ANNIE MUTSA MAZVITA MADZARA
versus
STANBIC BANK ZIMBABWE LIMITED
and
CLEVER HAMA MADZARA
and
THE SHERIFF OF ZIMBABWE
and
THE REGISTRAR OF DEEDS
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 25 March & 17 June 2015

Opposed Application

T Biti, for applicant
T Mpofu, for 1st respondent
No appearance by 2nd, 3rd, 4th & 5th respondents

TSANGA J: This is an opposed application in which the applicant seeks a declaratur which essentially addresses the tensions between matrimonial property, real rights and personal rights. What is sought is an order that a spouse should be able to veto an encumbrance of the matrimonial home and that they have a right to be consulted. As Applicant put it, at its gist is a quest to reverse the common law position that personal rights, more often than not those of a wife, against a husband's real rights, are not protected at all. She further seeks that the writ of execution on the immovable property issued by the Registrar be set aside and that the mortgage bond in favour of the first respondent be declared a nullity.

The context

Sometime in October 2014 the applicant says she came across a writ of execution and bond of indemnity issued by the first respondent, Stanbic Bank, (the Bank) against Clever

Hama Madzara (her husband) who is the second respondent in this matter. The writ declared that certain property being stand 17759 Harare Township, was especially executable. Unbeknown to her, the property had been encumbered by her husband for a loan advanced by the Bank without her consent. She states that she married her husband customarily in 1997 and subsequently converted this marriage to a registered civil marriage in 2002. According to her founding affidavit, the property in question was acquired sometime in 2000. As parties did not have registered marriage at the time, and since a mortgage loan was needed to develop the property, which loan her husband was able to get, and the bond was registered in his name. However, she states that she paid not only for the deposit on the property but that she was the central person who serviced the loan and later developed the house to its present 5 bedrooms and 3 lounges status. By way of background to economic enablers, she describes herself as a professional woman, highly educated with undergraduate and post graduate qualifications acquired both locally and abroad. She also says she runs her own organisation and has does work in a consultative capacity for numerous local and international institutions.

Immediately upon learning of the writ of execution she states that she had informed the Bank of the reality of the facts behind the 'real' acquisition of the property and her interest as 'owner'. This was done both orally and in writing. Having received no response in her endeavour to stem the impending sale, she had thus brought this application.

Applicant's argument

In her application she asserts that she is guaranteed constitutional rights to the property by virtue of s26 of the Constitution of Zimbabwe which provides that "the State must take appropriate measures to ensure that there is equality of rights and obligations during marriage and its dissolution". She also draws strength from s56 (1) which guarantees equality before the law and s56 (2) on equal treatment, including equal opportunities in the economic, cultural, and social sphere. Equally harnessed in support of her claim is s80, which provides that "all customs and traditions which infringe on the rights of women conferred by the constitution are void to the extent of that infringement". The applicant further relies on s7 of the Matrimonial Causes Act [*Chapter 5:13*] to assert that since she would have rights in the property on divorce, that in reality this right is a continuous one and is not just applicable on divorce.

Mr *Biti*, who appeared for the applicant distilled the above provisions as collectively constituting a genre of rights created by the Constitution that essentially equalise rights between men and women. In particular he emphasised that s46 (2) requires the court to be guided by the spirit and objectives of the Declaration of Rights in developing common law and customary law. This exhortation, he pointed out, is further repeated in s176. The core to his argument therefore was that the common law should be developed in favour of the property rights of spouses who do not hold title by casting real rights in relation to matrimonial property against the constitutional rights thus stipulated. He contended that this court should draw progressive strength from the thrust adopted in the case of *Chawanda* v *Zimnat Insurance Co. Ltd 1990* (2) ZLR 143 (SC) at p154 B-D *w*hich was guided by a living approach to developing customary law on the issue of spousal recognition arising from an unregistered customary law marriage. He located the gist of the problem as being the adoption by our courts of the interpretation of real rights vis a vis matrimonial property as expressed in the English case of *National Provincial Bank* v *Ainsworth* [1965] 2 ALL E.R 472 where it was held that where property is registered in the husband's name, then the wife's status gives her personal rights against her husband and that she is in the house not because of any contract or licence but by virtue of her marriage.

