

**IN THE HIGH COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 1403/16**

In the matter between:-

**MAKHOSAZANE EUNICE SACOLO**

**(NEE DLAMINI)**

**1<sup>st</sup> Applicant**

**WOMEN & LAW SOUTHERN**

**AFRICA-SWAZILAND**

**2<sup>nd</sup> Applicant**

And

**JUKHI JUSTICE SACOLO**

**1<sup>st</sup> Respondent**

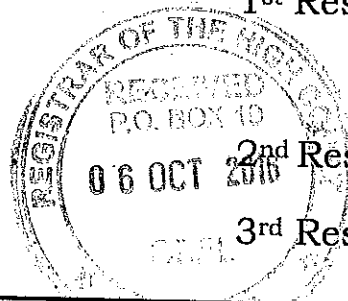
**MINISTRY OF JUSTICE AND**

**CONSTITUTIONAL AFFAIRS**

**ATTORNEY GENERAL**

**2<sup>nd</sup> Respondent**

**3<sup>rd</sup> Respondent**



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**APPLICANTS' HEADS OF ARGUMENTS**

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1.

**Introduction**

1.1 This is an application where the constitutionality of the common law marital power together with sections 24 and 25 of the Marriage Act of 1964 (the Marriage Act) is being challenged. The desired outcome by the applicants is to have the common law marital power abolished. It is also applicants' desire to have sections 24 and 25 of the Marriage Act declared unconstitutional and invalid. It is 1<sup>st</sup> applicant's further desire that she be authorized to administer her marital assets.

- 1.2 The application is only opposed by the 1<sup>st</sup> respondent and the other respondents have not filed any answering papers nor did they show any interest to participate in the matter.
- 1.3 In these Heads of Argument it is first dealt with the legal standing of the applicants and the relevant background facts giving rise to this application.
- 1.4 Thereafter the basis of 1<sup>st</sup> respondent opposition is dealt with and the principles applicable thereat.
- 1.5 In conclusion the principles of law applicable are applied to the facts of the present matter and also examine the positions of other jurisdictions regarding similar matters.

## 2.

### **Standing of the Applicants**

- 2.1 The 1<sup>st</sup> applicant is a female Swazi citizen and married in terms of Civil Rites to the 1<sup>st</sup> respondent. She has the duty at all times to uphold and defend the Constitution Act 1 of 2005<sup>1</sup>. She further alleges that provisions of chapter III of the Constitution are being contravened in relation to her<sup>2</sup>. She has the necessary capacity to bring these proceedings,

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<sup>1</sup> Section 2 (2) of the Constitution of the Kingdom of Swaziland Act 1 of 2005.

<sup>2</sup> See Section 35(1) of The Constitution, *supra*

2.2 The 2<sup>nd</sup> applicant is a legal *persona* and duly registered in terms of the company laws of Swaziland. It has the power to sue and be sued in its name. It is therefore entitled to approach this court in terms of section 35 of The Constitution<sup>3</sup>.

3.

**Factual Background**

3.1 The 1<sup>st</sup> applicant is a married woman in terms of civil rites. Even though the 1<sup>st</sup> respondent disputes this it shall be dealt with later on in this heads of argument. The gist of the 1<sup>st</sup> applicants complain is that upon marriage to 1<sup>st</sup> respondent they acquired property which included livestock. As the years went-by, on or about 2011 the 1<sup>st</sup> respondent started changing his behavior and he eventually deserted the marital homestead. Upon 1<sup>st</sup> respondent deserting the marital homestead life became tough for 1<sup>st</sup> applicant as 1<sup>st</sup> respondent stopped discharging his obligations as a parent and husband. The 1<sup>st</sup> applicant could not do anything with the marital assets as she is subjected to the marital power of the 1<sup>st</sup> respondent. The 1<sup>st</sup> applicant cannot do anything with the marital assets even to date, despite 1<sup>st</sup> respondent having deserted her. This is despite the fact that some of the livestock can assist in the

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<sup>3</sup> See Swaziland Coalition of Concerned Civic Organization Trust V. Elections and Boundaries Commission (26/08) SZSC 26

maintenance of the homestead and the upkeep of the children if they were to be sold,

3.2 Only the 1<sup>st</sup> respondent is opposing the application. The main issue canvassed by 1<sup>st</sup> respondent is that he and 1<sup>st</sup> applicant are married in terms of Swazi Law and Custom and therefore the common law marital power does not affect her and the Marriage Act does not apply to her.

3.2.1 A civil rites marriage certificate has been annexed by 1<sup>st</sup> applicant to her affidavit. The certificate shows that it was registered on the 19<sup>th</sup> August 2000. It appears that a Marriage Officer by the name of Hlatshwayo Norman G. officiated the marriage.

3.2.2 The said Marriage Officer has made a statement under oath to say that he never officiated the marriage. He explains that he was requested by 1<sup>st</sup> applicant to fabricate the certificate. Moreover the 1<sup>st</sup> respondent has denied any civil wedding ever being conducted.

3.2.3 To buttress the version of the 1<sup>st</sup> respondent together with that of the Marriage Officer, 1<sup>st</sup> applicant has annexed photographs of her and 1<sup>st</sup> respondent's wedding ceremony. A marriage officer appears thereat officiating the marriage. That photographic evidence puts beyond any doubt that 1<sup>st</sup> respondent and the marriage officer are deceitful and lying under oath.

### **Summary of the Argument**

4.1 *"The marital power and guardianship of the husband is the right of the husband to rule over and defend the person of his wife, and to administer her good in such a way as to dispose of them at his own will, or at any rate to prevent his wife from dealing with them except with his knowledge and consent"*<sup>4</sup>. In Swaziland, the marital power has recently been restricted, but not abolished<sup>5</sup>

4.2 By denying married woman the right to contract, administer property, and sue or be sued in court, common law marital power violates the right of married woman under the Constitution to equality before the law with men, equal treatment with men, and the right to dignity. Common law marital power also violate the right of married woman to equality before the law and equal treatment with men under the ICCPR, CEDAW, the African Charter, and the Protocol on the Rights of Women. This court possesses a constitutional duty to remedy violations of the rights of married women. This court should therefore remove marital power from the common law and so follow the example of all the Southern African nations that have already done so.

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<sup>4</sup> Wessels, J.W. (1908). History of Roman-Dutch Law. Grahamstown: Africa Book Company pp 450-3 Retrieved 25 January 2012.

<sup>5</sup> Sihlongonyane V. Sihlongonyane (470/2013) [2013] SZHC 144.

4.3 Section 24 and 25 of the Marriage Act discriminate against married women on the basis of race because it imposes on African spouses the customary consequences of marriage while granting to non-African spouses the common law consequences of marriage. This violates the right of married women to be free from racial discrimination under the Constitution and the international human right treaties ICERD, ICCPR, and the African Charter. Additionally, were marital power to be removed from the common law, the Marriage Act would still subject African women to customary marital power, perpetuating the violation of their rights. This necessitates this court striking out the offending part of Section 24 and all of 25 of the Marriage Act in addition to removing marital power from the common law.

5.

5.1 **COMMON LAW MARITAL POWER VIOLATES THE CONSTITUTIONAL RIGHT TO EQUALITY BEFORE THE LAW AND EQUAL TREATMENT WITH MEN BY DENYING WIVES, BUT NOT HUSBANDS OF THEIR LEGAL MAJORITY STATUS.**

(a) **Subordinating a Wife to Her Husband's Marital Power Violates Her Right to Equality as Guaranteed by the Constitution and Upheld by Swazi Jurisprudence.**

5.2 Marital power discriminates against women based on gender by reducing the legal capacity of married women but not married men to that of a minor, in violation of Constitution's Section 20's right to equality before the law. Section 20 guarantees, "[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life," irrespective of gender.<sup>6</sup> Section 20 defines the meaning of discrimination as to "give different treatment to different persons attributable only or mainly to their respective descriptions by gender...."<sup>7</sup> Common law Marital Power strips married women but not married men of their *locus standi*, ability to independently contract, and their ability to administer property. By depriving wives of their full legal status, but not husbands, marital power illegally strips married women of their right to equality based solely on their gender.

5.3 The Constitutional framers emphasized the fundamental right to equality in Section 28, which further guarantees that "[w]omen have the right to equal treatment with men."<sup>8</sup> Constitution's Section 38(a) even prevents the right to equality from ever being derogated from, even in a state of emergency.<sup>9</sup> Swaziland has further fortified the right to

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<sup>6</sup> SWAZ. CONST., 2005 § 20(1-2).

