

REPORTABLE (10)

JUDITH ISHEMUNYORO (NEE MANDIDEWA)
v
**(1) ANTHONY ISHEMUNYORO (2) TYN SERVE DISTRIBUTORS
(PRIVATE) LIMITED (3) THE REGISTRAR OF DEEDS (4)
THE SHERIFF FOR ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, HLATSHWAYO JA & ZIYAMBI AJA
HARARE, OCTOBER 26, 2017 & FEBRUARY 15, 2019**

T. Biti with *V. Tavaziva*, for the appellant

F. Chinwawadzimba, for the second respondent

No appearance for the first, third and fourth respondents

Judgment No. 14/19
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GWAUNZA JA:

[1] This is an appeal against the whole judgment of the High Court which dismissed an application by the appellant for a *declaratur* and certain relief related to the matrimonial home that she jointly owned with the first respondent.

[2.] Factual Background

[2.1] The appellant and the first respondent are husband and wife. They were customarily married in 1991. In or around that time, the appellant was an employee of the Ministry of Local Government and Housing. She was allocated and allowed to rent certain property called Stand No. 424 Sinoia

Township, (“the property”) by her employer. Sometime in 1994, the Government offered to sell the property to the appellant. She accepted the offer and allegedly paid the full purchase price of the property through monthly deductions from her salary. Upon completion of payment of the purchase price, on 11 June 2012, the property was transferred into the names of both the appellant and the first respondent, her husband. Prior to that development, on 28 November 2008, the two had solemnised their union in terms of the Marriages Act [*Chapter 5:11*].

[2.2] In 2000, the first respondent joined a certain businessman in the operation of a grocery store known as Manyene Trading (Pvt) Ltd (“the company”). The first respondent was a shareholder in the company and at some point, he acquired goods for the company on credit from the second respondent. ~~Respondent No 14/19~~ Civil Appeal SC 374/17 himself as surety for the debt owed by the company. The company failed to repay the debt owed to the second respondent and the latter instituted proceedings against it and the first respondent as surety and co-principal debtor, in the magistrates’ court. The total sum claimed by the second respondent was US\$138,500.00.

[2.3] On 7 November 2014, the magistrate found in favour of the second respondent and ordered the company and its directors to pay the US\$138,500 claimed. Neither the company nor the directors managed to pay the said amount and as a result, the fourth respondent attached the first respondent’s 50 percent share in the property in execution of the court order because the other 50 percent belonged to the appellant.

[2.4] Aggrieved by the attachment, the appellant filed an application in the High Court seeking a *declaratur* to the following effect:

“In immovable matrimonial property, which is the matrimonial home, creditors cannot attach the same as a result of debt accrued by either of the parties.”

She also sought an order;

- i) that the attachment of the first respondent’s rights in the property concerned be set aside;
- ii) that the Registrar of Deeds be authorised to transfer the 50 percent share of the property held by the first respondent to her, and
- iii) that the first and second respondents pay costs of suit.

[2.5] The second respondent opposed the application while the first respondent did not file any opposing papers thereto.

[2.6] The court *a quo* found that the first respondent’s share in the property was capable of being attached by the Sheriff and sold in order to recover the debt that he owed to the second respondent. It found further that insufficient evidence was led to prove that the appellant was the sole owner of the property, or that she was entitled to have the first respondent’s share transferred into her name.

In the result, it dismissed the appellant’s application.

[3] The appellant was aggrieved by the decision of the court *a quo* and consequently noted the present appeal on grounds that essentially raise two issues that is:

- i) whether or not the first respondent’s share in the property can be transferred to the appellant, and
- ii) whether or not a share in a matrimonial home jointly owned by spouses can be attached and sold in execution of a judgment entered against one of the spouses.

The appellant raised the following other ground of appeal:

“More importantly, the court *a quo* ignored, and was timid, in failing to take a robust approach required by the Constitution in protecting women’s rights in the matter.”