Among the numerous citations placed before the court, Mr *Biti* major point was that the reasoning in this decision was particularly adopted in the cases of *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) and in *Muzanenhamo* v *Katanga & others* 1991 (1) ZLR 182. The latter case he stated has been confirmed in numerous other decisions which he also pointed out.[1] He further drew attention to the real difficulties the court had with the common law position as fundamentally disadvantaging women in the case of *Muswere* v *Makanza* 2004 (2) ZLR 262.

In addition to the call for judicial activism, Mr *Biti* emphasised the need to take into account international conventions ratified by Zimbabwe which advance equality such as the Convention on the Elimination of all forms of discrimination against owned (CEDAW). He contended that this court is only being asked to confine itself to the sphere of the law of marriage as opposed to making a finding that would affect all registered property that are subject to claims. He argued that lenders and bankers would be forced to seek the other

[1] These were stated as *Maponga v Maponga & Ors 2004 (1) ZLR 63 (H); Chivise v Dimbwi 2004 (1) ZLR 12 (H); Semwayo & Anor v Chatara & Anor HH 48/07; Musariri v Ndavayi & Ors 2010 (1) ZLR 475 (H); Muganga v Sakupwanya 1996 (1) ZLR 217 (S); and Tewe v Hanoki & Ors S- 55-03*.

partner's consent where matrimonial property is involved. He pointed out that this is something that local authorities are already doing where a married person seeks to dispose of rights in immovable property. He further espoused that litigants have duty to test the legality of laws and that what applicant seeks is to test the legality of the common law rule in light of the constitution. He argued that whether Parliament decides to pass a law or not would be another matter.

The Bank's position

Only the Bank as the first respondent submitted papers in response to this application. The second to fifth respondents did not submit any papers and will be bound by the decision of this court. The Bank vehemently opposed the application on a number of grounds explored below.

The Bank's standpoint was that there is a material dispute of fact in that the claim by the applicant that she purchased the property singlehanded is not supported by any concrete evidence. According to the Bank, this is more so given that the agreement of sale, the loan agreement, and the title deed are all in the husband's name. The husband's failure to depose to an affidavit in support of his wife's assertions was put forward as a pointer to the falsity of the position. Its position as argued by Mr *Mpofu* in court, was that there is no factual basis as presented by the papers that could lead to a finding that the applicant is the owner of the property.

He also argued that there is in reality no cause of action since applicant admits that she does not have real rights which means that she has personal rights which are not enforceable against the whole world. According to Mr *Mpofu* that the applicant's claim, if any, is for contributions made to the development of the property in the event of divorce.

The Bank's further position argued on its behalf was that the applicant is estopped from making her claim because she did nothing for more than a decade to let the world know that she has rights which she now seeks to assert. It countered that the constitutional provisions cited by the applicant do not advance the matter in favour of the applicant because the law does not disentitle her from being registered as a joint owner. It was argued that evidence of title is not conclusive evidence of ownership and that the respondent could have, at an earlier stage, sought to have her name added. As such it maintains that there is no

infringement of constitutional rights. It is also denied that the bond is voidable as the property belongs to the person who has full dominium.

Mr *Mpofu* further indicated that s2 as read with s14 of the Deeds Registry Act [*Chapter 20:05*] which conveys real rights, is not about women and is not about a cultural practice. The law, he emphasised, is for the protection of everyone's interests and in his view though this particular law may affect women, it is not about them. He was of the view that this is a matter for legislative reform in terms of the ambit of any protection to be accorded the matrimonial home.