<sup>7</sup> *Id.* at § 20(3).

<sup>8</sup> SWAZ. CONST., 2005 § 28(1).

<sup>9</sup> *Id.* at § 38(a) ("Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights and freedoms; (a) life, equality before the law...").

equality by ratifying regional and international human rights treaties that guarantee equality regardless of gender, and by upholding the right in its own jurisprudence.

5.1.3 This Court should follow the precedent already set by Swaziland's Supreme Court and High Court in upholding the right to equality guaranteed by Sections 20 and 28. This Court is bound by the Supreme Court's precedent set in *Attorney General v. Doo Aphane*<sup>10</sup>, where the Court declared section 16(3) of the Deeds Registry Act invalid because it was "inconsistent with Sections 20 and 28 of the Constitution."<sup>11</sup> The Act prohibited women married in community of property from registering immovable property in their own names.<sup>12</sup> By allowing husbands to register property in their name, but not wives, the Act unfairly discriminated based on gender, in violation of the equality provisions of Sections 20 and 28.<sup>13</sup> The Court pointed out that practices and laws that discriminate against women "have deprived women of the rights which were freely available to men, and kept women in a position of inferiority and inequality...."<sup>14</sup> The Court agreed with Doo Aphane's claim that "her status as wife should

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<sup>10</sup> (12/09) SZSC 32

<sup>11</sup> *Attorney General v. Doo Aphane*, (12/09) SZSC 32 (28 May 2010) at ¶ 70.

<sup>12</sup> Deeds Registry Act, 1968, §16(3) (Section 16(3) read, "Immovable property, bonds or other real rights shall not be transferred or ceded to, or registered in the name of, a woman married in community of property....").

<sup>13</sup> *Doo Aphane*, (12/09) SZSC 32 at ¶ 70.

<sup>14</sup> *Id.* at ¶ 4.



*not...detract from the rights, privileges and standings enjoyed by persons generally.*"<sup>15</sup> But that is exactly what is happening to the married women of Swaziland: Because of marital power, their status as wives detracts from their rights, privileges and standing.

5.4 The discriminatory statute in *Doo Aphane* and the subjugation of wives under common law marital power both stem from the same inequitable notion of women's inferiority to men. While the *Doo Aphane* decision upheld a woman's right to register certain immovable property pursuant to the Act, it did not address common law marital power that more broadly prevents women from administering property.<sup>16</sup> Common law marital power continues to prohibit a wife from administering moveable and immoveable property, and gives that right to her husband, thereby denying her of her right to equality before the law and equal treatment with men.

5.5 This Court should follow its own precedent in holding that marital power violates the equality provisions of the constitution. In *Sihlongonyane v. Sihlongonyane*<sup>17</sup>, this honorable Court held that depriving married women of their *locus standi* through their husband's marital power was

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<sup>15</sup> *Id.* at ¶ 7.

<sup>16</sup> The issue of administration of property was not before the Court.

<sup>17</sup> (470/2013A) [2013] SZHC 144 (July 18, 2013)

“clearly inconsistent with the provisions of Sections 20 and 28 of our Constitution.” and therefore invalid.<sup>18</sup> In an effort to stop her husband from squandering jointly owned marital assets, a wife married in community of property under the Marriage Act brought suit to have the court grant her the right to administer the marital estate.<sup>19</sup> But, her *locus standi* was challenged<sup>20</sup> so the issue came before this Court, which found that pursuant to the Constitution’s equality provisions in Sections 20 and 28:

*“Marital power unlawfully and arbitrarily subordinates the wife to the power of her husband and is therefore unfair and serves no useful or rational purpose. Marital power is unfair discrimination based on sex or gender in as much as it adversely affects women who have contracted a specific type of marriage but does not affect the men in that marriage in the same way.”*<sup>21</sup>

5.6 This Court reasoned that because marital power was inconsistent with the equality provisions of Sections 20 and 28, and the “Constitution is...the Supreme law of the land, these tenets of the common law” could not stand.<sup>22</sup> This Court

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<sup>18</sup> *Sihlongonyane v. Sihlongonyane*, (470/2013A) [2013] SZHC 144 (July 18, 2013) ¶ 33.

<sup>19</sup> *Id.* at ¶ 7.

<sup>20</sup> *Id.* at ¶ 15.

<sup>21</sup> *Id.* at ¶ 24 (emphasis added).

<sup>22</sup> *Id.* at ¶ 30.

did not confine its condemnation of the unlawful gender discrimination of marital power to *locus standi* alone; it condemned all of marital power because it discriminates based on gender. Thus, the same reasoning this court used to invalidate a married woman's lack of *locus standi* in *Sihlongonyane*, holds for all elements of marital power: it is unfair discrimination based on sex because it unlawfully subordinates the wife to the power of her husband.<sup>23</sup>

5.7 While this Court stated in its order that the decision applied to “*all married women subject to the marital power of their husbands*,”<sup>24</sup> there was no claim before the Court for women under marital power married out of community of property. This could leave the decision open to interpretation as to whether all women retain their *locus standi* or not. Furthermore, even if this Court intended for their decision to encompass all women subject to their husband's marital power, it stopped short of invalidating common law marital power in its totality, thus necessitating the current cause of action. For this reason, Applicants urge this Court to finish what it started in *Sihlongonyane* and invalidate common law marital power in its totality.

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<sup>23</sup> *Id.* at ¶ 24.

<sup>24</sup> *Id.* at ¶ 33.

**Swaziland Should Be Persuaded By The Judicial Precedent Set In Other Courts In Striking Down Marital Power.**

6.1 This Court should be persuaded by the decisions of other courts that have struck down gender discriminatory laws similar to marital power for violating Constitutional rights. In *Gumede v. President of the Republic of South Africa*<sup>25</sup>, South Africa's Constitutional Court held that the codified customary law in the KwaZulu Natal statutes that made the husband the "family head" and required "obedience to the family head"<sup>26</sup> were unconstitutional because they discriminated based on gender by subjugating a wife to the marital power of her husband in violation of her right to equality.<sup>27</sup> When Mr. Gumede filed for divorce after 40 years of marriage, Mrs. Gumede filed a pre-emptory action to invalidate the relevant discriminatory customary law statutes, which deprived her of all property ownership.<sup>28</sup> The statutes stipulated the "*family head is the owner of all family property...he has charge, custody and control of the property*" and may "*in his discretion use the same for his personal wants and necessities.*"<sup>29</sup> The statutes further required "*the inmates of a family home irrespective of sex or age...be under the control of and owe*

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<sup>25</sup> 2008 (3) SA 152 (CC) 18 nn.34-35 (S. Afr)

<sup>26</sup> *Gumede v. President of the Republic of South Africa and Others* 2008 (3) SA 152 (CC) 18 nn.34-35 (S. Afr.).

<sup>27</sup> *Gumede*, (3) SA 152 (CC) at 37 ¶ 58.

<sup>28</sup> *Id.* at 5-6 ¶¶ 6-8.

<sup>29</sup> *Id.* at 18 n. 34.

*obedience to the family head.*"<sup>30</sup> The *Gumede* court determined that customary marital power that makes the husband the owner and controller of all family property "*patently limits the equality dictates of our Constitution,*"<sup>31</sup> and "*unashamedly demeans and makes vulnerable the wife concerned and is thus discriminatory and unfair.*"<sup>32</sup> The Court reasoned that the rules of marital power "*fostered [a] particularly crude and gendered form of inequality, which left women...marginalized and vulnerable.*"<sup>33</sup>

6.2 Like the "family head" provisions in South Africa's KwaZulu Natal statutes, Swaziland's common law marital power is unconstitutional because it too discriminates on the basis of gender. Swaziland's marital power similarly strips wives, but not husbands of their legal majority status thus depriving them of equality before the law and equal treatment with men. As the *Gumede* court noted, the impact of marital power is that wives are "*considered incapable or unfit to hold or manage property,*" and are "*expressly excluded from meaningful economic activity....*"<sup>34</sup> The same demeaning gendered inequality that had made the husband the family head in South Africa's KwaZulu Natal statutes also exists in Swaziland's marital power. This Court should follow South

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<sup>30</sup> *Id.* at 18 n. 35.

