

The Constitution and women's property rights in Swaziland

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1 Introduction

Swaziland's Constitution¹ recognises a legal system comprised of both formal and informal laws. The formal laws embody Roman-Dutch common law and the specific legislation attendant to it. Informal laws refer to the Swazi customary law that originated in the pre-colonial history of the country according to how they were interpreted and applied during colonial times,² and according to what, in present day circumstances, is interpreted to be such law.³

Most laws in force in Swaziland were promulgated in the pre-constitutional era and an evaluation of these laws shows a lack of compliance with the new constitutional principles and values. These pre-constitutional laws include those that impact on the legal status of women. The principles and values enshrined in the Constitution are quite progressive in terms of enhancing the legal position of women in Swaziland. Accordingly, it is imperative that a reform process for these laws be prioritised by the government authorities in the interest of facilitating and advancing the positive enhancement of the legal status of women.

The Constitution asserts its own supremacy.⁴ It provides that any law that is inconsistent with the Constitution shall be null and void. Moreover, in its recognition of the laws of the country under section 252, the Constitution subordinates such laws to its provisions. As a result any law found to be inconsistent with the constitutional provisions will not be applicable to the extent of such inconsistency.

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¹Act 1 of 2005, implemented in 2006 (hereafter the Constitution).

²These culminated in formal legislation passed by the colonial masters to recognise customary law, such as the Swazi Court Act 80 of 1950 and the Swazi Administration Order 79 of 1950.

³What has been termed as the 'living customary laws' by recent African legal scholars.

⁴Section 2(1). This particular provision in the Constitution therefore sheds some light as to the relative weight that has to be given to its provisions in the case of any legislation or conduct proven to be contrary to the Constitution.

The inconsistency between the constitutional provisions and laws in force in Swaziland was the subject of a court case in *Mary-Joyce Aphane v The Registrar of Deeds*⁵ where the provisions of the legislation⁶ were contrary to the constitutional protection of women,⁷ as embodied in the right to equality for all before the law,⁸ the right to the equal protection of the law and the equal right of spouses to own property.⁹ This article examines this decision and the legal framework in which the case was decided and considers the implications for the future of the law in Swaziland, especially as it relates to women's status with regard to property rights.

After this introduction the discussion will outline the legal framework of the laws affecting women's status in Swaziland. Current legislation, the constitutional provisions and the international legal status in relation to women's property rights will be discussed in the second segment of the article.

In the next segment, the *Aphane* case will be discussed. The judgment of the court will be analysed in the context of its contribution to enhancing the legal status of women in Swaziland. It is concluded that whilst seeking for the appropriate remedy to provide relief for persons whose constitutional rights have been breached, such as the rights of the applicant in this case, the court's interpretation of such remedy has not contributed favourably to the enhancement of women's status in Swaziland. The decision in the case demonstrates that such litigants still do not have access to direct and immediate relief, as the courts defer to the constitutional mandate of the legislature to make law for fear of breaching the separation of powers doctrine. It is submitted in article that, as much as the separation of powers doctrine must be strictly adhered to, when formulating the remedies to cure the constitutional inconsistencies of laws in Swaziland, the courts should not ignore the social and political environment in which the country's law reforms take place. Most often, the 'lack of political will' characterises a government's reluctance to engage in a meaningful reform process of laws such as those that affect the legal status of women in Swaziland. The result of such a lack of political will is the perpetuation of the status *quo* in the laws that define gender relations and thus allow them to remain oppressive.

It is submitted therefore that the decision in *Aphane* is important for evaluating how far the constitutional guarantees that enhance women's legal status have become a reality in the country's legal system.

⁵Unreported, High Court of Swaziland, Civil Case no 383/2009; Civil Case 12/2010(SC), (hereafter referred to as the *Aphane* case).

⁶The Deed's Registry Act 37 of 1968.

⁷Section 28(1) of the Constitution.

⁸Sections 14(1) and s 20 of the Constitution.

⁹Section 34(1) of the Constitution.

2 Background: The legal framework of women's status in Swaziland

The legal status of women in Swaziland can be evaluated against the laws provided for in the country's legal system. Sources of law are derived from both the written and unwritten laws in force in Swaziland,¹⁰ and a number of laws in existence in the country's legal system have a bearing on women's legal status.¹¹ The case discusses the laws pertaining to women's property rights and these will be the main focus of this article. Property rights include the legal rights to acquire, own, sell and transfer property, collect and keep rents, keep one's wages, make contracts, bring lawsuits, and, if seeking divorce, maintain some of the marriage assets.

2.1 *Civil and customary laws affecting women's property rights*

The common law and civil law embodied in the property laws in force are a reflection of the inequalities between men and women in Swaziland. Furthermore, customary law continues to be followed by a large percentage of the population and is often discriminatory against women.

There is a general social acceptance that a woman is inferior when it comes to property ownership and her status is that of a perpetual minor under the control and power of male guardianship. Several formal laws, as well as customary law and practice, express the perceived inferior status of women in matrimonial property rights, access to land and land ownership, and succession to and inheritance of property. All these aspects are discussed in more detail below.

2.1.1 Matrimonial property ownership

The Marriage Act¹² is an example of legislation that perpetuates women's position of inequality. The legislation can be said to set the tone for all other legislation that perpetuates the minority status of women. For instance, in marriage relations, it accords marital power exclusively to men, empowering them to solely deal and transact in property on behalf of women. The Act provides:

... the consequences flowing from a marriage in terms of this Act shall be in accordance with Common law as varied from time to time by any law ...¹³

Common law provides that all marriages are in community of property unless, at the time of the marriage, the parties entered into an ante-nuptial contract in order to create a property regime that is out of community of property.¹⁴ Marriages in

¹⁰Referred to in (n 2) and (n 3).

¹¹For example, the formal laws are embodied in the Marriage Act 47 of 1964; the Deed's Registry Act 37 of 1968; the Administration of Estates Act 102 of 1907 and the informal laws are embodied in the customary laws that survive in an unwritten form in Swaziland.

¹²*Ibid* .

¹³Section 24 of Act 47 of 1964.