Another major objection raised by Bank to this application was that it has been brought against a backdrop of an existing judgment granted by MUSAKWA J on the 18 June 2014, which in essence authorised the disposal of the property. It is the Bank's position that with this judgment not having been set aside the, there is effectively no litigant before this court as that judgment remains extant. The gist of the objection that was articulated by Mr *Mpofu* was that this court cannot interfere with the order of another judge of parallel jurisdiction since such order can only be set aside in terms of r63 of the High Court rules 1971 which deals with a default judgment; or alternatively in terms of r449 whereby a judgment can be set aside if it was made in error; or it can be set aside on appeal by the Supreme Court. He emphasised that regardless of applicant's arguments, her position boils down to asking this court to set aside the execution process. It was thus argued that addressing this primary issue will effectively dispose of this matter.

Mr *Biti*'s response to the above arguments was that what the court is being asked to do is make a finding that the applicant has a right in the immovable property. He emphasised that the core of his argument is that anything that treats the property as belonging exclusively to the husband is not binding. His position was that the declaration sought will not release the husband's indebtedness to the Bank. He also argued that the declaration will not naturally have consequences on what to do with the immovable property as the issue is about declaring ownership and rights. He further maintained that the rights that are sought to be spelt out are those of a spouse in relation to a home that is registered in the name of the other spouse only and that the declaration seeks to inform the Bank in particular of the rights and interests of such spouse.

Analysis of Declaration sought

The applicable provision which empowers the court to make a declaratory order in an appropriate case is s14 of the High Court Act [*Chapter 7:06*]. The purpose of a declaration is to define rights of the parties. Issues such as one before me, to declare title to property are generally the subject matter of declarations in addition to a wide range of other issues that hinge on the construction of instruments be they wills, leases, policies, among others. Generally also, where a declaration is sought the facts will not be contentious. Where rights are spelt out the expectation is that the other party will obey. Only if the other party fails to take action does the other party seek to enforce.

Key to the exercise of its discretion is that the court must be satisfied that the person is an interested party in an existing, future or contingent right or obligation. If satisfied on this point then the court must also decide whether the case is a proper one for the exercise of the discretion conferred. (See *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337; *MDC* v *President of Zimbabwe & Ors* 2007 ZLR 257 (H) at p267. In *MDC* v *President of the Zimbabwe* it was also stated that the court must be satisfied that that there are interested person upon whom the declaration will be binding and that by binding is meant that the decision of the court operates as *res judicata* between the parties.

The applicable procedure on the other hand for rescission or setting aside an existing judgment has been amply dealt with by our courts as resting on three possible avenues; an application brought in terms of Rule 63 for a judgment granted in default; an application in terms of r 449 where a judgment is granted in error; an application in terms of the common law. Outside these avenues it is incompetent for a judge to set aside the judgment of another judge of parallel jurisdiction. (See for instance *Mushoto v Mudimu & Anor HH 443-13* which goes into depth about the use of each of these procedures.)

In *Mutyasira* v *Gonyora NO and others* HH 180/14 in which MAWADZE J put it thus:

> "In my view applicant cannot seek to have this court review its own orders under the guise of a declaratory relief. This court can only vary or rescind its judgments and orders in terms of r449 (1) (a) to (c) of the High Court Rules, 1971. The applicant has not approached the court on that basis but seeks a declaratory relief".

It thus necessary to examine the content of the declaration to assess whether it indeed seeks to vary a judgment that is in place.

The order sought was initially couched as follows:

"IT IS ORDERED THAT:

1. The Applicant owns stand 17759 Blakeway Drive Lincoln Green , Harare
2. That the rights of the applicant in the property cannot be defeated by the mortgage bond registered in favour of the First Respondent.
3. The mortgage bond registered in favour of the First Respondent by the second Respondent be and is hereby declared null and void.
4. The execution and implementation of the Writ of Execution of immovable property issued by the Registrar of the High Court at the special instance of the First Respondent under Case Number HC 495/12 on the 29th of September 2014 be and is hereby set aside forth with.
5. The Respondents to pay costs of suit each paying the other to be absolved."