<sup>31</sup> *Id.* at 31 ¶ 46.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 11 ¶ 17.

<sup>34</sup> *Id.* at 35, 22 ¶ 35.

Africa's lead and strike down Swaziland's common law marital power because it too violates the equality provisions of the Constitution.

6.3 Similarly, in *Kirchberg v. Feenstra*,<sup>35</sup> the United States Supreme Court held that a Louisiana state statute that gave a husband the unilateral right to dispose of jointly owned marital property violated the equality provisions of the U.S. Constitution because it discriminated based on gender.<sup>36</sup> In *Kirchberg*, a husband was able to mortgage the jointly owned family house as collateral for attorney fees due to Louisiana Civil Code Statute 2404.<sup>37</sup> The Civil Code gave the husband, as "*head and master*," the "*exclusive control over the disposition of community property*," including sole administration of the estate "*without the consent or permission of his wife*."<sup>38</sup> This same right to sole administration as the family head is identical to that found in common law marital power in Swaziland, where a husband has the sole right to administer not only jointly owned marital property, but also property owned exclusively by the wife as well. Subjugating wives to their husband's marital power

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<sup>35</sup> 450 U.S. 455, 456 (1980)

<sup>36</sup> *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1980). See U.S. CONST. amend. XIV § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens; nor deny to any person ...the equal protection of the laws.").

<sup>37</sup> *Id.* at 456.

<sup>38</sup> *Id.* at 456-457.

violates their Constitutional right to equality in Swaziland precisely as it did in *Kirchberg*.

6.4 Furthermore, the discriminatory common law practice of marital power is unacceptable whether spouses entering into a civil rites marriage can exclude it through an ante-nuptial contract or not. The U.S. Supreme Court rejected the argument that the wife in *Kirchberg* could have avoided the discriminatory impact of the law if she had filed a 'Declaration by Authentic Act,' which would have prevented her husband from executing the mortgage without her consent. But the *Kirchberg* court declared, "[t]he absence of an insurmountable barrier will not redeem an otherwise constitutionally discriminatory law."<sup>39</sup> Just as the wife in *Kirchberg* could have taken the extra-legal step of nullifying her husband's marital power, women in Swaziland can take the extra-legal step of filing an ante-nuptial agreement excluding marital power from their marriages. But, the *Kirchberg* decision says having this option does not cure the discrimination of the law. Common law marital power is discriminatory with or without an insurmountable barrier. Wives should not have to go through the burden of an additional legal step just to preserve their constitutional right to equality, especially since

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<sup>39</sup> *Kirchberg*, 450 U.S. 455 at 461 (quoting from *Trimble v. Gordon*).

husbands do not have to take this legal step to preserve their rights.

6.5 The common thread in these cases is gender discrimination enshrined in law in violation of a married woman's right to equality. Part of the progress that still needs to be made in eradicating gender discrimination includes modifying the common law to bring it into compliance with Swaziland's Constitution. As such, it is incumbent on this Court to strike down the common law marital power, not in incremental stages, but in its totality.

## 7.

### **MARITAL POWER DENIES MARRIED WOMEN EQUAL RIGHTS WITH MARRIED MEN IN VIOLATION OF SWAZILAND'S LEGAL OBLIGATIONS UNDER INTERNATIONAL AND REGIONAL HUMAN RIGHTS TREATIES.**

7.1 Common law marital power violates the right of married women to equality before the law and to equality in marriage with married men under international and regional human rights treaties. Swaziland is a state party to the ICCPR, CEDAW, the African Charter, and the Protocol on the Rights of Women.<sup>40</sup> The Constitution exhorts the government to

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<sup>40</sup> International Covenant on Civil and Political Rights art. 26, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976, ratified by Swaziland 26



*“promote respect for international law [and] treaty obligations”* as one of its foreign policy objectives in section 61(c).<sup>41</sup> This objective to respect international law guide all organs and agencies of the State in applying or interpreting the Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just, free and democratic society. These constitutional prescriptions emphasize that a respect for international law should guide this court in interpreting the laws. This Court has also in precedent recognized that Swaziland’s obligations under international law supplement the fundamental freedoms guaranteed by the Constitution.<sup>42</sup> This Court should therefore apply the self-executing equality provisions

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Mar. 2004 [hereinafter ICCPR], available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, ratification status available at <http://treaties.un.org/Pages/ParticipationStatus.aspx>; Convention on the Elimination of All Forms of Discrimination against Women art. 15(1), U.N. Doc.A/34/36, 1249 U.N.T.S. 13, entered into force 3 Sept. 1981, ratified by Swaziland 24 Mar. 2004 [hereinafter CEDAW], available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>, ratification status available at [http://treaties.un.org/Pages/ViewDetails.aspx?srx=TREATY&mtmsg\\_no=IV-8&Chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?srx=TREATY&mtmsg_no=IV-8&Chapter=4&lang=en); African (Banjul) Charter on Human and Peoples’ Rights art. 3, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 Oct. 1986, ratified by Swaziland 15 Sept. 1995 [hereinafter *African Charter*], available at <http://www.au.int/en/content/african-charter-human-and-peoples-rights>, ratification status available at <http://www.achpr.org/instruments/achpr/ratification/>; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art. 8, adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (13 Sept. 2000), reprinted in 1 AFR. HUM. RTS. L.J. 40, entered into force 25 Nov. 2005, ratified by Swaziland 5 Oct. 2012 [hereinafter *Protocol on the Rights of Women*], available at <http://www.au.int/en/content/protocol-african-charter-human-and-peoples-rights-rights-women-africa>, ratification status available at <http://www.achpr.org/instruments/women-protocol/ratification/>.

<sup>41</sup> SWAZ. CONST. § 61(c) (2005).

<sup>42</sup> *Sihlongonyane v. Sihlongonyane* [2013] SZHC 144 (HC) at 18-19 paras. 27-29 (where the court quoted to General Comment 28 of the Human Rights Council when discussing the scope of the state responsibility to ensure the equality of men and women under matrimonial regimes and acknowledged that the government was appreciative of its international obligations when it enacted sections 20 and 28 of the Constitution).

of the ICCPR, CEDAW, and the regional human rights treaties to remedy the violations caused by marital power.

8.

**Common Law Marital Power Violates The Right Of Married Women To Equality Before The Law As Guaranteed By International Human Rights Treaties Binding On Swaziland.**

8.1 This Court must remove marital power from the common law because it violates the right of married women to equality before the law with married men under the ICCPR, CEDAW, and regional human rights treaties.<sup>43</sup> The ICCPR Article 26 provides that "*all persons are equal before the law and entitled without any discrimination to the equal protection of the law... [And] the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination.*"<sup>44</sup> Article 3 imposes upon state parties the requirement to "*undertake to ensure the equal right of men and women to the enjoyment of all*" the rights set forth in the ICCPR.<sup>45</sup>

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<sup>43</sup> Both the African Charter and the Protocol on the Rights of Women many of the same rights as the ICCPR and CEDAW, but the rights provided by the ICCPR and CEDAW are more developed. To avoid reduplication, only the ICCPR and CEDAW will be discussed and applied to Swaziland, but this does not detract from the equally binding nature of the regional human rights treaties. The African Charter holds that "every individual shall be equal before the law [and] every individual shall be entitled to equal protection of the law." *African Charter, supra*, art. 3. The Protocol to the African Charter states that "women and men are equal before the law and shall have the right to equal protection and benefit of the law," and includes a duty on state parties to "reform...existing discriminatory laws and practices in order to promote and protect the rights of women." *Protocol to the African Charter, supra*, art. 6

<sup>44</sup> *ICCPR, supra*, art. 26

<sup>45</sup> *Id.* art. 3.

CEDAW also guarantees the right of all women to “*equality with men before the law*.”<sup>46</sup> This right encompasses “*a legal capacity identical to that of men and the same opportunities to exercise that capacity*,” including “*equal rights to conclude contracts and to administer property*.”<sup>47</sup> The CEDAW Committee explained in General Recommendation 21 that the right to equality before the law also incorporates freedom to contract, and denial of that freedom restricts women’s legal autonomy and precludes them from legally managing property.<sup>48</sup> The Committee explained further that limitations on the right to bring litigation “*diminish [a woman’s] standing as an independent, responsible, and valued member of her community*” and curtail her ability to “*pursue or retain her equal share of property*.”<sup>49</sup> All state parties to CEDAW are thus bound to grant the right to contract, administer property, and litigate to everyone regardless of gender.