¹⁴Hahlo *The South African law of husband and wife* (1985) (5th ed) 194; Bhalla 'Some reflections on the Swaziland Marriage Act 1964' (1994) *African LJ* 542 at 549.

community of property under Roman-Dutch common law are always accompanied by marital power, a concept that dictates that the regulation of the joint estate of the parties falls under the administration of the husband by virtue of his marital power.¹⁵ Marital power thus denies a woman full legal capacity, and confirms her as a perpetual minors under the guardianship of her husband irrespective of having attained the legal age of majority.¹⁶ The case of *Victor Tsela v Zeemans Bus Service (Pty) Ltd and Royal Swaziland Insurance Corporation*¹⁷ illustrates the undermining of a woman's majority status due to marital power where she had contracted a marriage in community of property. Consequently, a woman such as the applicant's wife in this case was found to lack capacity to sue a bus company or its insurers in a civil matter where she incurred injuries as a result of a bus accident. The court ruled that she could only sue in this matter through her husband's assistance. Therefore, married women are subject to their husbands' marital power and lack *locus standi* (legal standing) in judicial matters in Swaziland.

The law thus perpetuates the legal limitations for married woman in the economic sphere. For example, a woman cannot enter into binding legal contracts, sue or be sued unassisted by her husband, she may not own or alienate property, open bank accounts, obtain loans or apply for travel documents without the permission of her husband.¹⁸ Men obtain their full contractual rights upon reaching majority. For women such rights are suspended. This is the case primarily for those married in community of property where the wife is subject to the husband's marital power. By extension, those married out of community of property tend to face challenges with collateral due to the registration of family assets in the husband's name. There is a serious need to align these laws with the Constitution.¹⁹

Similarly, women in customary marriages in Swaziland are accorded the legal status of minors and have virtually no control over their matrimonial resources and property. The patriarchal nature of Swazi society is such that a woman is always under the control of a male person, first under her father's control when unmarried,²⁰ and then under her husband's control at marriage.²¹

¹⁵*Ibid.*

¹⁶The age of majority is set at 21 years of age according to the Age of Majority Act of 1972.

¹⁷High Court Case No 779/1988 (unreported).

¹⁸See Ncube *Family law in Zimbabwe* (1989) 168. Ncube observes that the husband's power of administration is very strong and the wife's protection is minimal, and the concept causes hardship to countless women. A further interpretation of the concept shows that it bestows on men the power to unilaterally deal with the property with the resultant effect that he can alienate, encumber or otherwise deal with the estate as he sees fit. Thus under the marital power a husband can sell, unwisely donate, or deliberately destroy his and his wife's joint property without incurring any liability to his wife for damages.

¹⁹Southern African Development Community, Gender Protocol Alliance *SADC Gender Protocol Barometer Baseline Study: Swaziland* 26.

²⁰That is irrespective of her age.

²¹Marriages conducted under customary laws grant the husband vast and wide-ranging marital power similar to that involved in guardianship.

2.1.2 Access to land

Limitations for women's access to title deed land continue to be a challenge in Swaziland. The difficulties for women occur at two levels where access to land is concerned. Firstly, because of the minority status imposed on women due to the husband's marital power where married in community of property, they cannot unilaterally access credit from financial institutions without their husband's consent. In the second instance, the Deed's Registry Act regards women as incapable of unilaterally registering real rights to property, unless they are married 'out of community of property'. On special provisions relating to women the Act provides:

immovable property, bonds and other real rights shall not be transferred or ceded to or registered in the name of a woman married in community of property, bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.²²

The provisions of the Act further require women to furnish full information regarding their status, including the type of marriage they entered into as a condition to execute a deed in their favour.²³

This clearly prevents women in Swaziland from owning freehold land commonly referred to as title deed land.

In terms of Swazi customary law, which is applicable within Swazi Nation land, the section of land administered by chiefs,²⁴ the traditional system dictates that only male heads of Swazi households are granted land by chiefs. This confirms the recognised patriarchal nature of the Swazi society which generally recognises that all property in a household is held in the name of a male head of the household and access to land is acquired through a man.²⁵ However, there is evidence of a growing practice, by some chiefs, of relaxing the traditional rules and allocating land to women in their own right. This is also as a result of the interpretation of a provision in the Constitution providing:

save as may be required by the exigencies of any particular situation, a citizen of Swaziland, without regard to gender, shall have equal access to land for normal domestic purposes.²⁶

Therefore it seems as if women can now access traditional land in their own right. However, it is doubtful if a woman can have a remedy where that right is delayed or even denied by a traditional leader as these reforms are not captured in legislation. Even if the woman can invoke such Constitutional rights, it is doubtful if

²²See s 16(3) of the Act.

²³Section 16(4) of the Act.

²⁴A large percentage of the Swazi population resides under this land tenure system.

²⁵Ngwenya 'The majority legal status of women in Southern Africa: Implications for women and families' (1996) 17 *Journal of Family and Economic Issues* 179.

²⁶Section 211(2).

she can succeed as the supremacy of the Constitution²⁷ in Swaziland is often threatened by section 115(7) which provides that the same Constitution does not extend over certain traditional matters, including matters involving the regulation of Swazi Nation land. It is thus not quite clear how the conflict between the two competing claims of the Constitution as provided for under section 2 and the non-extension of the Constitution over traditional matters covered by section 115(7) should be dealt with.

2.1.3 Women's access to property resources through succession and inheritance

Laws governing property ownership when a male spouse dies is also prejudicial to women's legal status in Swaziland. In succession and inheritance matters, the Administration of Estates Act²⁸ requires that the estate of those who have entered into marriage by Swazi law and custom be distributed according to customary practices. The principle of male primogeniture is applicable and it prohibits women from inheriting property from the estates of their husbands in terms of Swazi customary law.²⁹ Instead the head of the household commonly referred to as 'Inkhosana'³⁰ assumes total control of the estate of the deceased. The court's re-interpretation of the procedure for the regulation of a deceased's person's estate in the case of *Dudu Dorothy Dlamini v The Master of the High Court and Mphosi J Mamba*³¹ modified the application of the male primogeniture principle to estates of persons married under Swazi law and custom. The court thus allowed the office of the Master of the High Court jurisdiction over the estate of a deceased person who had contracted a civil marriage and over the estate of a person who died having married under Swazi law and custom. This meant that the Master could apply other equitable distribution principles to the estate to all interested persons and not strictly adhere to the male primogeniture principle. However, this judicial practice still required legislative confirmation. The Constitution has been quite forthright in providing for protection for all spouses, particularly women, to property rights of their spouses. The Constitution provides:

34(1) A surviving spouse is entitled to a reasonable provision out of the estate of the other spouse whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.

This constitutional provision still needs legislative enactment for it to have legal force. Moreover, women's hardships are most apparent upon the death of their

²⁷As provided for under s 2(1).

²⁸Act 28 of 1902.