The appellant’s case

[4] The appellant’s main case *a quo* was that the first respondent had acted recklessly in ‘exposing’ the matrimonial home and acquiring debts which resulted in his share of it, being attached by the Sheriff. Further she stated thus in her founding affidavit:

“... as a joint owner, it is my respectful contention that a co-owner does not have *jus abutendi* in respect of the property. A co-owner in my opinion cannot introduce a structural change in the occupation of the land without the consent of the other or alternatively the co-owner cannot expose the property through reckless action such that the rights of the co-owner can be directed (sic)

... I therefore believe that where matrimonial property is concerned, which is jointly owned, the common law should be expanded to recognise that property cannot be attached or exposed, without the consent of the other co-owner.”
(*my emphasis*)

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The appellant also made reference to the effect that the attachment of the first respondent’s half share of the property would have, in particular, that it would result in the imposition on her, of another co-owner with equal rights over the property. She accordingly sought in this respect, an order setting aside the attachment of the first respondent’s half share in the property. The appellant in her heads of argument argued that the attachment of the first respondent’s share in the property amounted to an interference with her rights as a co-owner. She further argued that the rights enjoyed by co-owners do not include the right to alienate the property jointly owned without the consent of the other party. Accordingly, the first respondent had no right to pledge his share in the property as security for a debt without her consent. In advancing this argument, the appellant relied on the cases of *Van de Merwe v Van Wyk* 1921 EDC

298; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 (1) SA 950 at 959 D-E and *Masubey v Masubey* 1993 (2) ZLR 36.

- [5] The appellant argued that she was offered the option to buy the property by her former employer, the Government, accepted the offer and paid the full purchase price of the property. Consequently, the first respondent's share must be transferred to her because the first respondent had not paid anything in the acquisition of the property. Finally, the appellant advanced the argument that the first respondent's unilateral encumbrance of their matrimonial home constituted an infringement of her constitutional rights to equal treatment as enshrined in ss 56 and 80 of Constitution.

Respondents' case

- [6] It has already been noted that the first respondent did not put up a judgment in the appellant's case *a quo*. The consequence of this is that what the appellant averred in relation to how the immovable property in question was acquired and who contributed what to its acquisition, remained undisputed. The same applies to the averment that the first respondent had 'exposed' the property to judicial attachment without the appellant's consent.

- [7] The second respondent, who was in no position to dispute these averments, argued that in terms of property law, ownership of immovable property is proved by way of registration of title. Once the right of ownership is proved, it confers the most complete and comprehensive control over property to the extent that a co-owner has the right to alienate or dispose of his or her share in the property without seeking the consent of the other co-owner(s). The second respondent however accepted that

before a co-owner can alienate his or her share in the property, it is desirable that they seek the consent of the other co-owner. However, it took the view that failure to obtain such consent cannot, alone, be taken as a basis to interdict a co-owner from alienating his rights in the property unless it is proved that such alienation was done in an unreasonable manner. The second respondent thus argued that in this case the first respondent had not exercised his right of ownership unreasonably, since he used it as security, 'to honour a commercial transaction'.

- [8] The second respondent further argued that the constitutional right to equality applies to every person, man or woman and consequently, the fact that the appellant is a woman does not exempt her from the consequences of the law where there are legal obligations which must be met.

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Whether or not the first respondent's share in the property can be transferred to the appellant.

- [9] It is trite that property, either movable or immovable, may be owned jointly by two or more persons. In respect of immovable property, each co-owner has real rights in the property to the extent of their defined share. In this respect the learned authors Silberberg and Schoeman in their book '*The Law of Property*', 4th Ed at page 32 state as follows:

'THE CONCEPT OF A REAL RIGHT

A real right is a *jus in rem*. It establishes a direct connection between a person and a thing in the sense that the holder of a real right is entitled to control the use of a thing within the limits of his right. In other words, a real right is enforceable against the world at large – that is against any person who seeks to deal with the thing to which a real right relates in any manner which is inconsistent with the exercise of the holder's right to control its use (and in so far as a person may have a real right in another person's property, a real right is also enforceable against the owner of that property.) (my emphasis).