8.2 Common law marital power fundamentally violates the international right of married women to equality before the law. Common law marital power infringes the provisions of the ICCPR and CEDAW guaranteeing women equality before the law with men by restricting the *locus standi* of wives, their right to contract, and their right to administer property.

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<sup>46</sup> CEDAW, *supra*, art. 15(1).

<sup>47</sup> *Id.* art. 15(2).

<sup>48</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21, Equality in marriage and family relations* (13<sup>th</sup> Sess., 1994), para. 7, U.N. Doc. A/49/38 at 1 (1994) [hereinafter *CEDAW General Rec. 21*], available at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>.

<sup>49</sup> *Id.* para. 8.

Because marital power violates this right, it must be removed from the common law under Swaziland's obligation to remedy violations under Article 2 of the ICCPR and CEDAW.<sup>50</sup>

8.4 The Human Rights Committee has found marital power laws embodying the same principles as those in Swaziland to violate the ICCPR. In the case of *Ato Del Avellanal v. Peru*, the Peruvian civil code denied a married woman the right to sue in court and instead awarded that right solely to the husband.<sup>51</sup> This restriction on the rights of married women in Peru mirrors the way Swaziland's common law marital power curtails the *locus standi* right of married women.<sup>52</sup> Mrs. Del Avellanal, a married woman, sued the tenants of a building she owned for failure to pay rent, but was informed that only her husband could represent the matrimonial property in court.<sup>53</sup> After her domestic appeals failed, Mrs. Del Avellanal petitioned the HRC for redress.<sup>54</sup> The HRC found that the deprivation of Mrs. Del Avellanal's right to represent her property "den[ied] her equality before the courts and constituted discrimination on the ground of sex."<sup>55</sup> Thus, Article 2 of the ICCPR obligated Peru to take effective measures to remedy the violations suffered by the victim.<sup>56</sup>

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<sup>50</sup> ICCPR, *supra*, art. 2; CEDAW, *supra*, art. 2.

<sup>51</sup> *Ato Del Avellanal v. Peru* Human Rights Committee, Communication No. 202/1986: (34<sup>th</sup> Sess., 1988), para. 2.1, in U.N. Doc. Supp. No. 40 (A/44/40) at 196 (1988), available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/44/40](http://www.un.org/ga/search/view_doc.asp?symbol=A/44/40).

<sup>52</sup> Nhlapo, *supra* note 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Ato Del Avellanal*, *supra*, at paras. 2.1-2.2.

<sup>55</sup> *Id.* para. 10.2.

<sup>56</sup> *Id.* para. 12.

In Swaziland, common law marital power's restrictions on the rights of wives mirror the deprivation of equality rights that occurred in the *Del Avellanal* case. Just as in that case, marital power in Swaziland violates the ICCPR provisions for equality of women before the law with men.

8.5 Under both the ICCPR and CEDAW the right to equality before the law must be protected by the judicial authorities of state parties. State parties possess a duty under the ICCPR and CEDAW take action to implement the treaty provisions.<sup>57</sup> This obligation to implement the treaty rights must be carried out without delay, and no justification exists for a failure of the state parties.<sup>58</sup> As part of the obligation to implement, the judiciaries of the state parties must protect the rights guaranteed by the ICCPR and CEDAW and provide remedies for violations of those rights.<sup>59</sup> This Court therefore has a duty to provide remedies immediately for the violation

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<sup>57</sup> The ICCPR binds state parties to "undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." *ICCPR, supra*, art. 2(1). CEDAW obligates state parties to "condemn discrimination against women in all its forms [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women." *CEDAW, supra*, art. 2.

<sup>58</sup> Human Rights Committee, *General Comment No. 31; The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (80<sup>th</sup> Sess., 2004), paras. 4, 14, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter *HRC General Comment No. 31*], available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11); Committee on the Elimination of All Forms of Discrimination against Women, *General Recommendation No. 28, On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women* (47<sup>th</sup> Sess., 2010), para. 29, U.N. Doc. CEDAW/C/GC/28 (2010) [hereinafter *CEDAW General Recommendation No. 28*], available at <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>.

<sup>59</sup> The ICCPR requires state parties to "ensure that any person claiming...a remedy shall have his right thereto determined by competent judicial...authorities." *ICCPR, supra* note 75, art. 2(3) (b). CEDAW obligates state parties "to ensure through competent national tribunals...the effective protection of women against any act of discrimination." *CEDAW, supra*, art. 2(c).

of the ICCPR and CEDAW right of married women to equality before the law with married men.

9.

**Common Law Marital Power Violates The Right Of Married Women To Equality In Marriage With Their Husbands Under International Human Rights Treaties Binding On Swaziland.**

9.1 Common law marital power violates the right of married women under CEDAW, the ICCPR, and regional human rights treaties to equality in marriage with their husbands, requiring this Court to remove marital power from the common law.<sup>60</sup> Article 16 of CEDAW requires state parties to “*eliminate discrimination against women in all matters relating to marriage and family relations.*”<sup>61</sup> Article 16’s requirement includes a positive obligation on the state to ensure “the same rights and responsibilities during marriage” and “the same rights for both spouses in respect of the ownership, acquisition, management, administration, and disposition” of property.”<sup>62</sup> The ICCPR similarly guarantees the right to equality in marriage, obligating “state parties... [To] take appropriate steps to ensure equality of rights and

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<sup>60</sup> The Protocol on the Rights of Women proclaims in Article 6 that “state parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage [and] during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.” Protocol to the African Charter, *supra*, art. 6.

<sup>61</sup> CEDAW, *supra*, art. 16(1).

<sup>62</sup> *Id.* art. 16(c), (h).

responsibilities as to marriage, during marriage and at its dissolution.”<sup>63</sup> The HRC stated in its General Comment 28 that the right to equality in marriage included the right to own and administer property, “whether common property or property in the sole ownership of either spouse.”<sup>64</sup> The CEDAW Committee similarly considers the administration of property by both spouses a vital right, and encompasses within the definition of that right the corollary right to contract.<sup>65</sup> The administration of property and the right to contract are “central to a woman’s right to enjoy financial independence” in a marriage, and loss of those rights directly impacts a woman’s ability to provide housing and nutrition for herself and her family.<sup>66</sup> Absent equal rights to administer property and to contract, a married woman does not possess equal power in marriage with her husband. In direct violation of its obligations under CEDAW and the ICCPR, Swaziland’s common law marital power explicitly denies both the right to administer property and the right to contract to women married under the civil rites system.<sup>67</sup> This Court has the responsibility to remove marital power from the common law and so safeguard the right of women to equality in marriage.

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<sup>63</sup> ICCPR, *supra*, art. 23(4).

<sup>64</sup> Human Rights Committee, *General Comment No. 28, Equality of rights between men and women (article 3)* (68<sup>th</sup> Sess., 2000), para. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (29 Mar. 2000) [hereinafter *HRC General Comment No. 28*], available at

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11)

<sup>65</sup> CEDAW *General Rec. 21, supra*, at para. 25.

<sup>66</sup> *Id.* at para. 26.

<sup>67</sup> See NHLAPO, *supra*.

9.2 In *Morales de Sierra v. Guatemala*<sup>68</sup>, the Inter-American Commission on Human Rights struck down a set of domestic laws that embodied the same gender-based discrimination as Swaziland's common law marital power. The Guatemalan civil code empowered the husband alone to administer marital property and conferred responsibility upon the husband to represent the marital union in legal action. Petitioning the Inter-American Commission, Ms. Morales de Sierra argued that the Guatemalan law's vesting of exclusive authority in the person of her husband created an imbalance in power between the spouses and stripped the wife of her legal capacity.<sup>69</sup> The Inter-American Commission determined that the statutes violated the right of women to equality in marriage under CEDAW Art. 16.<sup>70</sup> The Inter-American Commission found the civil code provisions violated the right to equality in marriage because they institutionalized imbalances in power and established a *de jure* dependency of a wife upon her husband.<sup>71</sup> In Swaziland, common law marital power reduces the wife to a minor under the guardianship of her husband, creating the same kind of imbalance of power and *de jure* dependency imposed by the statute at issue in *Morales*.<sup>72</sup> Like the Inter-American Commission, this Court should interpret the equality provisions of CEDAW and the ICCPR to find that common law

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<sup>68</sup> Case 11.625, Inter-Am. Comm'n H.R., Report No. 28/98, OEA/Ser.L/V/II.98,

<sup>69</sup> *Id.* at ¶ 42.