At the hearing the applicant sought to amend the first paragraph so that it addresses the constitutional issue at the nub of the matter. The quest in the first paragraph was therefore altered to read as follows:

1. " The common law position that recognises real rights in the matrimonial property as superior to personal rights held by the other spouse in the same property is in breach of s80(3) and s 56 of the Constitution."

On the other hand, the order that was granted by MUSAKWA J on the 18th of June in the matter of *Stanbic Bank Zimbabwe Limited* v *HBD (Pvt) Ltd t/a Kalamazoo Business Systems 2) Clever Madzara 3) Elias Nhamo Madzara 4) Commercial Suppliers and Equipment (Pvt) Ltd HC 495 /12* reads as follows:

"IT IS ORDERED THAT

1. The 2nd, 3rd and 4th defendant shall jointly and severally, one paying the other to be absolved , pay the plaintiff the amount of US $ 96 348.99.
2. The 2nd, 3rd and 4th defendant shall jointly and severally, the one paying the other to be absolved pay interest on the amount of US$ 96 348.99 at the rate of 31.85% per annum from 04 November 2011 up to the date of payment in full.
3. Certain piece of land situate in the District of Salisbury called Stand 17759 Harare Township Salisbury Township Lands held under Deed of Transfer Number 11912/2001 dated 23rd November 2001, be and is hereby declared especially executable .
4. The 2nd, 3rd and 4th defendant shall jointly and severally, the one paying the other to be absolved pay plaintiff's costs of suit on the higher scale of legal practitioner and client."

Juxtaposing the existing order with the declaration sought, there is no denying that the declaration seeks instant coercive relief that impacts on the judgment that has been granted in favour of the Bank which has not been set aside. It seeks coercive relief in the active setting aside of the mortgage bond, the basis upon which the Bank regards the property as executable. The Declaration also seeks to declare the bond null and void. It also seeks to set aside the writ of execution and its implementation. All these are the issues that are at the heart of what informed the order that was sought before MUSAKWA J on 18 June 2014. This

leaves no doubt that that it seeks to set aside an existing court judgment while circumventing the main grounds and avenues upon which such a judgment can be set aside.

But even if I am wrong in concluding that this matter is hampered in its tracks by procedural irregularities of a judgment in place which has not been set aside, the issue of whether this is a proper case for the exercise of the court's discretion in light of the circumstances and arguments advanced by the applicant needs to be considered.

The import of the Deeds Registry Act on real rights

A real right is defined in s2 of the Deeds Registry Act [*Chapter 20:05*] as 'any right which become is a right upon registration'. Section 14 of the same Act essentially deals with how such real rights are transferred. For instance, ownership of land is transferred from one person to another through a deed of transfer executed or attested by a registrar. The reality of having the property registered in one's name is that during the course of they can dispose of it at will. Where however a party owns ones half the property then a party as the right to dispose of that half share. (See *Linda Mudawadzuri v Kingdom Bank and Ors* HH 95/15).

Mr *Biti* attributes the real problem in failing to make headway on this issue with regards to matrimonial property, to what he sees as slavish adherence to precedents. Yet from examining the above legal provision on real rights, Applicant's problem is not one that emanates from any inherent bias in the application of the law but more fundamentally from the legal rights that are accorded any property owner regardless of their sex. When courts accord centrality to real rights they are thus governed by the meaning as articulated in the appropriate legislation. It is the content of the law that accords the person with registered title full legal rights to that property. The order by MUSAKWA J was not in any manner or form, erroneously granted since the title deeds upon which the Bank sought to execute were in the husband's name. It cannot be said that legally the husband acted wrongfully in using the title deed that was in his name to secure the loan. The Bank was right in accepting the deed at face value in terms of who the owner of the property was. In entering into the loan agreement and accepting the deed, the Bank did not act outside any legal parameters. It relied for its security on the title deeds which were clearly in the borrower's name. Thus for all intents and purposes, the agreement that the Bank had with the husband was in accordance with procedural and substantive requirements relating to real rights.