What is emphasised in this *excerpt* is that every owner or co-owner enjoys real rights over the property registered in his or her name and such real rights cannot be lightly interfered with. *In casu*, the property is registered in the names of the appellant and the first respondent, meaning that both parties are owners of part of the property and have real rights over their respective shares therein, which cannot be lightly interfered with.

- [10] The right of ownership to immovable property must be registered with the Registrar of Deeds. A title deed is thus *prima facie* proof that a person enjoys real rights over the immovable property defined in the Deed. In the case of *Fryes (Pvt) Ltd v Ries* 1957 (3) SA 575 at 582, the court held that;

“Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose names real rights are registered. Generally speaking, no person can successfully challenge the right of ownership against a particular person whose right is duly and properly registered in the Deeds Office.” (*my emphasis*)

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It therefore follows that where two or more names appear on a title deed, a presumption exists that the property is owned by both or all the persons whose names appear on the Deed. The court explained the effects of registration of ownership in *Chapeyama v Chapeyama* 2000 (2) ZLR 175 (S) at p. 177 B as follows:

“In the first place, as already stated, the property was and is registered in the names of both parties. What this means is that Susan has real rights to an undivided half share of the property. In other words, she is the registered owner of an undivided half share in the property.”

A few years ago, this Court dealt with a similar issue in *Takafuma v Takafuma* 1994 (2) ZLR 103 (S). At 105H-106A, MCNALLY JA had this to say:

“The registration of rights in immovable property in terms of the Deeds and Registries Act [*Chapter 139*] (now [*Chapter 20:05*]) is not a mere form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

[11] The title deed *in casu* does not define the shares owned by the appellant and the first respondent in the property. However, where property is co-owned, there is a presumption that the parties own the property in equal shares. The position was enunciated in *Lafontant v Kennedy* 2000 (2) ZLR 280 (S), where the court held that;

“Where two persons own immovable property in undivided shares (as is the case here) there must, I think, be a rebuttable presumption that they own it in equal shares. That presumption will be strengthened when (as here) the parties are married to each other at the time ownership was acquired. Thus Jones Conveyancing in South Africa 4 ed p 118 states:

“Where transferees acquire in equal shares it need not be stated in the deed that they acquire ‘in equal shares’, as this fact is presumed in the absence of any statement to the contrary.”

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On the basis of this authority therefore, nothing turns on the fact that the Title Deed in relation to the property *in casu* (a Deed of Grant), simply ‘grants’ the property to the appellant and the first respondent. The property in this case was acquired in 2012, after the parties had solemnised their union in terms of the Marriages Act (*Chapter 5.11*). Thus by virtue of their names appearing on the deed the two own the property in equal undivided shares. The contention by the appellant that she solely purchased the property does not alter the legal effect of its registration in the parties’ joint names. In other words, it does not legally undermine the second respondent’s ownership and entitlement to the enjoyment and use of, real rights over the 50 percent share of the property that is registered in his name. In the absence of a court order, fraud, undue influence, mistake, gross irregularity or other factor vitiating such registration, this right cannot be lightly interfered with. The appellant has neither

claimed nor established any such circumstance. By all accounts, she voluntarily chose to have the property that she had solely paid for, jointly registered in her name and that of her husband.