<sup>70</sup> *Id.* ¶¶ 44-45.

<sup>71</sup> *Id.*

<sup>72</sup> Nhlapo, *supra* note 4.



marital power violates the right of married women to equality in marriage. This Court should similarly remove marital power from the common law and rectify the violation of the right of women under CEDAW and the ICCPR to equality in marriage.

10.

**This Court Should Apply International Treaty Law Because  
The Treaty Equality Provisions Are Self-Executing.**

10.1 The equality provisions of the ICCPR and CEDAW are self-executing and thus require immediate implementation by this Court. Under Section 238(4) of the Swazi Constitution, treaties require implementing legislation from Parliament unless they are self-executing.<sup>73</sup> Like Swaziland, the United States also makes this distinction between self-executing and non-self-executing treaties and has developed a detailed jurisprudence on this subject. In *Asakura v. City of Seattle*<sup>74</sup>, the U.S. Supreme Court established that treaty provisions guaranteeing equality rights needed no implementing legislation. That case involved a treaty between the United States and Japan providing for the equal right of foreign nationals of either country to reside in and carry on trade in

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<sup>73</sup> SWAZ. CONST., § 238(4) (2005).

<sup>74</sup> 265 U.S. 332 (1924).

the other country.<sup>75</sup> The city of Seattle then passed an ordinance that restricted the pawnbroker's trade to U.S. citizens only and Japanese citizens in Seattle challenged the law.<sup>76</sup> The U.S. Supreme Court found that the treaty established a rule of equality that "*cannot be rendered nugatory...by municipal ordinances or state laws... [And] operates of itself without the aid of any legislation.*"<sup>77</sup> Because the treaty provisions established a rule of equality and did not obligate the state to perform any particular act, the court declared the treaty provisions to be self-executing.<sup>78</sup>

10.2 Like the treaty provisions at issue in *Asakura*, the provisions of the human rights treaties in this case are self-executing because they similarly establish equality rights. The ICCPR, CEDAW, the African Charter, and the Protocol on the Rights of Women guarantee the right of women in Swaziland to equality in marriage and equality before the law with men without regard to their gender.<sup>79</sup> These provisions therefore operate of themselves without the need for implementing legislation just like the treaty provisions at issue in *Asakura*. This Court should therefore find that the equality provisions

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<sup>75</sup> *Id.* at 340.

<sup>76</sup> *Id.* at 339-40.

<sup>77</sup> *Id.* at 341 (citing to *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (wherein the court found that when either party to a treaty engages to perform a particular act, in that case the ratification and confirmation of land grants, the judiciary must defer to the legislature to execute the contract before it becomes a court rule)).

<sup>78</sup> *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

<sup>79</sup> See generally ICCPR, *supra*; CEDAW, *supra*; African Charter, *supra*; Protocol on the Rights of Women, *supra*.

of the ICCPR, CEDAW, and the regional human rights treaties are self-executing.

10.3 Common law marital power violates the right of women married under the civil system to equality before the law and equality within marriage with men under the ICCPR, CEDAW, and the regional human rights treaties. This Court should therefore remove marital power from the common law to comply with Swaziland's international treaty obligations.

## 11.

### **BY STRIPPING A MARRIED WOMAN OF HER LEGAL MAJORITY STATUS, MARITAL POWER DEPRIVES HER OF HER RIGHT TO DIGNITY AS GUARANTEED BY THE CONSTITUTION AND INTERNATIONAL LAW.**

11.1 Stripping married women of their adult legal status through marital power is an assault on their Constitutional right to dignity. Constitution Section 18 guarantees, "[t]he dignity of every person is inviolable."<sup>80</sup> Yet marital power violates the dignity of married women by reducing a wife under marital power to the status of a legal minor, while the husband

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<sup>80</sup> SWAZ. CONST., *supra*, § 18(1).

retains his legal majority status.<sup>81</sup> In *Doo Aphane*, the Supreme Court confirmed the Applicant's claim that marital power undermines the dignity of the wife.<sup>82</sup> As discussed *supra*, the Court invalidated Section 16(3) of the Deeds Registry Act for violating Doo Aphane's constitutional rights to equality irrespective of gender guaranteed in Constitution Sections 20 and 28. In *dicta*, the Court acknowledged that the Applicant was "*under no obligation*"<sup>83</sup> to advance any reason other than the "*perceived affront to her dignity*"<sup>84</sup> for her refusal to use her husband's name, to register property. Similarly in *Gumede*, the South African Constitutional Court, in holding that subjugating a wife to the marital power of her husband violated her right to equality, pointed out that marital power "*unashamedly demeans and makes vulnerable the wife concerned.*"<sup>85</sup> In striking down discriminatory codified customary law that made the husband the family head, the *Gumede* court denounced marital power for "render[ing] women extremely vulnerable by not only denuding them of their dignity but also rendering them poor and dependent."<sup>86</sup>

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<sup>81</sup> CEDAW Report, *supra* note 1, ¶ 15.1.2 ("While both women and men attain majority and hence full legal capacity at the age of 21, the type of marital property regime and its attendant consequences that a woman enters into can potentially have the effect of her return to minority status in exercising her legal capacity.").

<sup>82</sup> *Attorney General v. Doo Aphane*, (12/09) SZSC 32 (28 May 2010) ¶ 9.

<sup>83</sup> *Id.* at ¶ 14.

<sup>84</sup> *Id.*

<sup>85</sup> *Gumede v. President of the Republic of South Africa and Others* 2008 (3) SA 152 (CC) at 37 ¶ 58 (S. Afr.).

<sup>86</sup> *Id.* at 23 ¶ 36.

11.2 Finally, in *Bhe v. Magistrate*<sup>87</sup>, the Constitutional Court of South Africa struck down the discriminatory rule of male primogeniture in the customary law of succession because it discriminated against women on the basis of sex and deprived them of their right to dignity. The Court ruled that the primogeniture rule, “Violate[d] the right of women to human dignity”<sup>88</sup> because it implied women are “*not fit or competent to own or administer property.*”<sup>89</sup> The Court noted that the “*effect [was] to subjugate women to a status of perpetual minority ... simply by virtue of their sex and gender.*”<sup>90</sup> In finding the rule of male primogeniture an affront to a woman’s dignity, the *Bhe* Court relied upon the South African constitution’s guarantee that “*everyone has inherent dignity and the right to have their dignity respected and protected.*”<sup>91</sup> According to the *Bhe* Court this inherent right to dignity is “*together with the right to life, the source of all other rights.*”<sup>92</sup>

11.3 Like South Africa’s codified customary law at issue in *Gumede* and the male primogeniture rule in *Bhe*, Swaziland’s common law marital power deprives married women of their right to dignity by reducing them to the status of a perpetual minor because of their sex. The same demeaning gender inequality that existed in the discriminatory laws at issue in

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<sup>87</sup> 2004 (49) SA 1 (CC) at 80 ¶ 136 (S. Afr.).

<sup>88</sup> *Id.* at 57 ¶ 93.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 57 ¶ 93.

<sup>91</sup> S.AFR. CONST., 1996 §10.

<sup>92</sup> *Bhe*, (49) SA 1 (CC) 29-30 ¶ 48.

*Gumede* and *Bhe*, exists in Swaziland marital power. Just as in South Africa, Swaziland's common law marital power assumes married women are not fit for property administration when it strips wives of their right to administer, thus stripping them of their dignity as well. Given the right to dignity is guaranteed in the Swazi Constitution, this Court has an obligation to uphold the justiciable right of dignity, as the South African court did twice, in *Bhe* and *Gumede*,<sup>93</sup> and strike down common law marital power for violating this foundational right.

11.4 Besides its Constitutional obligation, Swaziland is also obligated to uphold the right to dignity found in the international and regional treaties to which it is a State Party. The loss of dignity is never more apparent than when stripped away by man's inhumanity to man, which is why the right to dignity underlies the very foundations of the United Nations Charter where in the waning days of World War II, the world assembled to reassert its dignity and humanity after the brutality of two world wars. The stated purpose of the Charter is, "*to reaffirm faith in fundamental human rights, in the **dignity and worth of the human person**, [and] in the equal rights of men and women....*"<sup>94</sup> The Universal

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<sup>93</sup> *Gumede*, (3) SA 152 (CC) 22 ¶ 35 (A rule of customary law that implies that women are not fit or competent to own or administer property violates their right to dignity and equality).