²⁹In customary law, women have no right to inherit from their husbands and fathers, but are entitled to maintenance from the (male) heir. See Albertyn 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' Gender Research Project, Centre for Applied Legal Studies, Wits 7.

³⁰The male head of the household.

³¹High Court Case No CIVT 367/1989.

husbands. According to Swazi law and custom, upon the death of the husband, women married under customary law are expected to be confined indoors for long periods of time whilst mourning their husbands, and are prohibited from engaging in certain activities which often translate into economic gain. Meanwhile, it is common for women to be dispossessed of their marital property, including land, by relatives of the deceased husband due to the customary law perception that they are incapable of inheriting property from their husbands.³²

With regard to the prejudicial legal status of women, it is encouraging to note that certain initiatives have been taken by the Swazi government to work towards law reform. However, there is concern as to the extent of government's commitment to such reforms in terms of time and resources. A number of laws have been translated into Bills, with the provisions thereof seeking to address and align the laws to be in harmony with both the constitutional provisions and appropriate gender expectations so as to improve the status of women. The Marriage Bill,³³ the Married Person's Equality Bill,³⁴ the Deed's Registry Bill³⁵ and the Administration of Estates Bill³⁶ are all draft laws that are in line for either public consultations with stakeholders or tabling before Parliament.

Access to justice for women is still not tangible in Swaziland. Parliament still has to translate these Bills into law and thus be said to be actively reforming laws into constitutionally compliant legislation.

2.2 *The Constitution and women's property rights*

The Constitution of Swaziland incorporates a Bill of Rights, based on the international human rights norms. The Preamble pledges to 'protect and promote the fundamental rights and freedoms of all in the Kingdom ...'. More specifically, when providing for women's protections, it has been observed that:

Swaziland is fairly advanced in making conscious decisions towards ensuring gender equality and women's empowerment ... Evidence to this improvement has been demonstrated through the provision of an equality clause in the Constitution ...³⁷

As a basic protection for women's rights the Constitution provides for the equality for all. The equality clause in the Constitution therefore provides:

³² *Vulnerability of women and the girl-child to HIV and AIDS transmission focusing on women's sexual and reproductive rights* Women and Law in Southern Africa (WLSA) (2004) Mbabane: Women and Law in Southern Africa Research and Education Trust 29; Tfwala *Women's control over sexual matters in traditional marriages: A development perspective* (July 2008) (unpublished LLM dissertation) 50.

³³ 2006 as amended in 2009.

³⁴ 2009.

³⁵ 2009.

³⁶ 2009.

³⁷ UNDP 'Promote gender equality and empower women' on Millennium Development Goals. See www.un.org.sz/index.

20(1) All persons are equal before the law in all spheres of political, economic, social and cultural life and every other respect and shall enjoy equal protection of the law.

This section is further elaborated upon in subsection (2) in terms of specifically outlawing discrimination based on a number of factors, including that based on gender.³⁸ Subsection (3) sheds light on how 'discrimination' is to be perceived in the Constitution by providing:

For purposes of this section, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.

Whilst section 20 captures the general prohibition against discrimination, section 28 goes further to specifically provide for the rights and freedoms of women and outlaws discrimination against women. The section reads:

28(1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

Furthermore the Constitution protects all persons' right to property ownership³⁹ and specifically allows spouses a reasonable provision out of the estate of the other spouse irrespective of the marriage into which they had entered.⁴⁰

Concerning traditional laws and customs, the Constitution prohibits compelling a woman to undergo or uphold any custom to which she is opposed.⁴¹ Therefore, customary practices such as those which require a woman to sit in mourning for her husband when he dies and not be involved in any economic activity that can ensure access to property ownership are contrary to the Constitution.

Clearly, the Constitution is supposed to usher in a new dispensation for women in Swaziland through the recognition and entrenchment of the fundamental rights that protect women's legal status. The Constitution therefore has the potential to alleviate women's struggle for their rights and one way of achieving that would be through legislative enactment and the amendment of existing discriminatory legislation. The discussion in the first part of this article shows that legislation in its current state poses a hindrance to the enhancement of women's legal status. Also the prolonged lapse of time during the legislation has remained unaligned to the Constitution severely disadvantages women who continue to suffer hardship and injustice due to their subordinate legal status.

³⁸The subsection provides: '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'.

³⁹Section 19.

⁴⁰Section 34(1).

⁴¹Article 28(3).

Consequently, the law's delayed engagement in a meaningful reform process has forced women such as the applicant in the case to be discussed below⁴² to approach the courts to seek that the constitutional invalidity of certain laws be declared as they have a negative impact on the legal status of women in Swaziland.

2.3 Swaziland's commitments to international human rights agreements on women's legal status

Swaziland's commitment to international agreements enhancing women's status is, in theory, unquestionable. The country is a signatory to a number of international and regional instruments that have a bearing on gender equality and equity.

It is significant that, since its independence, Swaziland has been a member of the United Nations.⁴³ Consequently, the country signed and ratified the basic Universal Declaration of Human Rights adopted by the UN's General Assembly in 1948. This declaration recognises that '[a]ll human beings are born free and equal in dignity and rights'.⁴⁴

Swaziland is also a state party to the two key international human rights instruments that help to promote the status of women in the domestic and international sphere. These are the International Covenant on Civil and Political Rights (ICCPR)⁴⁵ and the International Covenant on Economic Social and Cultural Rights (ICESCR).⁴⁶ Both these human rights covenants echo the Universal Declaration of Human Rights principles in protecting the equality of all before the law. The ICCPR in particular provides that: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant'.⁴⁷ The ICESCR provides: 'The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant'.⁴⁸

Swaziland is also a state party to the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW).⁴⁹ Article 1 of the Convention provides for state parties to grant women equal rights with men in the enjoyment of human rights and fundamental freedoms. This article is further

⁴²See section 3 of this article.

⁴³During the 1674th plenary meeting of the 22nd session of the United Nations General Assembly (UNGA) The Kingdom of Swaziland was accepted into the world body pursuant to General Assembly Resolution: A/Res/2376(XXIII) 'Admission of Swaziland to membership in the United Nations'. See www.un.int/wcm/content/site/swaziland (accessed on 2011-11-11).

⁴⁴Article 1 of the United Nations Universal Declaration of Human Rights (UDHR).

⁴⁵Adopted in 1966 and acceded to by Swaziland on 2004-03-26.

⁴⁶Adopted in 1966 and signed and ratified by Swaziland on 2004-06-26.