[12] In our law, the legal regime governing ownership of immovable property by spouses within a subsisting marriage, reinforces rather than derogates from the principle that ownership of real rights is to be protected. In simple terms it provides for marriages out of community of property in the absence of an antenuptual contract executed by the spouses according to the relevant law. Specifically, s 2 of The Married Persons Property Act [*Chapter 5:12*] provides as follows:

- 1
- 2 **Community of property excluded from marriages after 1 January 1929, except where agreements made to the contrary**

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(1) Community of property and of profit and loss and the power or any liabilities or privileges resulting therefrom shall not attach to any marriage solemnized between spouses whose matrimonial domicile is in Zimbabwe entered into after the 1 January, 1929, unless such spouses shall, by an instrument in writing, signed by each of them prior to the solemnization of their marriage and in the presence of two persons, one of whom shall be a magistrate, who shall subscribe thereto as witnesses, have expressed their wish to be exempt from this Act. (*my emphasis*)

The import of this provision is that a spouse whose name appears for instance, in the Title Deed of any immovable property enjoys full ownership rights therein. He or she can deal with the property in any way he wishes, including alienating his rights therein or otherwise encumbering such property. Similarly, if both spouses are registered as joint owners of the property, each one enjoys full ownership rights over his or her share in the property¹. I have already found that *in casu*, the appellant and

¹ This situation is to be contrasted with a regime for instance, the South African one, that imposes community of property in marriage. Since all the property is owned equally by the spouses, neither is at liberty to deal with any share thereof as he/she wishes without the consent of the other.

the first respondent each legally and independently own an undivided half share in the property in dispute. On the basis of common law as well as our matrimonial property regime, the shares owned by each of them, being real rights, cannot lightly be interfered with.

- [13] It should be noted that the appellant, having used her own resources to fully purchase the property, could have effectively safeguarded her real rights therein by having the property registered in her name only. It is contended on her behalf that her decision may have been motivated by societal and cultural pressures and considerations that shape and impact on gender relations within the family set up. In other words, factors that fall outside the dictates of the law. As this may very likely be true, one may sympathise with the appellant given the predicament she now finds herself in. Unfortunately for her however, there is no gainsaying the fact that the inclusion of the first respondent's name in the Title Deed in question, clearly reposed in him real rights that at law, cannot lightly be interfered with. This includes depriving him of property that he rightfully owns.

One circumstance that may constitute an exception to this principle would be the division of immovable matrimonial property between a divorcing couple irrespective of whose name the property may be registered in accordance with s 7 of the Matrimonial Causes Act [Chapter 5:13]. The case at hand not being a divorce matter, does not constitute any such exception.

- [14] In light of the above I fully concur with the reasoning of the court *a quo* in holding, as it did, that the appellant had not established a legal basis for the transfer of the first

respondent's share of the property in question, into her name. The court stated as follows in its judgment:

'... there is no establishment of a solid foundation or a basis why the first defendant's share should be awarded to her. Without any recognised ground, mere contribution not being enough as mere grounds of equity do not suffice, (the) applicant cannot get the relief sought.'

As no fault can be found in this finding, this issue is determined against the appellant.

Whether or not a share in a matrimonial home jointly owned by spouses can be attached and sold in execution of a judgment entered against one of the spouses.

- [15] A reading of the papers on record shows that nowhere in her founding papers was the allegation made by the appellant that the second respondent had unilaterally pledged his half share of the property as security for the debt that he had incurred, and without the appellant's consent. The appellant's grounds of appeal in this court similarly do not allude to the question of whether or not it is legally permissible for a spouse to unilaterally encumber a jointly owned property without the other spouse's consent. This claim, whose effect was to improperly introduce a new cause of action, was only made in the appellant's heads of argument. Focus was then effectively shifted from the correctness or otherwise of attaching a spouse's half share in a jointly owned matrimonial home, to whether or not it was legally permissible for one spouse in such a situation, to alienate or otherwise encumber his share in the matrimonial home, without the other spouse's consent. The judge *a quo* fell into this trap and relied for her determination partly on this *dictum* from the learned authors *Silberberg and Schoeman's the Law of Property* at p 258:

"Every co-owner has the right freely and without reference to his co-owners to alienate his share, or even part of his share subject, of course, to the provision of the Agricultural Land Act ... It is this right which is probably the most important characteristic which distinguishes a co-owner *per se* from all other forms of co-ownership such as partnerships and associations. It is clear that the exercise of this right may lead to friction in that it enables one co-owner to

force the others into a legal relationship with a party or parties they do not desire.”

