that both Mr. Motsa and Mr. Vilakati agree that Section 16 (3) is unconstitutional."*

[42] More importantly, she declared that:

> *"I too agree that it is unconstitutional."*

[43] At page 8 paragraph [16] she continued:

> *"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."*

[44] It is perhaps the conclusion reached by the Trial Judge that something must be done - no doubt urgently since the constitution was in its fifth year at the time when she was writing – which may have led her to effect what she thought would be the more immediate remedies of severance and reading in, rather than a remedy under which "**the best organ to resolve the impasse (is) Parliament"** would do so "**and not the courts**." Emphasis added.

[45] The attention of the court a quo was drawn to the important Lesotho Case of *Minister of Labour and Employment and Others V TS'EUOA (2008) 3 ALL SA 602 (Les CA*) which is of highly persuasive

authority. At page 14 paragraph 29 of her judgment, Her Ladyship observed that:

> *"The wording of Section 22 (2) (6) 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."*

[46] Her Ladyship evidently had uppermost in mind that Parliament was the "best organ to resolve this impasse ….. and not the courts" when she wrote at page 15 paragraph [32] of her judgment:

> *"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)."*

[47] Her Ladyship then proceeded to scold the Attorney General and in essence Parliament for its slothfulness in embarking upon aggressive legal reforms. The relevant segment of her judgment, found at page 16 paragraph [34] reads thus:

> *"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."*

[49] It must be noted however, that the Fifth Edition of the Bill of Rights Handbook by Iain Currie and Johan de Waal warns at page

197 that "it is inappropriate for a court to order a legislature to introduce and adopt legislation. See *BushBuck Ridge Border Committee V Government of the Northern Province (1999) (2) BCLR* 193 1 where the relief claimed by the Applicants required the court to direct Parliament and certain provincial legislatures to introduce legislation.

[50] The High Court held at page (202 C) that the relief claimed would deprive the democratically elected legislature of its right and functions to legislate and stated that 'debate and amendment of [such] a bill would not be possible.' In contrast, however, the order we have made today, merely stipulates a period of time within which Parliament can discharge its duty, in the name of good government, to rectify a constitutional illegality, which all parties agree exists, in a way or ways which it deems fit, within the ambit of its constitutional competence.

[51] The Attorney General also submitted that:

> *"Where various policy options are open to Parliament to cure the constitutional defect in legislation, it is not for a court, by using the reading in power, to choose one of the options. The words of Lamer CJ in Schachter are instructive in this regard:*
>
> > *'… the court should not read-in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.' (At page 36).*

See also Dawood v Minister of Home Affairs, Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs 2000 (3) SA 966 (CC); [2000]5 LRC 147 at paragraph 64."

[52] Counsel for the Respondent countered by saying in the numbered paragraphs of the Heads of Argument that:

"3.1 The High Court of Swaziland is enjoined by Section 35 to determine any contravention of the provisions of Chapter 3 (the bill of rights). Section 35 (b) of the Constitution gives the court the power to "make such orders, issue such writs and make such directions as it may deem appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this chapter".

- *Section 151 of the Constitution further enjoins the High Court to enforce the fundamental human rights and the freedoms guaranteed by this Constitution.*

- *With our Constitution still fairly new, as the appellant submits, we have to seek reliance on foreign jurisprudence in the interpretation of the powers of the High Court as stipulated in Section 35(2). This includes borrowing from the South African, Canadian and other jurisdictions and this is what we will do on behalf of the respondent.*

- *In Canada the relevant provisions of the Canadian Charter of Rights and Freedoms ("the Charter") reads as follows:*

1. *The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society;*

15(1) Every individual is equal before and under the law and has the right to the equal protection and

equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability;

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

[53] I am inclined to accept the submission of the Attorney General that Parliament, and not the court, is the appropriate body to make a selection from a range of policy options.

[54] **REMEDIES**

In *National Coalition for Gay and Lesbian Equality V Minister of*

*Home Affairs supra*at pages 40 – 41, paragraphs 73 –

Ackermann J summarised the principles which should guide a court in deciding when the remedy of reading in is appropriate in this way:

"Having concluded that it is permissible in terms of our Constitution for this Court to read words into a statute to remedy unconstitutionality, it is necessary to summarise the principles which should guide the Court in deciding when such an order is appropriate. In developing such principles, it is important that the particular needs of our Constitution and its remedial requirements be constantly borne in mind.