⁴⁷Article 3.

⁴⁸*Ibid.*

⁴⁹Adopted in 1979 and ratified by Swaziland on 2004-03-26.

given emphasis by article 15 which guarantees equality before the law and equal protection of the law, thus indicating that both men and women have the same legal status and equal opportunities to exercise their rights and capacities.⁵⁰ Moreover, article 5 is quite explicit in requiring state parties to take steps to modify the conduct of men and women and to eliminate prejudice. Since Swaziland has ratified this Convention, it is legally bound to abide by these provisions. The country has in fact committed itself to taking measures to end discrimination against women in all forms. The measures the country needs to take include the incorporation of the principle of equality of men and women in its legal system, the abolition of all discriminatory laws and the adoption of appropriate laws prohibiting discrimination against women.⁵¹

In the regional context, previously a member of the Organisation of the African Union (OAU),⁵² Swaziland is also a member of the African Union (AU) that replaced the OAU in 2002.⁵³ She is a state party to the Banjul African Charter on Human and People's Rights and is subject to its provisions.⁵⁴ The Charter contains several provisions that proclaim the general rights to non-discrimination and equality before the law. Notably, it provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.⁵⁵

It provides further for '[e]very individual to be equal before the law' and to '... be entitled to equal protection of the law'.⁵⁶ These articles can thus be interpreted to seek to afford everyone, including women, rights to equal protection and right to property.⁵⁷

The Southern African Development Community (SADC)⁵⁸ of which Swaziland is a member was established in 1981 by the Southern African states. The SADC has also included in its agenda the promotion of gender equality and thus the

⁵⁰'An overview of women's rights in African customary law' Legal Resources Centre (2004) 6. Available at www.lrc.org.za/papers/402 (accessed on 2011-11-11).

⁵¹*Id* at 5.

⁵²The OAU was established on 25 May 1963.

⁵³Its Constitutive Act provides under art 1 as one of its objectives, for the promotion and protection of human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.

⁵⁴The Banjul Charter was adopted in 1981. See Fombad 'The Swaziland Constitution of 2005: Can absolutism be reconciled with modern constitutionalism?' (2007) *SAJHR* 100.

⁵⁵Article 2.

⁵⁶Article 3.

⁵⁷'Women in Swaziland still have limited property rights' *Human Rights Brief 2* available at <http://www.hrbrief.org/2010/03/> (accessed 2011-06-23).

⁵⁸This body has been in existence since 1980, initially formed as the Southern African Development Coordination Conference (SADCC) following the adoption of the Lusaka Declaration and later transformed into a development community on 1992-07-17.

elimination all forms of discrimination against women in its vision of 'a regional community that will ensure economic well-being'.⁵⁹ Thus the SADC⁶⁰ Gender Protocol provides that by 2015 SADC countries shall have reviewed, amended or repealed discriminatory laws and specifically abolish the minority status of women.⁶¹

The signing or ratification of these instruments shows the Swaziland government's commitment to respect, protect and implement the rights enshrined therein, including the equal rights of all citizens and the elimination of any discriminatory laws. By ratifying all of the above-mentioned Conventions without reservation, Swaziland is supposedly said to have pledged to 'take steps to take all appropriate measures, including legislation, to modify or abolish, existing laws, regulations, customs and practices which constitute discrimination against women'. However Swaziland has hardly adhered to its commitments to this end. Government has failed to facilitate any reforms to laws that discriminate against women. By allowing discriminatory laws to remain in operation and to continue to be profoundly discriminatory against women, Swaziland is in effect violating both its own Constitution and its international commitments. The Constitution as has been shown reflects some of these guarantees and protections to enhance the legal status of women. However these still need to be translated into policy and legislative frameworks and into implementation plans to practically enhance women's legal status. The slow progress in attaining the translation and alignment of existing laws with either the Constitution or the international agreements leaves women with no remedy to uplift their legal position and once again leaves women with no option but to approach the courts to enforce their rights as protected in the Constitution.

The next segment of the article will examine the *Aphane* case in which the applicant approached the courts for the enforcement of her rights as protected in the Constitution.

3 The *Aphane* case

3.1 *Background to the case*

The applicant, Mary-Joyce Aphane and Michael Mandla Zulu were married in community of property. They entered into a deed of sale for the purchase of certain immovable property in or around Mbabane city. The deed of sale reflected both their names as purchasers. Naturally they wished to have the property registered in their joint names. However they were advised that the joint registration of the said property in both their names was legally impossible because they were married in community of property. Effectively the property would have to be registered in the

⁵⁹'Towards a common future'. See www.sadc.int/index/browse/page/52.

⁶⁰Swaziland is one of the eleven member countries to this regional body.

⁶¹Article 17(3).

sole name of Michael Mandla Zulu per the law requirements. This was in compliance particularly with section 16(3) of the Deed's Registry Act.⁶²

The matter was initially heard in the High Court where Aphane (the plaintiff) prayed the court to grant her an order that would effectively allow her the leeway to register jointly immovable property in her name and that of her husband, Michael Mandla Zulu, to whom she is married under civil law and in community of property.⁶³ The plaintiff challenged in the main the discriminatory nature of section 16(3) of the Deed's Registry Act and regulations 7 and 9 of the Deed's Registry's regulations on the basis of gender and marital status and therefore prayed for these to be struck down. Reference to the section is important and it provides:

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

While observing that these laws disadvantage all women married in community of property by fostering gender inequality, the plaintiff also highlighted how these provisions are inconsistent with sections 20 and 28 as well as the Preamble to the Constitution of Swaziland.⁶⁴ As previously observed, section 20 of the Constitution makes everyone equal before the law and section 28 awards women equal rights to men in political, economic and social activities.⁶⁵

The plaintiff therefore sought an order declaring the relevant sections of the Deed's Registry Act unconstitutional. On the other hand, the government argued that there was nothing in section 16(3) which prohibits immovable property from being registered in the joint names of two spouses who are married to each other in community of property, but that the prohibition is only confined to the registration of real rights in the *sole* name of a woman married in community of property.⁶⁶

The High Court found that the constitutional property rights of women of the applicant's legal status were violated by the legislative provisions as they appear in the Deed's Registry Act. To remedy such a constitutional violation the High Court judge proceeded to rule for striking out and reading in⁶⁷ some words into the legislation and thus immediately achieve the alignment of the legislation with the Constitution's provisions. The judge held that by virtue of section 151(2)(a) of the Constitution, the High Court had jurisdiction to enforce fundamental rights and freedoms guaranteed by the Constitution. The Judge in essence re-wrote the law. She cut out the words 'not' and 'save' and replaced 'save' with the word 'even'. The paragraph now read:

⁶²Act 37 of 1968.

