

Historic step towards equality for Swazi women

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Womens-Rights

Country: Swaziland

Publication: Open Debate

Date: Thu, 2012-10-11 15:53



There is nothing extraordinary about Mary-Joyce Doo Aphane. Nor is there anything extraordinary – in most countries – about her desire to register a newly-bought property in both her and her husband’s names. What is extraordinary is that she still couldn’t do that in Swaziland in the 21st century, despite being married in community of property. And what is even more extraordinary is that she took on the out-dated, discriminatory laws in court and won – the first time that Swaziland’s 2005 Constitution has been used as the basis to protect women’s rights.

True, the Supreme Court technically overturned the decision on appeal but it did not alter the spirit of the ruling – that Swazi women married in community of property have the right to register property in their own names as well as their husbands. This might seem like a minor victory but for Swazi women – who are still legally regarded as minors in many ways – this could mark a major turning point in their long battle for equality.

The full report can be downloaded below

It all began in November 2008 when Aphane and her husband, Michael Zulu, bought a piece of land in the capital, Mbabane and tried to register it in both their names. Aphane had continued to use her maiden name after their wedding and as they were married in community of property – where all their property is combined in a joint estate

regardless of whether it was acquired before or after the marriage and regardless of how much each one contributed – she believed that she had the right to have her name and her husband's on the title deed.

But she didn't – or not according to the office of the Registrar of Deeds, which informed them that the property could only be registered in the name of Michael Zulu in accordance with Section 16 (3) of the Deeds Registry Act, 1968. This provision is based on Swaziland's common law, which still adheres to the view that a woman married in community of property is under the marital power of her husband. In other words, the wife is legally classified as a minor in this instance and her husband becomes the sole administrator of their joint estate.

Faced with what appeared to be an unconstitutional provision and a clear case of discrimination based on gender, Aphane instituted legal action against the office of the Registrar of Deeds, the Minister of Justice and Constitutional Affairs and the office of the Attorney General. In her court papers, Aphane argued that the Deeds Registry Act violated her constitutional rights to register property in her maiden name since the Act states that women married in community of property can only register their immovable property in the name of their husbands

Aphane sees herself as an accomplished woman, citizen and person – and does not believe that her status as Zulu's wife should limit her ability to enjoy the rights, privileges and standings enjoyed by others. By going to court, she was simply claiming the right to be treated in the same way as her husband rather than being regarded as an appendage – as a minor who cannot exercise adult rights.

Interestingly, the government did not even try to fight the case on constitutional grounds. The State's lawyer agreed that section 16 (3) of the Deeds Registry Act is prima facie unconstitutional but argued that the court should not remove it from the statute but should instead follow the principle of avoidance. Aphane's lawyer responded that the principle of avoidance does not apply when the aggrieved person cannot get a remedy without a determination of the constitutional issue.

The High Court of Swaziland ruled in favour of Aphane and the decision was celebrated by many women in Swaziland and across the region as a huge step towards protecting women's property rights – and promoting greater equality. However, the judgment also raised a number of critical questions about whether other women in similar marital regimes and those married under different regimes could use this ruling to claim their own rights.

The situation was complicated when the government appealed the judgment and – in an unusually speedy finalization of litigation proceedings in Swaziland – won the case in the Supreme Court in May 2010, arguing that the High Court had usurped the power of Parliament and appropriated to itself the function of law-making.

However, while the Supreme Court upheld the appeal, it also upheld the spirit of the original decision by declaring Section 16 (3) of the Deeds Registry Act invalid because it is inconsistent with sections 20 and 28 of the Constitution. But it then suspended this declaration of invalidity for 12 months to give parliament time to pass a law to amend the unconstitutional section.

The Supreme Court also authorised the Registrar of Deeds to register immovable property in the joint names of husbands and wives married to each other in community of property while parliament was working on the new legislation. And lastly, the Supreme Court ordered that, if parliament were unable to change the Deeds Registry Act within a year, the Attorney General could ask the court for an extension of time.

So what is the current situation? There is no doubt that Section 16 (3) is unconstitutional and that Swazi women married in community of property may now register property jointly in their own and their husband's names. But the other ramifications of this historic decision are not so clear. This paper aims to bring some clarity to these broader issues and illustrate how much this decision has changed the status of women in Swaziland.

Documentation:

 [Open Debate - Historic step towards equality for Swazi women](http://www.osisa.org/sites/default/files/open_debate_6_-_doo_apthane_v_registrar.pdf)

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