The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of

the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a Court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, ***secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible****. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the second.*

In deciding to read words into a stature, ***a Court should also bear in mind that it will not be appropriate to read words in, unless in so doing a Court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a Court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution."*** *Emphasis added.*

[55] The submissions of both counsel under this head are that a successful litigant, and similarly placed persons, should be given an effective remedy. At page 39, paragraph 70 E Ackerman J in the *National Coalition for Gay and Lesbian Equality* case conceded that reading in is, **depending on all the circumstances,** an appropriate form of relief under Section 38 of the South African Constitution. He then quoted from the judgment in *Knodel v British Columbia (Medical ServicesCommission*) (1991) CLLC 17, 023 (SC) at 16, 343 ([1991] 6 WWR 728; 58 BCLR (2d) 356) *per*Rowles J, as quoted with approval by Lamer CJC in *Schachter's* case above n 93 at 13f which reads:

'whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.'

[56] The real question is whether, in the circumstances of the present matter, reading in, or reading in coupled with severance would be just and equitable and an appropriate remedy.

[57] As is so often done by judges in the common law world,

Ackermann J then paid grateful tribute to the judges in other common law jurisdictions and acknowledged the role that other courts had played in his formulation of the conclusions to which he had come at pages 39 – 40 paragraphs [71].

"I am strengthened in this conclusion by the fact that in several jurisdiction Courts have held that they do possess the power to read words into statutes where appropriate. In Schachter, above n 93 at 11 – 25. (1992) 93 DLR (4th) 1 per Lamer CJ for the Court at 12h – 13h. the leading Canadian case, the Supreme Court of Canada held that a Court may read words into a statute in appropriate circumstances and set out principles to guide such decisions. Since then Canadian Courts have read words into statutes on several occasions. See Miron v Trudel above n 65 paragraphs 178 – 181. see also Egan v Canada above n 44 at 159 – 61 (in which the dissenters proposed the reading of words into a statute); Rodriguez v British Columbia (Attorney-General) (1994) 107 DLR (4th) 342 at 383 – 4. Courts in the United States also accept that they have the power to read words into statutes to provide remedies for unconstitutionality. See Iowa-Des Moines National Bank v Bennett 284 US 239 (1931); Welsh v United States 398 US 333 (1970); Califano, Secretary of Health,

Education and Welfare v Westcott et al 443 US 76 (1979); Skinner v Oklahoma 316 US 535 (1942); and a discussion of the issue by Bruce K Miller 'Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v Mathews' in (1985) 20 Havard Civil Rights – Civil Liberties Law Review 79 and by Evan H Caminker 'A Norm-Based Remedial Model for Underinclusive Statutes' in (1985-6) 95 Yale Law Journal 1185. The Israeli Supreme and the German Constitutional Court have also made similar orders."

[58] It is common cause that the court a quo was correct to declare that Section 16(3) of the Act as it stood at the time of the hearing contains within it the germ of a constitutional invalidity which necessitated remedial action. The Appellant specifically stated in the Heads of Argument that it was not appealing against the rejection by the court a quo of its main defence of avoidance. The court was thus required to consider *inter alia* the effect of the finding of constitutional invalidity upon the society at large. See The Bill of Rights Handbook 2005 by Iain Currie and Johan de Waal page 195 paragraph 8.3:

"[i]t is left to the courts to decide what would be appropriate relief in any particular case …. Appropriate releief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

[59] Section 172 of the Constitution of South Africa permits orders of severance and reading in, limiting the retrospective effect of orders, and even suspending orders of invalidity.