⁶³See 2.2 above.

⁶⁴Paragraph 6.

⁶⁵See section 2.2 in this paper.

⁶⁶Paragraph 6. The respondents saw this position fortified by s 44(1) of the Deed's Registry Act.

⁶⁷Paragraph 32.

... immovable property, bonds and other real rights shall be transferred or ceded to, or registered in the name of, a woman married in community of property, *even* where such property bonds or real rights are by law or by a condition of a bequest or donation excluded from the community.⁶⁸

The government of Swaziland lodged an appeal to the Supreme Court and the Supreme Court overturned the decision of the High Court in part. The court unanimously agreed with the decision of the court *a quo* in finding that section 16(3) of the Deed's Registry Act was unconstitutional and has to be brought into conformity with the Constitution because it is counter to sections 20 and 28 of the Constitution.⁶⁹ However, the contentious issue to be determined on appeal was the choice of remedy following the finding of a breach of the constitutional provisions by the particular legislation.⁷⁰

3.2 *Analysis*

For the enhancement of women's legal status in Swaziland, the Supreme Court's judgment in *Aphane* was a major drawback. The court's interpretation of the appropriate remedy for a constitutional breach of women's rights in the context of an unconstitutional law meant a longer wait before women will realise the dream of being treated equally with men by the country's laws. The case illustrates the court's insensitivity towards the prejudicial legal status of women as it ignored important social considerations. It has been suggested that the lack of political will to meaningfully engage in reform that will align all pre-existing legislation with the Constitution may have influenced judicial decisions as regards the determination of an 'effective' remedy in court decisions such as *Aphane*. The decision of the High Court likewise brought out an important consideration of justice when the judge remarked upon the 'lack of political will' that characterises the governance and, as a result, the social and political circumstances in the country.⁷¹

3.2.1 The choice of remedy

The issue of the appropriateness of the remedy meted by the court *a quo* is the issue that became central to the decision and it has relevance when evaluating the impact of the extent to which courts can develop laws and align them with the Constitution. The alignment of laws affecting women's legal status is a matter of urgent concern for women in Swaziland as evidenced *inter alia* by cases such as the respondent's.

Whilst the Supreme Court was in agreement with the High Court's finding that the legislative provisions in question infringed women's constitutional right to

⁶⁸Paragraph 31 (emphasis added).

⁶⁹Paragraphs 13-14.

⁷⁰Paragraph 27 page 19 of the Supreme Court case.

⁷¹Paragraph 16.

equality, the Supreme Court stood against granting the remedy ordered by the High Court, namely, to address the impugned statute. Instead, the Court observed that 'the controversy in this case is about the appropriateness or otherwise of the order made by the court a quo to correct the unconstitutional elements contained in Section 16(3) of the Deed's Registry Act'.⁷²

The appeal, therefore, was directed at the appropriateness of the choice of remedy following the finding that the legislation breached the Constitution.⁷³

Normally, constitutions will regulate the choice of remedies available when a constitutional provision is breached.⁷⁴ Section 35(2)⁷⁵ of Swaziland's Constitution attempts to provide for an equivalent to address how the court can enforce the fundamental rights enshrined therein. Section 35(2) provides:

- (2) ... The High Court shall have original jurisdiction –
 (b) to determine any question which is referred to it in pursuance of subsection (3); and 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.

An interpretation of this subsection, read together with section 2(1) of the Constitution providing for the supremacy of the Constitution, clearly establishes the powers of the court to come up with a remedy for constitutional invalidity. However the section is not specific about the available options and does not offer a list of remedies available to the court to apply as relief when a breach of provisions providing for fundamental rights is at issue. Counsel for the applicant argued that as far as Swaziland's constitutional position is concerned it is comparable to that provided for under the Canadian Charter of Rights and Freedoms ('the Charter') under the Canadian Constitution.⁷⁶

The court's powers to address the infringement are not in doubt. What is to be ascertained, though, is the appropriate remedy that should be meted out by the court in the circumstances. In the absence of clear constitutional provisions dedicated to remedies for a violation of those provisions, counsel for the appellant argued that the court should adopt the stance taken by the court in the Canadian case of *Scharter v Canada*⁷⁷ to ascertain the appropriate remedy.

⁷²Paragraph 1 of the Supreme Court decision.

⁷³Paragraph 27 page 19 of the Supreme Court decision.

⁷⁴See, eg, s 38 of South Africa's 1996 Constitution which governs remedies in case of infringement of the Bill of Rights.

⁷⁵Subsection (2) provides: 'The High Court shall have original jurisdiction – (a) To hear and determine any application made in pursuance of subsection (1); to determine any question which is referred to it in pursuance of subsection (3); and 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'.

⁷⁶Paragraph 28 of the Supreme Court decision.

⁷⁷Paragraph 30 and the case cited in full at para 35 as *Scharter v Canada* (1992) 93 DLR (4th) 1.

According to the decision in *Scharter v Canada*, the remedies that the court can consider include those of 'severance' and 'reading in' to comply with the wording of section 35(2)(b) of the Swaziland Constitution. Section 35(2)(b) refers to what the court 'considers appropriate' in its consideration of the remedies it can adopt and apply to a case. The judge in the court *a quo* had applied the remedies of 'severance' and 'reading in' which the Supreme Court of Swaziland later found to be an inappropriate order.

3.2.2 Appropriate relief: 'Reading in' versus the principle of separation of powers doctrine

It is an established legal requirement that courts are to make any order that is just and equitable so as to regulate the impact of a declaration of invalidity occasioned by the constitutional inconsistency of legislation.⁷⁸

In the South African courts the remedies of 'severance' and 'reading in' have been debated quite extensively. Where a law is to be declared invalid to the extent of its inconsistency with the Constitution, the courts may declare as invalid only those parts of a law which are unconstitutional. This may entail striking down a particular section or subsection of a law and leaving the rest of the law intact.⁷⁹ In *Coetzee v Government of the Republic of South Africa*⁸⁰ the test or approach laid down by Justice Kriegler for severance was said to be twofold, namely, that it must be possible to sever the bad from the good, and the remainder must still give effect to the purpose of the law.⁸¹ The first objective is said to be achieved by the actual striking out of words and phrases from a legislative provision and notionally leaving the language of the provisions of the legislation intact, but subjecting it to a condition for proper application.