<sup>94</sup> UN Charter, preamble, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 Oct. 1945, adoption by Swaziland 24 Sept. 1968, 646 U.N.T.S. 177, available at <http://www.un.org/en/documents/charter/>,

Declaration of Human Rights reaffirmed the importance of dignity in its opening sentence, “[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”<sup>95</sup> and again in the very first article, “[a]ll human beings are born free and equal in dignity and rights.”<sup>96</sup> The right to dignity is similarly enshrined within the preambles of CEDAW and the ICCPR.<sup>97</sup> Moreover, the African Charter specifically guarantees the right to dignity in article 5, “[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”<sup>98</sup> The African Charter links dignity with the recognition of legal status, therefore any loss in legal status, like wives under marital power, denotes a loss in dignity. Furthermore, CEDAW article 5 requires States Parties to eliminate “*prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*”<sup>99</sup> The very nature of common law marital power assumes women are inferior to men and therefore need to

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ratification available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-2&chapter=1&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-2&chapter=1&lang=en) (emphasis added).

<sup>95</sup> Universal Declaration of Human Rights, preamble, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948) *ratified* 16 Dec. 1949 [hereinafter UDHR], available at <http://www.un.org/en/documents/udhr/>.

<sup>96</sup> *Id.* at art. 1.

<sup>97</sup> CEDAW, *supra*, preamble ¶ 2 (...all human beings are born free and equal in dignity); ICCPR, *supra*, preamble ¶¶ 2, 3; (¶ (2) in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all... ¶ (3) Recognizing that these rights derive from the inherent dignity of the human person).

<sup>98</sup> African Charter, *supra*, art. 5.

<sup>99</sup> CEDAW *supra*, art. 5(1).

come under a man's guardianship. Furthermore, it is based on stereotyped gender roles that assume women only work in the home, and therefore have no need of the rights they are being stripped of. Because common law marital power strips wives of their full legal status and subjects them to their husband's marital power, it strips them of their dignity as well. Marital power is a humiliating assault on the dignity of married women, because it strips a wife, but not a husband, of her ability to independently contract, to administer property, and her *locus standi*, in violation of the Constitution and international treaties Swaziland is obligated to uphold. This Court should therefore remove marital power from the common law.

## 12.

### **THIS COURT HAS A DUTY TO RESHAPE THE COMMON LAW TO COMPLY WITH THE CONSTITUTION AND BRING SWAZILAND IN LINE WITH THE REST OF ITS SUB-SAHARAN AFRICAN COUNTERPARTS BY REMOVING MARITAL POWER.**

12.1 It is incumbent upon this Court to remove marital power from the common law as part of its duty to construe the common law in compliance with the fundamental equality rights guaranteed in the Constitution. The Constitution requires that the principles and rules of the Roman Dutch Common



Law "shall be applied and enforced...except where and to the extent that those principles or rules are inconsistent with this Constitution."<sup>100</sup> This Court has the duty to modify the common law because it "is [the courts'] law [and the] courts are protectors and expounders of the common law."<sup>101</sup> As explained in *Sihlongonyane*, the courts "have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral, and economic make-up of society."<sup>102</sup> The Constitution also places this Court under an explicit duty to enforce the fundamental freedoms of the Constitution, including the right of married women to equality before the law, equal treatment with their husbands, and respect for dignity.<sup>103</sup> Because the common law doctrine of marital power violates married women's fundamental equality rights, this Court must refashion the common law to bring it into compliance with the Constitution.

12.2 Every other Southern African nation governed by Roman-Dutch common law has already removed marital power because it violates the rights of married women by denying

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<sup>100</sup> SWAZ. CONST. S 252(1) (2005).

<sup>101</sup> See *Sihlongonyane v. Sihlongonyane*, [2013] SZHC 144 (HC) at 12-13 para. 32 (quoting *Thebus and Another v. The State* 2003 (6) SA 505 (CC) at 21 para. 31 (S. Afr.).). In *Thebus*, the Constitutional Court of South Africa dealt with the question of developing the common law under a constitutional requirement that they do so in compliance with the Bill of Rights. In the excerpted part the Constitutional Court is referring to the common law duty of the courts to develop the common law and not to their constitutional duty to develop the common law under the South African Bill of Rights.

<sup>102</sup> *Id.*

<sup>103</sup> See *supra* Jurisdiction Section for the discussion of the court's jurisdiction under §§ 35(2), 151(a) (1) to hear claims regarding violations of fundamental freedoms.

them equality with married men.<sup>104</sup> Moreover, Swaziland is obligated under international law to ensure the protection of married women's fundamental rights either through legislation or action by this Court.<sup>105</sup> Some nations have done this through legislation, while others have used the courts. This Court should follow the lead of the South African Constitutional Court in *Gumede* and the Namibian Supreme Court in *Myburgh v. Commercial Bank* and find marital power to violate the Constitution. In *Gumede*, the court invalidated codified customary law that retained marital power in customary marriages as inconsistent with the Constitution.<sup>106</sup> South Africa had removed marital power from the common law with the Matrimonial Property Act of 1984.<sup>107</sup> The Act and its subsequent amendments did away with the restrictions marital power placed on the capacity of the wife to contract and litigate and granted the wife the same property and juristic powers of her husband.<sup>108</sup> The last vestiges of marital power in South Africa were eliminated by the court's decision in *Gumede* to bring customary law "into

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<sup>104</sup> Mary Hallward-Driemeier and Tazeen Hasan, EMPOWERING WOMEN: LEGAL RIGHTS AND ECONOMIC OPPORTUNITIES IN AFRICA 73 (2013) (noting that of all the countries using the Roman-Dutch common law system, only Swaziland retains marital power).

<sup>105</sup> ICCPR, *supra*, art. 2(2); CEDAW, *supra*, art. 2(a-c)

<sup>106</sup> *Gumede v. President of the Republic of South Africa and Others* 2008 (3) SA 152 (CC) at 38-39 para. 59 (S. Afr.). See *infra* section IB for a full discussion of the *Gumede* case.

<sup>107</sup> Matrimonial Property Act 88 of 1984 (amended 1986, 1987, 1988, 1993, 1996, 2005, 2008) (S. Afr.). See Recognition of Customary Marriages Act 120 of 1998, § 7 (S. Afr.).

<sup>108</sup> Matrimonial Property Act at §§ 11, 14-15. Specifically, § 11(1) states that "the common law rule in terms of which a husband obtains the marital power over the person and property of his wife is hereby repealed," while for marriages in community of property, it provides under § 14 "the same powers with regard to disposal of the assets of the joint estate, the contracting of debts..., and the management of the joint estate," and under § 15, the right to "perform any juristic act with regard to the joint estate" subject to certain consent requirements.

*harmony with our supreme law and its values.*"<sup>109</sup> In Namibia, the 1996 Married Persons Equality Act removed marital power. The Act abolished all restrictions on the legal capacity of the wife, and abolished the common law position of the husband as head of the family.<sup>110</sup> Subsequently, the Namibian Supreme Court determined in *Myburgh* that marital power had in fact been abolished as soon as the Constitution was promulgated in 1990.<sup>111</sup> The court based its decision on the Constitution's stated supremacy of fundamental rights over existing common law precepts.<sup>112</sup> The court therefore made the Married Persons Equality Act retroactive to the date of the promulgation of the Constitution.<sup>113</sup>

12.3 Zimbabwe removed marital power from all marriages in the amended 1928 Married Persons Property Act.<sup>114</sup> Botswana's Abolition of Marital Power Act of 2004 repealed marital power, removed all legal restrictions on the power of the wife, and gave spouses equal capacity to administer marital property.<sup>115</sup> Finally, in 2006, Lesotho repealed marital power, removing the wife's restrictions in regards to entering a contract, suing or being sued, registering immovable

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<sup>109</sup> *Gumede* at 14 para. 21.

<sup>110</sup> Married Persons Equality Act 1 of 1996 §§ 2-3 (Namib.).

<sup>111</sup> *Myburgh v. Commercial Bank of Namibia* [2000] NASC 3 (SC) at 18-19 (Namib.).

<sup>112</sup> *Id.* at 9.

<sup>113</sup> *Id.* at 19.