[60] The Respondent's reaction to the Appellant's submission that the court suspend its declaration of invalidity for a period of twenty-four months is one of deep misgiving because of the well known pressure on parliamentary time, and of the competing demands of contending bills on the legislative agenda for passage into law. Her Counsel contended that:

> *"It is unacceptable that after almost four years since the Constitution was promulgated there still exist discriminatory laws such as Section 16 (3). Furthermore, it is not good practice that the citizens of Swaziland must argue every unconstitutional provision before the High Court, and once they have succeeded the state will argue that they must wait for the express repeal by Parliament especially when the state is not showing any efforts to bring the laws to be in line with the Constitution."*

[61] It is not difficult to accept the force of the Respondent's contention in this regard and to appreciate the genuineness of her expressed misgivings. However, it is outside the competence of this court to direct the processes of the legislative function. It is within this court's jurisdiction however to suspend the declaration for a period of twelve months which we regard as a sufficient interval of time to allow Parliament to remedy the constitutional invalidity, having regard to the fact that the Constitution came into force some five years ago, and that the mischief contained in Section 16 (3) of the Deeds Registry Act continues unabated.

[62] APPROPRIATE RELIEF

In the Bill of Rights Handbook Fifth Edition at page 197 paragraph 8.5, the authors explain some of the essential features and characteristics of a court's order granting constitutional relief. They say:

"Ideally speaking, a court's order must not only afford effective relief to a successful litigant, but also to all similarly situated people. This is the second factor that must be considered. As the Constitutional Court has stated, in constitutional cases there is 'a wider public dimension. The bell tolls for everyone.' National Coalition for Gay and Lesbian Equality v Minister of Home Affairs (note 24 above) paragraph 82. This requires a consideration of the interests of all those who might be affected by the order, and not merely the interests of the parties to the litigation. Hoffman (note 25 above paragraphs. 42 -3.

The third factor that is often referred to is the separation of powers and, flowing from it, the deference a court owes to the legislature when devising a constitutional remedy. Although it has refrained from laying down guidelines, the Constitutional Court has stated that deference involves 'restraint by the Courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the Legislature'. ***National Coalition for Gay and Lesbian Equality V Minister of Home Affairs 2000 (2) SA 1 (CC****). See also* ***Oosthuizen V LUR, Plaaslike Regering en Behuising 2004 (1) SA 492 (0) 499 F*** *(Court declining to grant order compelling an NEC to provide further and better answers to questions posed in a provincial legislature on the basis that it would interfere with the internal proceedings of the legislature.)"*

[63] In the light of the particular circumstances of this case and upon the law as disclosed in the authorities, this Court has concluded that the appropriate relief is that which is set out in the Order which concludes this judgment.

[64] **COSTS**

The Respondent in her Notice of Motion sought an order:

"1. Declaring that the provisions of:

1.1 Section 16 (3) of the Deeds Registry Act No. 37 of 1984 and

- *Regulations 7 and 9 of the Deeds Registry Regulators promulgated under the above Act and the Deeds Office Practice which requires that a woman married in community of property assumes her husband's surname in the registration of immovable property,*

are inconsistent with the provisions of Sections 20 and 28 of the Constitution of the Kingdom of Swaziland No. 0001/2005 of and null and void.

1. *Directing and authorising the First Respondent to permit the registration of an immovable property, being Lot No. 36, Entabeni Extension 1, situate in the urban area of Mbabane, District Hhohho, to be registered into the joint names of:*

- *the Applicant and*
- *Michael Mandla Zulu*

As reflected in the Memorandum of Sale annexed to the founding affidavit and marked Annexure "D".

1. *Ordering such Respondent as may oppose the relief sought herein to pay the costs of this application and in the event of more than one Respondent opposing the same, such Respondents who so oppose be ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved including certified costs of counsel in terms of High Court Rule 68;*
2. *Granting the Applicant such further and/or alternative relief as the above Honourable Court may deem fit in the circumstances."*

[65] At page 138 paragraph 5.6, The Bill of Rights Handbook explains the manner in which the principles relating to costs in constitutional litigation have been applied:

> *"The Constitutional Court has indicated that in constitutional litigation an additional principle applies. It is that litigants should not be deterred by the threat of an adverse costs order from approaching a court to litigate an alleged violation of the Constitution. If the issues raised by the applicant in a constitutional case are raised in good faith and not vexatiously, Motsepe v Commissioner for Inland Revenue (note 36 above) paragraph 30. See also Beinash (note 119 above) para 30: 'By litigating as persistently and vexatiously as they did, the applicants placed respondents in the untenable position where they had to respond to such unmeritorious litigation, resulting in unnecessary costs.... [I]t would be unfair for the harassed respondents to bear the costs. In the circumstances, costs should follow the result.' It the issues raised are important and controversial (such as an alleged violation of the Bill of Rights), and if the proceedings instituted by the applicant lead to the resolution of those issues, the applicant should not be penalised by a costs order even if an adverse decision has been given against him or her. Similar principles are applied by the Land Claims Court to litigation in terms of the 'social interest legislation' under its jurisdiction: Skhosana v Roos 2000 (4) SA 561 (LCC) para 30; Valley Packers Co-operative Ltd v Dietloff [2001] 2 All SA 30 (LCC) para 13; Hurenco Boedery (Pty) Ltd v Regional Land Claims Commissioner, Northern Province 2003 (4) SA 280 (LCC) (noting that despite the general disinclination to award costs, the risk of an adverse costs order against a party putting forward a ill-founded claims and defences remains intact). The principles should also, in our view, be applied to litigation arising from other legislation giving effect to*

fundamental rights such as the Promotion of Administrative Justice Act and the Promotion of Access to Information Act 2 of 2000. A litigant must, however, comply with the procedural requirements for constitutional Court litigation. If failure to do so results in dismissal of an application for leave to appeal or for direct access, the applicant will be liable for costs."

[66] Municipality of Plettenburg Bay V Van Dyk & Company Inc. 2004 (2) BCLR (CC).

[67] In the Lesotho case of *The Minister of Labour and Employment and Others v 'Muso Elias Ts'euoa C of A (CIV) 1/2008* Gauntlett, JA, writing for the unanimous Court of Appeal articulated the principles relating to the award of costs which are applicable to the case before us at page 16 of his then unreported judgment in this way:

"As regards costs, the appellants submitted that no order of costs should have been made against them by the court a quo, and that (irrespective of the outcome of this appeal) no costs order on appeal should be made. It is indeed so, as Mr. Viljoen for the appellants argued, that this court is in principle reluctant to make or sustain costs orders in constitutional matters where large issues of constitutional importance are at stake. But that principle relates chiefly to a policy concern to avoid stifling litigation of public importance. Conversely, costs orders may be appropriate in constitutional matters where, as here, individuals find that the vindication of their personal rights triggers complex and costly constitutional litigation (cf. The Road Transport Board v Northern Venture Association, supra at paragraph [16] and further authorities there considered). In these circumstances, it does not seem to me that any basis has been shown on which we could properly interfere with the costs order made a quo, or refrain from following suit as regards the costs of the appeal."

[68] As already stated, the Respondent's application focused attention upon a flagrantly discriminatory provision in the legislation. Though she brought an action in her own personal capacity the result of her successful challenge to the impugned legislation, is that all women similarly placed can benefit from her vindication of their constitutional rights. She has done a commendable service not only to herself but to her community and to this Kingdom as a whole.

[69] In all the circumstances of this case, I hold without hesitation that the Respondent should be awarded costs on the ordinary scale both in this Court as well as in the court below.

[70] **ORDER**

In the light of the foregoing it is ordered that:

1. The appeal is upheld;
2. The order of the High Court is set aside;
3. Section 16 (3) of the Deeds Registry Act 37 of 1968 is hereby declared to be inconsistent with Sections 20 and 28 of the Constitution and it is therefore invalid.
4. The declaration of invalidity made in (iii) above is suspended for a period of twelve months from the date of this order to enable Parliament to pass such legislation as it may deem fit to correct the invalidity in Section 16 (3) of the Deeds Registry Act 37 of 1968.
5. Pending the enactment of legislation by Parliament, the Registrar of Deeds is authorized to register immovable property, bonds and other real rights in the joint names of husbands and wives married to each other in community of property.

1. Should Parliament fail to remedy the unconstitutionality in the section declared to be inconsistent with the Constitution in terms of paragraph (iii) above within the period referred to in paragraph (iv) above, the Appellant is granted leave 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.

1. The Respondent be awarded costs on the ordinary scale both in this Court as well as in the court below.

_____

S.A.Moore

Justice of Appeal

_____

I agree M. M. Ramodibedi

Chief Justice

_____

I agree J. G. Foxcroft

Justice of Appeal

_____

I agree A. M. Ebrahim

Justice of Appeal

_____

I agree Dr. S. Twum

Justice of Appeal