The learned judge then concluded as follows:

“In essence therefore the first respondent is at law authorised to alienate his right, encumber the same without reference to the other co-owner. It therefore follows that the second respondent (sheriff) would be within its rights to attach the 50 percent share of the first respondent to recover a debt incurred in a purely commercial transaction.” (my emphasis).

- [16] Thus while the court *a quo* made the correct finding as regards the Sheriff’s power to attach the share of jointly owned property that belongs to one of the spouses who has incurred but failed to repay a debt, it did so on an erroneous basis. The cause of action was whether or not the Sheriff can attach a share of jointly owned matrimonial property. Had the court addressed its mind to the appellant’s cause of action as enunciated in her founding affidavit, it would have found that this issue has been determined and settled by our courts, as a few authorities show. ^{Judgment No. 14/19} ~~In the leading case of~~ ^{Civil Appeal SC 374/17} *Gonyora V Zenith Distributors (Pvt) Ltd & Ors* 2004 (1) 195 (H) the applicant, a registered co-owner of the matrimonial home, took issue with the sale of the entire house in circumstances where the writ of execution should properly have only related to her husband’s half share. The court in that case correctly held that it was ‘inconceivable’ that the applicant’s share could be attached and sold in execution without *causa*. In yet another case, *Sheriff of Zimbabwe v Mukoko and Anor*, SC 805-17, the claimant and her husband co-owned their matrimonial home and the property was attached in execution of a debt owed by her husband. She approached the High Court with an interpleader application contending that her undivided half share in the property had been wrongfully attached. The court found that a writ is only enforceable against the property of a judgement debtor, in this case, the undivided half share of the claimant’s husband and not the entire property. The attachment of her share was

thus declared a nullity. *In casu*, while the appellant's half share of the property was not attached, the common law principle affirmed in the two cases cited above holds strong. This is that a writ of execution is properly enforced against the property of a judgment debtor, notwithstanding that it forms a part of jointly owned property.

[17] The warrant of execution issued by the second respondent against the first respondent's property relates only to his 50 percent share. The appellant's half share remains unencumbered. On a strict interpretation of the law and authorities cited above, her rights as a co-owner were not infringed. She remains free to enjoy her real rights in the half share she owns as she sees fit. The contention made on behalf of the second respondent is that the first respondent's half share is all that is intended to be sold in execution in order to settle the debt in question.

[18] It should be noted that the first respondent *in casu* did not formally or directly 'alienate' his share of the property. A perusal of the Deed of Suretyship shows that what he did was bind himself as surety and co-principal debtor with his company, Manyene Trading (Pvt) Ltd, for the due payment of its debt to the second respondent². Nowhere in the Deed of Suretyship does it state that the matrimonial home was being pledged as security for the repayment of the debt in question. Nor did the appellant tender any other evidence to that effect, for instance a Surety Mortgage Bond over the first respondent's half share in the property. It was therefore a mis-characterisation of the evidence before the court, to allege that the first respondent unilaterally encumbered the property by binding it as security for the repayment of the debt owed to the second respondent. At the stage of signing the deed of Suretyship, all that the

² It is noted that the Deed of Suretyship purports to have been entered into and signed for by both the appellant and the first respondent. However, it can be assumed and was so accepted by the court *a quo* that the appellant had no knowledge of the transaction and that her signature thereto was forged. Indeed, a casual look shows a marked difference between her supposed signature in the Deed of Suretyship, and that in her founding affidavit.

first respondent did was to create the possibility, in the event that he failed to repay the debt in his capacity as surety and co-principal debtor, of his share in the matrimonial home being attached in order to raise funds to repay the debt in question. It should be noted too that had the first respondent been possessed of other assets besides his share in the matrimonial home, such share would not have been attached.