<sup>114</sup> Married Persons Property Act of 1929 § 2 (Zim.) ("The marital power or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe.").

<sup>115</sup> Abolition of Marital Power Act 34 of 2004 §§ 4-5, 7 (Bots.).

property, and other rights.<sup>116</sup> This Court should comply with its obligations under constitutional and international law by removing marital power from its common law and join the rest of the southern African nations in guaranteeing the same rights to married women as married men.

13.

**THE MARRIAGE ACT SECTIONS 24 AND 25 MUST BE STRUCK DOWN FOR DISCRIMINATING ON THE BASIS OF RACE AGAINST “AFRICAN” WIVES BY REQUIRING THAT THE CONSEQUENCES OF THEIR MARRIAGES BE GOVERNED BY SWAZI LAW AND CUSTOM.**

13.1 Striking down the common law marital power to give wives married under the Marriage Act equal status with their husbands will not rid the civil rites marriage system of its unconstitutional discrimination. Sections 24 and 25 of the Marriage Act will continue to deprive “African” wives equal rights with their husbands. Sections 24 and 25 dictate that the consequences of a civil rites marriage between two “Africans,” performed pursuant to the Act, are not governed by the Act but instead are governed by Swazi law and custom:

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<sup>116</sup> Legal Capacity of Married Persons Act 9 of 2006 § 3 (Lesotho).

"24. The consequences flowing from a marriage in terms of this Act shall be in accordance with the common law as varied from time to time by any law, **unless both parties to the marriage are Africans** in which case, subject to the terms of Section 25, **the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom**"<sup>117</sup>

"25(1) If both parties to a marriage are Africans, the consequences flowing from the marriage shall be governed by the law and custom applicable to them **unless** prior to the solemnization of the marriage **the parties agree that the consequences following from the marriage shall be governed by the common law**".<sup>118</sup>

"25(2) If the parties agree that the consequences flowing from the marriage shall be governed by the common law, the **marriage officer shall endorse on the original marriage register** and on the duplicate original marriage register the fact of the agreement; and the production of a marriage certificate, original marriage register or duplicate

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<sup>117</sup> The Marriage Act 47 of 1964 (Swaz.) § 24 (emphasis added).

<sup>118</sup> *Id.* at § 25(1) (emphasis added).

*original marriage register so endorsed shall be prima facie evidence of that fact unless the contrary is proved.”*<sup>119</sup>

13.2 This Court should strike the racially discriminatory sections of the Marriage Act because they treat “Africans” differently from non-Africans, in violation of (A) the Swazi Constitution, and (B) international law.

14.

**The Marriage Act Sections 24 And 25 Discriminate On The Basis Of Race Against “Africans,” Violating Their Constitutional Right To Equality.**

14.1 The Marriage Act sections 24 and 25 discriminate against “Africans” on the basis of race, thereby denying “African” spouses their right to equality before the law. The Act treats “African” spouses differently than non-African spouses by requiring Swazi law and custom, not the common law, govern the consequences of “African” civil rites marriages. Constitution Section 20 states, “[a]ll persons are equal before and under the law....”<sup>120</sup> and that “a person shall not be

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<sup>119</sup> *Id.* at § 25(2) (emphasis added).

<sup>120</sup> SWAZ. CONST., 2005 § 20(1).

*discriminated against on the grounds of race....*<sup>121</sup> The Constitution specifically defines discrimination as “*giv[ing] different treatment to different persons attributable only or mainly to their...race....*”<sup>122</sup> Yet that is exactly what the Marriage Act does. The common law governs the marital power and proprietary rights of non-African spouses that enter into civil rites marriages under the Act, but “African” spouses are subject to Swazi law and custom marital power and proprietary rights. The Act discriminates against “Africans” by imposing upon them different consequences of marriage, thus treating them differently than non-Africans only because of their race.

14.2 African spouses cannot intelligently choose the best marriage regime for themselves if they are unaware of their options. Requiring “Africans” to take the additional legal step of getting an endorsement to have their civil rites marriages governed by the Marriage Act poses problems. Namely, “African” spouses would have to know first, that the extra step is required and second, what is entailed in a common law in community of property marriage, as well as the details and ramifications of the other marital regimes available to them.<sup>123</sup> Few couples are aware of their options and the requirements involved and marriage officers frequently lack

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<sup>121</sup> *Id.* at § 20(2).

<sup>122</sup> *Id.* at § 20(3).

<sup>123</sup> R. T. Nhlapo, *supra*, at 40-41; see also Applicants’ supporting affidavits generally.

the education or understanding to assist them.<sup>124</sup> This was evidenced by couples seeking help at a Manzini legal aid clinic who *"knew nothing of the difficulties posed by Section 24 and thought they were married in community of property."*<sup>125</sup> "African" spouses are assuming the marital power and proprietary rights of their marriage are governed by the common law when they enter into a civil rites marriage, instead of a customary marriage. Yet, when "African" spouses marry under the Act, the very consequences of their marriage they assume are governed by the common law are instead diverted to Swazi law and custom. Professor R.T. Nhlapo tells how Africans who may not even know they have to opt into the rights under the Act think they are marrying under civil law, but *"discover with shock, much later, that customary law has been imported into their civil marriage."*<sup>126</sup>

14.3 Marital power and the proprietary rights of a marriage affect every aspect of a wife's daily life. The consequences of marriage under the common law have been discussed at length but the consequences of marriage under Swazi law and custom are even more restrictive to "African" women. Under Swazi law and custom, a wife is disabled by *"[t]he patriarchal and patrilineal nature of Swazi traditional*

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<sup>124</sup> *Id.* at 41.

<sup>125</sup> *Id.*

<sup>126</sup> 2 R. T. Nhlapo, *supra*, 115.



society,”<sup>127</sup> in that a husband, and his “family have the ultimate say in how the relationship would progress,” not the wife.<sup>128</sup> Meaning, the wife is expected to embody the traditional values of “obedience, submissiveness, and humility,”<sup>129</sup> while being deprived of the ability to own property or access land, has almost non-existent inheritance rights, and has extreme difficulty in obtaining a divorce.<sup>130</sup> This shows how the racial discrimination of forcing the consequences of “African” marriages into Swazi law and custom compounds the gender discrimination of marital power.

14.4 “Africans” should not be forced to endure the injustice and indignity of racially discriminatory laws like the Marriage Act sections 24 and 25. The language guaranteeing equality before the law in Section 20 is very specific in stating that “a person shall not be discriminated against on the grounds of gender, race, color, ethnic origin, tribe....”<sup>131</sup> The Constitution, the supreme law of the land,<sup>132</sup> guarantees equality before the law irrespective of **race**. This is a clear abrogation of the manifestly discriminatory provisions of the Marriage Act,

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<sup>127</sup> *Id.* at 115.

<sup>128</sup> Committee on the Elimination of Discrimination Against Women, *Summary Record: Swaziland 7, 8 ¶¶ 42-43* (58<sup>th</sup> Sess., 2014), U.N. Doc. CEDAW/C/SR.1232 (10 July 2014), available at [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SWZ&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=SWZ&Lang=EN) (click on CEDAW, then click I-II, scroll down to summary record 1232 and click “view document”).

<sup>129</sup> *Id.* at 99.

<sup>130</sup> *Id.* at 115, 116.

<sup>131</sup> SWAZ. CONST., 2005 § 20(2).

<sup>132</sup> *Id.* at § 2(1). (“This Constitution is the supreme law of Swaziland.”).

which treats “African” marriages differently than non-African marriages. Marriage Act, sections 24 and 25 are racially discriminatory on their face and must be severed.

14.5 Furthermore, “Africans” should not have to be burdened with the extra time and expense of having to reinforce their choice to be governed by civil law through an additional legal step when non-Africans do not have to. As already shown in *Kirchberg v. Feenstra*, “[t]he absence of an insurmountable barrier will not redeem an otherwise constitutionally discriminatory law.”<sup>133</sup> Just as the law in *Kirchberg* was discriminatory whether or not the wife used the path allotted to her to escape her husband’s marital power, the Marriage Act sections 24 and 25 are racially discriminatory regardless of whether “Africans” can get a formal endorsement requesting the Marriage Act govern the consequences of their marriage or not.

14.6 This Court should follow the persuasive precedent set in South Africa’s Constitutional Court in striking down racially discriminatory laws. In *Bhe v. Magistrate*, the Court struck down civil code inheritance statutes because they discriminated against Africans on the basis of race.<sup>134</sup> South Africa’s Intestate succession Act Section 1(4) (b) provided,

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<sup>133</sup> *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1980) (quoting from *Trimble v. Gordon*).