The remedy 'of reading in' is often understood to be a corollary to the remedy of severance. Whilst severance will be employed to remove the offending parts of a statutory provision, 'reading in' permits the adding of words to the statutory provision to cure it. In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*⁸² guidelines were outlined by the court for employing 'reading in' as a remedy to cure a constitutional defect in legislation. The court held that the result produced by 'reading in' must, in the first instance, be consistent with the Constitution. Secondly, it must not be at odds with the legislative framework of the law in question and thirdly, whilst granting the remedy, it should not result in unsupportable budgetary constraints.⁸³

⁷⁸Currie and De Waal *The bill of rights handbook* (2005) 199.

⁷⁹*Id* 200.

⁸⁰1995 4 SA 631 (CC).

⁸¹Currie and De Waal (n 78) 201.

⁸²1999 3 BCLR 280 (C).

⁸³Paragraph 54 of the Supreme Court decision.

In the case under discussion the application of these guidelines was not the important consideration for the court's decision. The court went on to emphasise that as much as these remedies were available to choose from, the principles of the separation of powers doctrine⁸⁴ weighed heavily against the court to employ these remedies.

Whilst making a determination of the appropriate remedy, courts have been warned several times of being sensitive and heed to the separation of powers doctrine.⁸⁵ It has been held that this doctrine dictates that the power of making laws is the primary domain of the legislature and that the role of the courts is to interpret the laws, and the two roles are to be kept separate. Courts are therefore to refrain from usurping the law-making powers vested in the legislature.⁸⁶

Quoting from a previous appeal court judgment⁸⁷ the judge observed that as a constitutional monarchical democratic state, the separation of powers doctrine also forms the cornerstone of Swaziland's constitutional order⁸⁸ that realises the function of the legislature as the law-making organ of the state.

It is common practice for the courts to be perceived at a certain level as playing an important role in law-making and that, and as much as 'judge made laws' are permissible, such 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.⁸⁹ Again, quoting Lamer CJ, the judge observed that 'courts should certainly go as far as required to protect rights, but no further. Interference with legislative purpose should be minimized ...'. In the court *a quo*, the judge of the High Court was found to have realised this important role of Parliament in resolving the problem of constitutional infringement.⁹⁰ The Supreme Court concluded that whilst realising the important role of Parliament in law-making, the judge in the court *a quo* still went on to apply the remedies of 'severance' and 'reading in'. The remedies of the court *a quo* were found to be inappropriate in the circumstances of the case.

⁸⁴Currie and De Waal (n 78) 18.

⁸⁵Note that in *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* the court referred to this as the 'the deference a court owes to the legislators when devising a constitutional remedy' and went on to explain 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' para 66.

⁸⁶See Dersso 'The role of courts in the development of the common law under s 39(2): *Masiya v Director of Public Prosecutions Pretoria (The State) and Another*' (2007) 23 SAJHR 373 at 376.

⁸⁷*Prime Minister of Swaziland and six others v MPD Marketing and Supplies (Pty) Ltd* Appeal Case No 18/2007. See para 38 of the Supreme Court decision.

⁸⁸Paragraph 38 of the Supreme Court decision.

⁸⁹Paragraph 39 of the Supreme Court decision.

⁹⁰Paragraph 40 quoting the High Court judgment (para 12), and also para 46 quoting the High Court judgment (para 32).

3.2.2 Suspension of the order of invalidity: The appropriate remedy

The Supreme Court *in casu* decided, on the basis of preventing the Court's legislative encroachment and in giving effect to the doctrine of separation of powers, to disallow the remedy of 'reading in' as applied in the High Court. Instead, the Court went on to grant an order for the applicants and allowed the order of invalidity to be suspended for a period of a year to allow the legislative arm of government to appropriately address the invalidity of the statute. This then prompts an enquiry as to the circumstances under which a court will grant an order of suspension of an order of invalidity.

In *Minister of Justice v Ntuli*⁹¹ the South African Constitutional Court pointed out that it is important that all relevant information is placed before the court when it is asked to suspend an order of invalidity and that the information must relate to the consequences of an order of invalidity.⁹² In *Mistry v Interim National Medical and Dental Council of South Africa*,⁹³ the Constitutional Court was even more specific in outlining the type of information to be brought before the Court by a party seeking an order of suspension of invalidity.⁹⁴ Whilst all the other types of information were given and addressed by the appellants in the case under discussion, there was nothing mentioned to alert the court to any impending Bill on the specific legislation in issue aimed at aligning its provisions with the Constitution.

The decision of the Supreme Court has taken the agenda of advancing women's status a step backwards.⁹⁵ As much as the decision to adopt the remedy of suspension to purge the constitutional inconsistency in the statute in question seems, legally speaking, to be well reasoned, it still does not detract from the evaluation that the Supreme Court's stance is contrary to the urgent need for women to have equal status with men before the law. In practice, the decision hinders women and can be held to promote the prevailing spirit of relegating the legal status of women to a lesser position on the country's governance agenda.

4 A 'lack of political will'

Although it had no bearing on the decision of the Supreme Court, an issue raised by the applicant's attorneys could nevertheless have bearing on the future of women's rights in Swaziland. The applicant's attorneys argued that there must be

⁹¹1996 1 SA 1207 (CC) discussed in Currie and De Waal (n 78) 210.

⁹²Currie and De Waal (n 78) 211.

⁹³1998 4 SA 1127 (CC).

⁹⁴Currie and De Waal (n 78) 211 quoting para 37 of the *Mistry* decision.

⁹⁵Whereas the decision of the High Court immediately allowed women married in community of property to register property in their own name, the Supreme Court ordered that the women must wait for two years to do so.

a compelling 'interest of good governance' to justify maintaining a piece of legislation in force even though it has been rendered invalid pending parliamentary attention.⁹⁶

On finding the provisions of section 16(3) unconstitutional, the judge in the court *a quo* held that as much as legislative powers were beyond the court's jurisdiction to update the discriminatory law, due to government's lack of political will to effect any meaningful harmonisation of the country's laws to bring them in line with the Constitution,⁹⁷ she went on to effect practical changes to the law to align it with the Constitution. Although the Supreme Court found that the High Court acted against the principles of the doctrine of separation of powers, the consideration of the judge is nonetheless an important one, especially as it is likely to impact on the future of women's rights, including property rights, in Swaziland. The realisation of women's rights in full in the country will depend to a large extent on the prompt reform of laws that impact on women, both under the received common law as updated by statute and under the customary laws and practices of the country with a view to aligning them with both the constitutional values and the rights enshrined in the Bill of Rights. Positive action by both the government and the legislature are required to realise this goal. However, it is submitted that due to the lack of political will in the desired direction by those responsible for the country's governance, slow progress is anticipated.