Mr *Biti*'s argument is that the manner in which the law on real rights has gendered effects in practice must be recognised and addressed by this court. In other words, to put his argument in context that feminists have articulated the problem, this is a "gender neutral law that encounters a gender specific reality". That being the case the argument put forward by Mr *Biti* is that the court must of necessity recognise the inappropriateness of this aspect of the law of property on real rights when applied to a matrimonial context and hold the resultant gendered reality that emerges unconstitutional.

That in practice the effect of a husband having real rights in his name may have deep seated gendered implications that play out differently for women is true but by no means a peculiarity to this aspect of the law. With the standard in law having been for a long time essentially male, almost every aspect of the law when scrutinised with gender lenses will fall foul of gendered-ness in its effects. Gender-ness also does not lead automatically to an inference of unconstitutionality unless this can be illustrated. It may be more illustrative of the ways in which existing laws need to be gender sensitised for their efficacy. Thus gender neutral laws encountering such gender specific realities has in fact been at the root of the use of law reform as one of the central strategies in addressing problematic areas of the law that hamper substantive equality between men and women.

The applicant in her founding affidavit, states that in reality she is the one who acquired the property and offers the motivation for the sole registration in her husband's name as having been 'mortgage' related. A mortgage was required to acquire the property. It was the husband who was in a position to acquire a mortgage. They had no marriage certificate so the mortgage was acquired solely in his name although she says in reality she serviced it. The details of how this was done are however not provided. The bottom line is that it had nothing to do with the law. This is more so given that the registration of the property in a party's name who is not the actual owner for reasons that can be explained is legally something that can be reversed. Although applicant rests her argument on the new constitution, this issue has been a thorn in the flesh for the court in a number of instances that have been handled by this court. Admittedly the new constitution has run the extra mile compared to its predecessor in articulating fundamental rights that impact on the private sphere of people's lives in very specific detail. Yet it is also a reality that the core constitutional arguments that are at the heart of this case in interpreting the common law on real rights vis a vis matrimonial property were just as easily made with the previous constitution. (See *Deputy Sheriff* v *Jurai Jesina Kingsley and Cold Chain Zambia Limited*

HH 507/14). In that case BERE J in 2011, declined to refer a matter that was before him to the Supreme Court on the constitutionality of the effects of the common law on real rights in a matrimonial setting on the basis that there was no discrimination or violation of any constitutional rights. His reasoning in the case that was before him was that the applicant could have taken steps to have the property registered in her name. He relied on relevant authorities such as *Lafontant* v *Kennedy* 2000 (2) ZLR 280 (S); *Nyamweda* v *Georgia* 1988 (2) ZLR 42 (S); *Menezer* v *McGaili* 1971 (2) SA 12 at p14; *Young* v *Van Ransburg* 1991 (2) ZLR 149 (SC).

The customs, traditions and cultural argument

It is with regard to the applicant's failure to act that Mr *Biti* draws on the negative effects of culture and tradition to locate her inaction. His argument is that the applicant being a married woman for whom culturally '*lobola'* had been paid, she could not have acted as freely as it is assumed, to have the house later registered in her name. This is because its payment supposedly results in 'power over' the woman for whom it is has been paid. He thus asks this court to be guided by s80(3) of the constitution which elaborates rights of women and states as follows regarding laws customs traditions and cultural practices which infringe the rights of women.

> (3) "All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this constitution are void to the extent of the infringement. "

Whilst I acknowledge this argument that culture and tradition may indeed act as strong factors militating against action and that her inaction in this case may be an indicator of the power imbalances within a marriage particularly where '*lobola'* has been paid, the reality is complex and is certainly not so linear as to lead to the inference that it is culture and tradition that bear the responsibility for inaction. The payment of "*lobola"* is also a cultural practice of choice.