[19] Be that as it may it cannot be denied that, while the signing of the Deed of Suretyship in reality might *per se* not have interfered with the family's daily enjoyment of the matrimonial home, the danger, presumably unknown to the appellant, was always there that the first respondent might default in his repayment of the loan, giving rise to the judicial attachment of his share of the property. This having then transpired, the consequence is that in practical terms, the appellant's and the family's enjoyment of the matrimonial home as a whole has been jeopardised. Were the first respondent's undivided half share to be sold, the appellant would be forced to co-own what was hitherto the family's matrimonial home, with a complete stranger. The appellant has indicated that she has no desire to relinquish her rights therein by, for instance, allowing the sale of the entire property and being paid 50 percent of the proceeds thereof. One may comment that sales in execution, being forced sales, generally do not realise the true value of the property concerned. Such an outcome would clearly prejudice the appellant who, through no fault of hers, would be forced to accept a fraction of the true value of her half share of the property and possibly not be able to use it to purchase a property of the same value.

[20] The court *a quo* in my view correctly highlighted the legitimate concerns that arise out of a situation where a spouse who with his spouse jointly owns what is in effect a

matrimonial home, puts such home at risk by raising debts that he may fail to pay back. *Albeit* not addressing a situation where the Sheriff has attached such spouse's share, the concerns highlighted by the court *a quo* apply equally to that situation. The court also ventured a suggestion as to how these concerns may best be addressed. It opined as follows:

“It cannot be disputed that the exercise of a co-owner's rights brings outright hardship to another co-owner in a matrimonial set up. This is particularly so when the property in issue is a matrimonial home. A house being indivisible, the property being a family home as in this case, it becomes in my view virtually impractical that the property be owned by two unrelated parties”.

[21] It is against this background that the appellant appealed to the High Court imploring it, among other relief, to ‘expand’ the common law to recognise that jointly owned matrimonial property should not be attached or ‘exposed’ without the consent of the other co-owner. She argues for a change in the law so that the Sheriff is restrained from attaching and selling in execution, any jointly owned property that lawfully belongs to the judgment debtor.

This part of the claim in my view was misconceived on two main respects. Firstly, as I have above highlighted, at least one Supreme Court judgment, *Sheriff of Zimbabwe v Mukoko and Anor*, SC 805-17, has affirmed the correctness of the attachment and sale in execution by the Sheriff, of the undivided share of a jointly owned matrimonial home in order to satisfy a debt incurred by one of the spouses. Being accordingly bound by this decision, the High Court could not have made a determination *in casu* other than the one that it made. Secondly, and to the extent that the High Court is empowered in terms s 176 of the Constitution, to among other things ‘develop’ common law, it could in my view not have properly done so if the effect was to override a Supreme Court judgment on the exact same issue.

[22] The court therefore correctly declined the invitation to ‘expand’ common law in an exercise of judicial activism, in order to grant the order sought by the appellant. Be that as it may I find it instructive to consider the issue as argued by the appellant, and as determined by the court *a quo* in this respect. The appellant argued at length and cited numerous authorities from our jurisdiction and beyond, on the need for courts, through judicial activism, to play their role in outlawing laws and practices that adversely affect the advancement of women’s development in all spheres of life. It was argued in this and other respects, that at common law, the courts are obliged to be ‘judicially active’ and develop the common law. Reliance for this argument was *inter alia* placed on the case of *Zimnat Insurance Company Ltd v Chawanda* (1990 (2) ZLR 143 at 145 B-D) where GUBBAY ACJ (as he then was) stated:

“It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because judges have an amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law making is an inherent and inevitable part of the judicial process”.

Special mention was made of s 176 of the Constitution, which vests in our higher courts, the power to protect and regulate their own processes and ‘*to develop common law or the customary law, taking into account the interests of justice and the provisions of this constitution.*’ It was the appellant’s argument that the circumstances of this case and the issue at stake therein, constituted a proper case for the exercise of this power.