The Supreme Court itself in this case can be interpreted as having cast some doubt on Parliament's commitment to legislative reform. Whilst giving the order to suspend the invalidity of the statute in question, the court cautiously warns of and anticipates the likely failure of Parliament to 'remedy the unconstitutionality in the section declared to be inconsistent with the constitution...' In that event the court allows that '... the appellant is granted leave to approach the court on the present record ... to seek such further order as the circumstances may require'.⁹⁸ The question that can be raised is what response or order can be expected this Court if Parliament fails to comply with the present order. The question may be posed as to whether, in the light of its stance in *Aphane*, the Supreme Court will breach the principle of the separation of powers or order another remedy?⁹⁹

The Constitution enjoins Parliament to enact and revise legislation with a view to aligning it with the Constitution.¹⁰⁰ However the Constitution is lacking because it fails to provide for a Law Reform Commission. Such a commission is

⁹⁶Paragraph 10 of the High Court decision.

⁹⁷The judge actually criticised the Swazi government for not moving faster to embark on aggressive legal reforms, especially those relating to women who have been marginalised over the years in many areas of the law (para 34).

⁹⁸Paragraph 70 of the Supreme Court decision.

⁹⁹According to Currie and De Waal (n 78) 202, the tribute that is to be paid to the principle of the doctrine of separation of powers by the courts is the recognition of the fact that sometimes Parliament may not do anything to reform laws contrary to constitutional provisions.

¹⁰⁰Section 106(2) of the Constitution Act, 2005.

necessary for Parliament competently to carry out the legislative agenda set for it in the Constitution.¹⁰¹ Since 2006 when the Constitution came into operation¹⁰² the legislature has not amended or repealed a single law in an effort to make these laws comply with the constitutional provisions. It has been noted that 'for now, review of laws is given to the officers at the Attorney General's chambers who are already overwhelmed by too much work'.¹⁰³ Thus, despite the existence of laws that discriminate against women, there is very little effort made to harmonise those laws and bring them into line with the provisions of the new Constitution. Moreover, although in practice the Attorney General's officers did review a number of outdated laws they have not prioritised the review of laws impacting upon women's issues. The lack of political will evidenced by the legislature's non-commitment to meaningful constitutional reform, especially as it relates to law reform impacting on women's legal status is further endorsed by the deliberate non-compliance with the constitutional mandate that government ensure adequate representation of women in Parliament.¹⁰⁴ The Constitution provides that at least eight of the King's nominees and five of the House of Assembly's nominees to the Senate be women.¹⁰⁵ In the Kingdom's last general elections, the King violated the constitutional mandate by appointing seven female senators, rather than the eight required. Thus the agenda for legal reform, especially as regards laws that affect women's status, is further compromised because women's representatives in the legislative branch of the state cannot effectively push for such reform.

The passive stance of the legislature in deciding and actively engaging in a meaningful reform process of laws has to some extent left the responsibility of deciding on the constitutionality of laws to judicial review. As much as it is desirable that constitutionalism ensure the existence of an efficient and effective mechanism for controlling and compelling compliance with the letter and spirit of the Constitution,¹⁰⁶ the function of the courts must be limited to just that. The Constitution of Swaziland does not provide for the creation of a specific Constitutional Court dedicated to deliberating on constitutional matters in the country as seen in other countries.¹⁰⁷ However, it provides for the High Court and

¹⁰¹This is in spite of the recommendation to this effect made by a team of experts on human rights issues whilst reviewing the Draft Constitution. See 'Swaziland striving for democratic governance' IBA Report (an analysis of the draft Swaziland Constitution, August 2003 available at [http://www.ibanet.org/human rights/fact finding missions](http://www.ibanet.org/human%20rights/fact%20finding%20missions) (accessed on 2006-11-08)) 26.

¹⁰²In January 2006.

¹⁰³An interview with a woman activist. See Interpress service news agency; 'Swaziland: Government in Court over Property rights' at <http://ipsnews.net/africa> (accessed on 2010-05-26).

¹⁰⁴Women are most likely to advocate for the reform of laws affecting their status in Parliament.

¹⁰⁵See ss 86, 94(2), 95(3)(a) of the Constitution.

¹⁰⁶See Fombad (n 52) 108.

¹⁰⁷For instance, in the context of s 166 of South Africa's Constitution which provides for such a court.

the Supreme Court by way of appeal,¹⁰⁸ to carry out the function of judicial review of constitutional matters.¹⁰⁹ Actually, section 151(2)(a) and (b) which states that the High Court shall have power to 'enforce the fundamental human rights and freedoms guaranteed by this Constitution...' is commendable for confirming the justiciable nature of the fundamental rights enshrined therein. Whilst determining such rights, the court naturally should be guided by section 2 which provides for the supremacy of the Constitution. As pointed out above, the property rights of women are often infringed by rules of Swazi law and custom which, for instance, serves to subordinate adult women first to their parents and upon marriage to their husbands. The Constitution empowers women for example to open bank accounts, obtain passports, and take jobs without the permission of a male relative; however, these constitutional rights are often in conflict with customary law, which classifies women as minors. Also, the Constitution provides for equal access to land; however, customary law forbids women from registering property in their own names. These customary expectations can be the subject of judicial review in the absence of legislative intervention to rectify them and the courts can find for constitutional infringement. However, it is not quite clear how far the Constitution extends to matters of Swazi law and custom and, as such, to rulings by the courts for constitutional validity.¹¹⁰

Even in cases where the courts would have jurisdiction to pronounce on the constitutional validity of some matters of Swazi law and custom, it is still questionable how far the decisions of the courts would be adhered to by the governance structures, including the chiefs who administer Swazi law and custom in the rural parts of the country. Such concern stems from the era in Swazi history when the rule of law was threatened by, amongst other factors, the disregard of court decisions by the executive arm of government. Prison officials, for example, refused to release suspects charged with offences that fell under the non-bailable order despite an Appeal Court¹¹¹ ruling that the non-bailable law was invalid.¹¹² Moreover, in spite of the court's ruling allowing two chiefs and their followers to return to their rural homes after they had been forced out of their communities previously, the government authorities prevented them from returning. Consequently, two rulings by the Court of Appeal¹¹³ confirming the decision of lower courts

¹⁰⁸See s 146 of the Constitution.