The formal law is admittedly far from being centre stage in the everyday lives of people in our normatively plural African context. Religion and culture are important and may be far more central tenets upon which women negotiate marriage as well as their everyday existence. It is these equally powerful "social fields" that in reality may have more gravitas in people's lives than the law. Moreover some women may indeed harbour imagined fears of being single as a result of divorce in a context where the socialisation puts the status of being married at a premium. Some may not wish to sacrifice their marital status on the altar of

assertiveness. Despite its widespread reality, the status of being single attracts the social stigma somewhat worse than that of a leper especially in religious circles. Regrettably too, an inordinate amount of energy is often expended denouncing 'rights activism' at social gatherings such as kitchen tea parties and some women's church meetings which urban women attend and tune in on societal expectations regarding appropriate marital behaviour. Furthermore, inaction may simply be because a person could not have foreseen that this kind of situation would arise. Also, legal consequences may be unappreciated by most women until trouble comes knocking at the door.

Nonetheless the reality is also that in a modern social setting, the options in the nature of social messages being channelled are all too often legion. As such, choosing to operate within a cultural or religious bubble is significantly also a choice which the court cannot ignore. Women are not an undifferentiated whole. Just as there are women who are hampered by the power and pull of tradition and culture from taking action, there are just as many who assert their rights in spite of societal expectations. Married women in particular are constantly bombarded with messages surrounding law and marriage. There are a plethora of women's organisations working on women's legal rights issues ranging from organisations such as ZWLA[2], WLSA[3]; WAG[4] to the weekly televised "*Mai Chisamba Show"* a talk show which examines a range of social issues mostly those impacting on women and children.

Thus, women have choices. Women make choices. Others, even when they have the knowledge, may still choose to adhere to the influences of religion and culture. Others still may move from silence to voice and make a deliberate choice to confront patriarchy in the face by recognising that "she whom patriarchy calls bad, is in fact good". They thus use their knowledge to assert their rights and consciously fashion alternative realities. In this regard, many have heeded the call by women's groups to approach marriage as a partnership from the onset and to have the matrimonial home registered in the names of both spouses and also not to shy away from owning their own property. It would therefore be inaccurate to portray the vibrational pulse of women's engagement with issues that affect them as being at the level of simple 'victimology' purportedly emanating from culture and tradition. This would be pure expediency to facilitate the applicant's case.

[2] Zimbabwe Women Lawyers Association
[3] Women and Law in Sothern Africa
[4] Women's Action Group

The applicant herself makes a substantial issue of being well educated - a reality that could, from a logical perspective, been harnessed in her favour to familiarise herself with the marital consequences of her marriage and to act accordingly to protect her rights. This court is being asked to believe that a woman of her calibre, not only highly educated but of economic prowess and running an entire organisation, nonetheless lacks personal empowerment to navigate culture and tradition. This is for even the minimum act of having at least insisted that she keeps the title deed, given her claim to having ploughed money on her own into the property. That she did not act is indicative of her own choice and can hardly be laid on the door of any supposed unconstitutionality of culture and tradition.

Also if, as Mr *Biti* has argued on behalf of his client, that she may have subsequently failed to take action to have the property registered in her name because of cultural constraints, when she clearly could have done so to avert the problem at hand, then the core problem has nothing to do with the application of the law on real rights or its supposed unconstitutionality. Knowing where the problem lies is vital in adopting the correct strategy. Where the law is in place that could have been harnessed to prevent the problem in question and where despite this reality, action is not taken, this has everything to do with changing attitudes that prevent women from being assertive. It is about giving meaning to 'empowerment' which eventuates when women who not only know their rights but also take steps to assert them and actively to change their reality. The strategy for this to occur is thus awareness and consciousness raising.