<sup>134</sup> *Bhe v. Magistrate* 2004 (49) SA 1 (CC) at 80 ¶ 136 (S. Afr.).

*"[an] intestate estate includes any part of an estate...in respect of which section 23 of the Black Administration Act...does not apply."*<sup>135</sup> Section 23 of the Black Administration Act detailed a separate legal system for "Africans" except those who had opted to be governed by the intestate succession act, which generally applied to Europeans. The combined effect of the statutes governing African succession forced "Africans" into a different legal structure, which precluded females from inheriting, while non-Africans enjoyed the full protection of the legal system, including equal inheritance rights regardless of gender. The South African statutes provided that "Africans" who had opted to have the consequences of their marriage governed by the common law through an antenuptial contract would have their estates devolve *"as if the said Black had been a European."*<sup>136</sup>

14.7 South Africa's Constitutional Court struck down its discriminatory civil code provisions because *"their combined effect [was] to put in place a succession scheme which discriminates on the basis of race and colour applying only to African people,"*<sup>137</sup> This is precisely what Swaziland's Marriage Act's sections 24 and 25 do. In striking down the statutes, the South African court said they were *"a*

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<sup>135</sup> *Id.* at 21-22 ¶ 39.

<sup>136</sup> *Id.* at 19-20 ¶ 36.

<sup>137</sup> *Id.* at 87-88 ¶ 143.

cornerstone of racial oppression”<sup>138</sup> where “natives were placed in a category separate from the Europeans.”<sup>139</sup> Swaziland’s Marriage Act’s sections 24 and 25 require different laws for different races in exactly the same way in violation of the equal protection clause of the Constitution. The equality provisions in the Swazi and South African Constitutions are identical<sup>140</sup> and the effect of the discriminatory legislation in both countries is the same. This Court should follow the example of the *Bhe* court and strike these racially discriminatory provisions in the Marriage Act as they are an affront to all Africans. This would include in section 24, “...**unless both parties to the marriage are Africans in which case, subject to the terms of Section 25, the marital power of the husband and the proprietary rights of the spouses shall be governed by Swazi law and custom,**” as well as all of section 25. By severing this language the court will bring the Marriage Act into consistency with the Constitution, ridding Swaziland of a malicious relic of racism.

15.

**Because They Discriminate Based on Race, The Marriage Act Sections 24 and 25 Violate Swaziland’s Obligations under International Law.**

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<sup>138</sup> *Id.* at 38-39 ¶ 61.

<sup>139</sup> *Id.* at 39-40 ¶ 62.

<sup>140</sup> S. AFR. CONST., 1996 § 9. (9(1) “Everyone is equal before the law,” 9(3) “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race.”).

15.1 International law requires the elimination of all forms of racial discrimination, including the racially discriminatory provisions of the Marriage Act. The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) defines racial discrimination as

*“Any distinction, exclusion, restriction or preference based on race...which has the purpose or effect of nullifying or impairing the recognition...on an equal footing, of human rights and fundamental freedoms.”*<sup>141</sup>

ICCPR article 26 and the African Charter articles 2 and 3 guarantee all persons are “equal before the law” and entitled to “equal protection of the law,” regardless of race.<sup>142</sup> ICERD article 5 reinforces this right to equality irrespective of race.<sup>143</sup> Yet, the Marriage Act’s sections 24 and 25 deny to “African” spouses, the same right to have the consequences of their marriage governed by the Act as it provides for non-African spouses. These sections that segregate “Africans” from non-Africans based on race are denying “African”

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<sup>141</sup> International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, U.N. Doc. A/9464 (1965), 660 U.N.T.S. 195, *entered into force* 4 Jan. 1976, *acceded to by Swaziland* 7 April 1969 [hereinafter ICERD] available at, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, country ratification status available at <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (scroll down to International Convention on the Elimination of all forms of racial discrimination, then click on desired language).

<sup>142</sup> ICCPR, *supra*, art. 26; African Charter, *supra*, art. 2 and 3.

<sup>143</sup> ICERD at art. 5. (art. 5 states, “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights...” (emphasis added)).

spouses equality with their non-African counterparts in direct violation of the ICCPR, the African Charter, and ICERD.

15.2 States Parties are obligated to uphold these equality provisions and eliminate discrimination. In *General Comment 18*, the HRC specified that ICCPR article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities” and is “therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.”<sup>144</sup> ICERD similarly requires States Parties to “[e]liminate racial discrimination in all its forms...without delay”<sup>145</sup> The obligation to eliminate discrimination requires a State Party to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination.”<sup>146</sup> The Marriage Act is a legislation regulated by the State. As applied, the Act segregates “Africans” from non-Africans based solely on their race, denying them equality before the law with non-Africans. Instead of amending or nullifying discriminatory laws without delay, Swaziland has allowed their laws to discriminate against “Africans” based solely on their race. Marriage Act sections

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<sup>144</sup> *Id.* at ¶ 12.

<sup>145</sup> *Id.* at art. 1.

<sup>146</sup> *Id.* at art. 1(c).

24 and 25 are in direct violation of international law as codified in ICERD, the ICCPR, and The African Charter.

15.3 In conclusion, as discussed previously, this Court has the authority to strike the racially discriminatory provisions from the Marriage Act and bring Swazi law in line with its domestic and international legal obligations by giving "Africans" equality before the law with their non-African counterparts. The *Bhe* court best summed up the position of Applicants in stating, "No society based on equality, freedom, and dignity would tolerate different treatment based on skin color."<sup>147</sup> The Constitution not only guarantees these very rights, but also requires the courts to uphold and enforce them.<sup>148</sup> Because the Marriage Act's sections 24 and 25 treat "African" marriages differently than non-African marriages, discriminating on the basis of race, they are inconsistent with the Constitution and international law, therefore this Court must sever the offending provisions.

16.

## **CONCLUSION**

16.1 Common law marital power deprives married women of their right to equality before the law, equal treatment with men,

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<sup>147</sup> *Bhe v. Magistrate* 2004 (49) SA 1 (CC) at 42-43 ¶ 65 (S. Afr.).

<sup>148</sup> SWAZ. CONST. preamble and art. 14(2). (Preamble states, "Whereas all the branches of government are the Guardians of the Constitution, it is necessary that the Courts be the ultimate Interpreters of the Constitution." art. 14(2) states the fundamental rights "shall be respected and upheld by the Executive, the Legislature and the Judiciary...and shall be enforceable by the courts.").

equality within marriage, and right to dignity under both the Swazi Constitution and the ICCPR, CEDAW, the African Charter, and the Protocol on the Rights of Women. Common law marital power violates the equality rights of married women by depriving all women married under the Marriage Act the right to administer property and the right to contract, and also denies to women married out of community property but with marital power the right to sue or be sued in court. This Court should follow the example of the other southern African nations that have removed marital power and fulfill its constitutional mandate to reform the common law in line with the Constitution by removing marital power.

16.2 Sections 24 and 25 of the Marriage Act discriminate against married women on the basis of race by assigning African and non-African spouses to different legal consequences of marriage. This violates the right of African spouses to be free from discrimination on the basis of race under both the Constitution and the ICERD. Additionally, were marital power to be removed from the common law, sections 24 and 25 of the Marriage Act would perpetuate gender discrimination by subjecting African spouses to customary marital power.

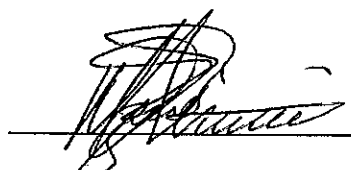
16.3 We therefore ask this Court to remove marital power from the common law and to strike out the part of section 24 beginning with "unless both parties" continuing to the end and the



entirety of section 25 of the Marriage Act. This would completely eradicate marital power from the civil system and remedy the violations of the fundamental rights of married women caused by marital power.

**WHEREFORE,** may it please the Honorable Court to grant orders as prayed for, together with any further or alternative remedy as the court may deem appropriate, in the Notice of Motion.

**DATED AT MANZINI** on this the <sup>5<sup>th</sup></sup> day of OCTOBER, 2016.



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**MBABANE**

AND TO: **FAKUDZE ATTORNEYS**

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AFFAIRS**

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