The court *a quo* was not persuaded by the submissions made on behalf of the appellant in this respect and stated thus:

“It is this undesirable and impractical situation that in my view Mr *Biti* sought to demonstrate and seek solution to by referring to dynamic constitutionalism. No doubt legislative intervention is required to protect a family home. This may constitute law reform providing legal mechanisms for the prevention of encumbering a matrimonial home in the absence of meeting certain criteria”.

As TSANGA J stated in *Madzara v Stanbic Bank Zimbabwe Limited and others* HH546/15,

“the absence of mechanisms for the protection of a matrimonial home is indicative of a *lacuna* in the law which needs to be addressed legislatively in terms of spelling out the exact parameters of the protection of the matrimonial home.”

The court *a quo* thus in my view was correct in the following assertion;

“Attainment of such a milestone can never be achieved through judicial activism. This is a pertinent issue which touches on the concept of real rights as constituted by ownership and the will to deal with property and the limiting of such rights where matrimonial property is juxtaposed with the dictates of commerce.”

[23] Having considered the lengthy submissions made on behalf of the applicant and the respondent in the circumstances of the case and the relief sought, I do not find any fault with the reasoning of the court *a quo* on this point. Judicial activism, while having a place in our legal system as in many others, and in appropriate cases, however has its limits. The major limitation to the law making role of the courts is the need for the judiciary not to step onto the toes of the Legislature, whose primary mandate is to make laws through Parliament. I have no doubt in my mind that s 176 of the Constitution is not meant to vest the judiciary with authority to usurp the legislative responsibility of the Legislature. In this respect I associate myself with the sentiments of TSANGA J as expressed in the case of *Madzara v Stanbic Bank (supra)* as follows:

“In sum, much as judicial activism has its place in law’s advancement given the absence of constitutional breach in the manner averred by the Applicant in this case, and the clear recognition of a legislative gap that the State can be pressed to rectify, these are not issues that can be addressed through the

enthusiastic pen of an overly activist judge. These issues require informed dialogue and the legislator's engagement with relevant stake holders on what would be realistic. Sight should not be lost of the significance of participation for efficacy of laws by those on whom they will have a bearing. (*my emphasis*)

It should be noted in this case that the appellant's call was for the exercise of judicial activism taking the form of 'expanding' the common law, based only on the facts of the dispute at hand. The dispute clearly has a bearing on both social and economic issues but does not reflect the full ambit and reach of the problem sought to be addressed. The interests of other players like banks and building societies whose business includes the lending of money upon the pledging of immovable property as security would most likely be affected. One may envisage a situation where such entities may, to their detriment, become wary of extending mortgage bond facilities to a married couple aspiring to acquire and jointly own a matrimonial home, to any married person for that matter, or to a married couple wishing to jointly own property to develop their jointly owned property! One may also not rule out collusion between an unscrupulous married couple, who may borrow money from a lending agency and then hide behind their joint ownership of a matrimonial home in order to frustrate the creditor's efforts to recover its money. Furthermore, it must be accepted that the second respondent was unable to find any other property belonging to the first respondent that could have been attached and sold in execution in order to raise the not inconsiderable amount that it is owed. It falls to reason that granting the relief sought by the appellant would leave the second respondent with no recourse, much to its prejudice. These and other related matters are weighty and complex. They need proper consideration before such a fundamental change to the common law as is sought by the appellant can be effected, even by the Legislature should it be so

persuaded. The Judiciary by nature, lacks the resources or any capacity to undertake such a task.

- [24] That being the case, it is patently evident that granting the relief sought by the appellant, while it may solve her particular problem, would create problems for many others on whom it would impact. It is not the type of relief that the court may properly grant. This dilemma is aptly captured by FRANKFURTER J in the USA case of *Sherrer v Sherrer* 334 US 343, 366 (1948), as follows:

“Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow window of litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution”.