¹⁰⁹See s 151(2)(a) and (b).

¹¹⁰Neither the Supreme Court nor the High Court, which interprets the Constitution, has jurisdiction in matters concerning the office of the King or Queen Mother, the regency, chieftaincies, the Swazi National Council, or the traditional regiments system, all of which were governed by traditional law and custom

¹¹¹*Gwebu v Rex* (2002) AHRLR 229 (SWCA 2002).

¹¹²*Commissioner of Police v Madeli Fakudze* Civil Case 38/2002 (HC) (Unreported).

¹¹³*Minister of Home Affairs v Madeli Fakudze* (n 112); *Gwebu* (n 111) and *Bhembe v Rex* (n 113). In the former case, the Court of Appeal upheld a court ruling that the Commissioner of Police and another senior officer were in contempt of court and should serve a 30-day prison sentence. The police had repeatedly obstructed Madeli Fakudze and others from returning to their homes in

prompted the Prime Minister to openly declare that government would not abide by the court judgments because 'it is Government's belief that the judges of the Court of Appeal have been influenced by forces outside our system and they have not acted independently'.¹¹⁴ Such disregard for the rule of law culminated in the resignation en masse of judges of the then appeal court.¹¹⁵

5 Conclusion

The subordinate legal status of women persists in Swaziland despite the country's commitments under both international law and the Constitution, both of which are meant to secure equality for women. The Constitution of Swaziland reflects its obligation to guarantee women's equal rights under both national laws and under customary practices, thus eliminating cultural practices and beliefs as well as material conditions that undermine that equality. However, as it has been observed, '... despite the fact that on the face of it, the constitution holds all of the provisions needed for the protection of a woman's right to own property: the right to equality before the law, the protection of the property rights of spouses, and the right for the high court to enforce the fundamental human rights contained in the constitution' have not been fully realised; several pieces of legislation are still inconsistent with the Constitution,¹¹⁶ such as the Deed's Registry Act which prohibits women married in community of property from registering property in their own right without the assistance of their husbands. Moreover, the rights encapsulated in the Constitution, such as those provided for under sections 20 and 28, will be and often are in opposition with the principles of Swazi law and custom, including those that regulate property rights for women. It is not easy to map out the path for the resolution of this conflict. It is likely that the insistence on such human rights norms as the unconditional right to equality will be resisted by the custodians of tradition, who interpret gender equality as a threat to the very foundations of Swazi society and the values embodied in Swazi law and custom.

In the recent past, South Africa has undergone a transition to democracy that has resulted in significant gains for women in terms of their political and legal status.¹¹⁷ Thus South African courts¹¹⁸ have actively scrutinised laws and

Macetjeni, despite a Court of Appeal ruling in June that they should be allowed to return. Madeli Fakudze and other members of his community had been evicted from their homes in 2000 by the security forces. In the latter case the Court of Appeal ruled that a King's Decree under which pre-trial prisoners were denied the right to apply for bail was invalid.

¹¹⁴ *Swaziland: Fact finding mission to the Kingdom of Swaziland* ICJ/CIJL 2003-06-10 at 14-15.

¹¹⁵ *Id* 15.

¹¹⁶ See (n 12).

¹¹⁷ Albertyn 'Using rights and the law to reduce women's vulnerability to HIV/AIDS' *Gender Research Project*, Centre for Applied Legal Studies, Wits 77.

¹¹⁸ Legal Resources Centre (n 51) 23. The High Courts, Supreme Court of Appeal and the Constitutional Court have the power to enquire into the constitutional validity of any law, including customary law.

customary practices for their compliance with the Constitution, especially those that countenance practices that conflict with constitutional guarantees of fundamental rights¹¹⁹ for women. Several cases have been decided in these courts where they have limited the extent to which customary law adversely affects women's ability to fully exercise and enjoy their legal rights.¹²⁰ In relation to property rights, this was apparent in *Mthembu v Letsela*,¹²¹ as well as in *Bhe v The Magistrate, Khayelitsha*.¹²² In the latter case the Constitutional Court went further to provide interim relief until the legislative arm of government corrected the defect in the customary law. Unlike the courts in South Africa, Swaziland's courts have not provided any relief for applicants whilst waiting for Parliament to correct an unconstitutional law upon a declaration of constitutional invalidity.

Meanwhile, the constitutionally mandated legislative arm of the Swaziland government meant to spearhead legal reforms to align laws with the Constitution is clearly not committed to carrying out this mandate. The non-repeal of any law contrary to the Constitution even after five years into the constitutional enactment is discouraging evidence of this reality. As a result, women like the applicant in the High Court case of *Aphane*, have resorted to speeding up the law reform process in a piecemeal fashion by challenging in court some of the discriminatory laws perpetuating their prejudiced status. This has, unfortunately, meant a slow and expensive reform process. Much as the court finally granted the applicant (and women in a similar position) the relief she sought, such relief was conditional upon legislative reform. The order had to be granted in terms of the law pending legislative intervention for the full realisation of her rights.

As much as the courts have made the order to reform the offending laws, it is still questionable how far government is committed to ensure the practical realisation and enforcement of this process. Several examples were given in this article to support the contention that such commitment is lacking, especially as regards implementing the reforms that will enhance the legal status of women. These include, *inter alia*, deliberate non-compliance with quotas for women's representation in law-making, the threat to the rule of law, the history of non-compliance and the doubtful future compliance by government of court orders, and so on. These are reasons to fear a negative outcome for the future protection of women's rights, including those that relate to property rights in Swaziland. It is foreseen that progress towards the attainment or the enhancement of women's

¹¹⁹See (n 50) 22.

¹²⁰*Id* 24.

¹²¹2000 3 SA 867 (SCA) where unfortunately the Supreme Court of Appeal upheld the decision of the Transvaal Provincial Division and denied the appellant's application for an order declaring the customary rule of primogeniture invalid on the ground of being inconsistent with the Constitution.

¹²²2005 1 SA 580 (CC); the Constitutional Court confirmed the decision of the High Court to refuse to follow the *Mthembu* reasoning and instead declared the law of primogeniture unconstitutional and that Parliament should correct the legislative defects of both the Black Administration Act 38 of 1927 and the Intestate Succession Act 81 of 1987.

legal rights in Swaziland will be slow, especially where the reform of the country's formal laws is involved. It is even doubtful whether any progress will be shown with respect to property rights governed by the customary laws that regulate the way of life for the majority of Swazi women.