Locating the applicant's problem in this regard as one of empowerment and consciousness raising rests on appreciating the symbiotic relationship and interplay between the substantive, structural and cultural components of any legal system. Where a problem emanates from the content and substance of the law, the strategy is generally law reform. Where it relates to its structural component that is as arising from the law's application by the courts and other related agencies then the strategy is generally advocacy and representation within these structures. Where the problem relates to the cultural component as exemplified by attitudes and shared values, the strategy is education. [5]

The issue of inaction on the applicant's part is not about the content or the application of the law within its structures. It is about attitudes and personal choices. The applicant in her

[5] I draw here on the general structure and interactions of the of the legal system articulated in the book: M Schuler (Ed) **Empowerment And The Law : Strategies Of Third World Women** (Washington: OEF International) 1986 at p22-23

affidavit did not proffer the payment of '*lobola'* as the explanation for her inaction. It would be far too simplistic for to lay the blame on culture and tradition as primary causes for inaction without any real evidence having been articulated of how these realities actually played themselves out in the applicant's case. It is hard to imagine that a woman in her position who by her own admission is economically independent, would have been cowed by the payment of what would today in all probability amount to no more than a few hundred dollars of *'lobola'*.

Her husband's evidence is also conspicuous by its absence and tends to bolster Mr *Mpofu*'s argument of likely collusion. Whether the absence of his evidence is from collusion or from any sense of guilt as to the consequences that have befallen the family as a result of his action, or some solace in having the blame thrust at the bank, the reality is that its absence takes no further the wife's assertions that she is owns the whole property. The affidavit from the sellers of the property cannot be the sole foundation of her factual claim and neither can counsel's speculation regarding the effects of culture or tradition on her failure to assert her rights. I will address her 50% argument when I examine the full import of s26 (c).

Why legislative reform

Even in those countries where '*lobola'* is not paid women may still face similar challenges regarding the matrimonial home if it is not legislatively protected as an asset of joint interest in the course of the marriage. That the protection of the matrimonial home is legally desirable does not need much argument because of its important role in any family context. That being the case it is nonetheless crucial to address the issue of whether the problem is one to be addressed through creative judicial interpretation or whether it is an issue best addressed by comprehensive law reform given that no law is being violated. Notably, by arguing for the most apart that the house is in fact hers, applicant has nothing against real rights as such. The law is the same for both men and women so there no violation of s 56 of the constitution regarding non-discrimination and equal treatment. Her argument in any event is not that the home cannot be used as security for a loan but rather that where a matrimonial home is used then the other spouse should play a role in consenting and that where consent has not been given such encumbrance should not be sanctioned. This is indicative of a lacuna in the law which needs to be addressed legislatively in terms of spelling out the exact parameters of the protection of the matrimonial home. I say this for a number of reasons which I detail below.

Section 26 (c) which Mr *Biti* relies on from his argument on equal rights during marriage and at its dissolution is couched as follows:

> "The state **must take appropriate measures to ensure that** -
>
> a)……..
> b)…….
> c) there is equality of rights and obligations **during marriage** and **at its dissolution**. (My emphasis)."

The provision is part of the national objectives in the Constitution which are designed to guide the State and all its institutions in formulating and implementing laws and policy decisions. Materially it does not fall under fundamental rights whereby the applicant can say her rights have been violated. Its primary thrust is to guide the state and its institutions. It can thus be used to its fullest to cajole the state to take concrete action and measures on an issue that requires its intervention. The state includes its rule making and its rule implementing bodies. Appropriate measures are to be taken in anticipation of an event that may hamper equality or in the event of their being needed to effect equality. Legislative intervention is what is needed herein for the following reasons.

The legislature already has measures in place that articulate what should happen to property rights on divorce or on death in the context of marriage. However, there is less legislative detail articulating property rights during marriage since how people get on with the business of being married is generally left to them. Ordinary rules regarding property apply in the context of every day existence without regard to sex.

There is no doubt that s7 of the Matrimonial Causes Act [*Chapter 5:13*] kicks in where the marriage is ending. Section 7 (1) is prefixed thus:

> "Subject to this section, in granting a decree of divorce, judicial separation or nullity of a marriage or at any time thereafter, an appropriate court may make an order with regard to….."

Other key pieces of legislation that impact on the matrimonial home include the Deceased Estates Succession Act [*Chapter: 6:02*] and the Administration of Estates Act [*Chapter 6:01*][6] which kick in on dissolution of a marriage by death.

The facts in this case, and indeed those from cases that have come before this one on this very issue, point to one overwhelmingly one conclusion - which is that married couples,

[6] Reference here is with particular to Part IIIA of the Administration of Estates Act.

particularly women, do expect the law to intervene with normative guidelines on the matrimonial home not just on divorce or death but during the course of the marriage. Thus legislative reform is where the energy should have been placed a long time ago.

What constitutes a matrimonial home if a spouse is to be prevented from encumbering such a home, whether by sale, mortgage or pledge for a debt, needs to be legislatively articulated. What constitutes an encumbrance itself needs to be spelt out. Furthermore, the conditions under a party may be allowed to encumber the property, whether by consent or court order would need to be fully spelt out, given that a spouse may have no objections to the matrimonial home being used as security where they envisage that likely benefits will flow from being given a loan. The rights of the untitled party also need to be addressed where the property is not jointly owned as in this case.

In sum, much as judicial activism has its place in law's advancement, given the absence of constitutional breach in the manner averred by the Applicant in this case, and the clear recognition of a legislative gap that the state can be pressed to rectify, these are not issues that can be addressed through the enthusiastic pen of an overly activist judge. These issues require informed dialogue and the legislator's engagement with relevant stake holders on what would be realistic. Sight should also not be lost of the significance of participation for efficacy of laws by those on whom they will have a bearing.

When there is such appropriate legislation outlining the operative framework for dealing with the matrimonial home, then indeed it would be the full responsibility of lenders to ensure that what they are dealing with is not a matrimonial home. In addition, what these facts also point to, is that apart from clear legislative guidelines, there is also a need for local banks to adopt best practices and a Code of Ethics in how they engage with parties in relation to matrimonial property given the tremendous impact that the sale inevitably has on the family.

Purely by way of example as to how some jurisdictions have addressed the issue of protecting the matrimonial home from encumbrances, in Canada (Ontario) for instance, the issue is comprehensively addressed under the Family Law Act R.S.O. 1990, Chapter F.3. The gist of their legislative provisions in s19 (1) of the above Act is to the effect that a person has an interest in that property if it was ordinarily occupied by the person and his or her spouse as their family residence or their matrimonial home. Furthermore, both spouses have an equal right to possession of a matrimonial home. The Act also clearly sets out in s21 (1) when and how a spouse can dispose of encumber an interest in a matrimonial home. On alienation of

the matrimonial home, the other spouse for instance, must join and consent to the instrument; or the other spouse must release all rights by a separation agreement; or a court order must have authorised the transaction; or the property must not have been designated as a matrimonial home.[7] In England too following the case of Ainsworth (*supra*) in 1967, which Mr *Biti* says is the basis upon which our courts have followed the real rights argument slavishly, the Matrimonial Homes Act of 1967 was passed whose main thrust was to ameliorate the effects of this decision by providing for the interests of a married spouse to the matrimonial home regardless of the fact that it is not registered in their name. Banks in England have also subsequently adopted an Ethical Code of Conduct regarding the sale of the matrimonial home.

In summary, in my view legislative intervention that addresses the rights of the spouse to the matrimonial during the course of the marriage is where the energy should be. Even when cases such as this one are lost, they nonetheless play an important role in fore-fronting the types of problems that need the legislator's attention. Accordingly for the reasons I have outlined above, I pass the following order:

It be and is hereby ordered that this application is dismissed with costs.

Tendai Biti Law, Applicants Legal Practitioners
Mawere & Sibanda, 1st Respondent's Legal Practitioners

[7] See more fully s19 & s21 of the Ontario **Family Law Act R.S.O 1990 Chapter F.3** which can be accessed on the internet. The issues that deal with the matrimonial Home are addressed comprehensively under part II of the act devoted to the matrimonial home.