- [25] This is in line with the sentiments of GUBBAY CJ in *Walker Industrial Pty Limited v Walker* 1995 (1) ZLR 87 (S) when he stated:

“Almost ninety years ago in *Blower v Van Noorden* 1909 TS 890 at 905 INNES CJ aptly observed that:

“There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision and when they are so important or so radical that they should be left to the legislature.” (*my emphasis*)

In my view this is a proper approach to judicial decision-making which strikes the correct balance between excessive caution, on the one hand, and judicial over-reach, on the other. HLATSHWAYO JA had occasion to comment on the same dilemma in his former life as an academic some two decades ago, thus:

“In point of fact, though, there is no great difference between the two approaches, especially given the very limited scope of judicial law-making. However, the consequences of adopting one approach as against the other are far-reaching on the maintenance of the rule of law structure, the development and consolidation of human rights and human rights culture. To use a homely description, judicial law-making could be likened to “grazing over the fence”. Now, it is one thing when judges stretch their necks to graze on the sweet green grass bordering the judicial paddock and quite another for them to go trip, trap, trip, trap billy goat Gruff style, across the bridge to graze on the other side. Then one never knows what ugly trolls they might disturb and the constitutional havoc that might ensue. In this illustration, judicial restraint can be compared to stretching the neck as far as it can go to graze on the sweet green grass, while remaining within the judicial constitutional space, and judicial activism to bolting out of the paddock and going round to eat perhaps the very same grass or a little bit more further afield. The extra mouthful of grass, I submit, is not worth the consternation that the act of bolting out of the judicial enclosure causes!”³

[26] It is not to be denied that the relief sought by the appellant is one that would resonate with women’s rights activists and many married women who jointly own matrimonial property with their husbands. This is because it would deal a killing blow to one of the major social and cultural pressures that serve to stifle the growth and development of married women, their access to vital resources like reliable shelter and the security that all this brings to women and families as a whole. I however agree with the learned judge *a quo* and the authorities cited, that the complexity of the matter at hand and its undeniable impact on other players who are not parties to this claim, are issues that should properly be left to the legislature to address. The issue at hand is one that, to use TSANGA J’s words (*supra*), ‘requires informed dialogue and the legislator’s engagement with relevant stake holders on what would be realistic’. Thus thorough, systematic legislation informed by views garnered from consultation with relevant players and stakeholders is necessary in addressing problems like the one at hand, that impinge on matters to do with the country’s social and economic development.

³ Order in the Courts: Judicial Activism and Restraint, 1997, Legal Forum, p.14

I do not entertain any doubt, when all is said, that the exercise of judicial restraint is properly called for in relation to the legal changes sought *in casu*.

CONSTITUTIONAL ARGUMENTS

[27] I do not find any merit in the constitutional arguments made for the appellant. The facts of the matter show that no constitutional guarantees in terms of equality of rights during marriage, or equal treatment including equal opportunities in the economic, cultural and social spheres, were infringed. Nor did this happen with respect to the appellant's right to acquire property. The appellant was gainfully employed, freely acquired the property in question, but voluntarily chose to have it registered in her and her husband's joint names. No coercion or undue pressure on her by anyone is alleged. She therefore effectively donated one half-share of what was rightfully her property, to her husband. It is this action that lies at the root of the problem that led to her bringing the matter to court. It thus becomes difficult to comprehend how the lawful consequences of such an action can be said to have mutated into an infringement of her rights to equality in marriage, to acquire property and to shelter.

[28] When all is said, there is in my opinion, a clear need for those who advocate for the protection of the rights of women, children and the family as whole, to lobby the Legislature to enact laws that address the problem *in casu* and similar issues. As indicated, I concur with the view taken by the court *a quo*, that this is a matter to be properly dealt with by substantive law, rather than through the court taking 'a robust approach' in protecting women's constitutional rights as contended for the appellant. Other jurisdictions, no doubt prompted by similar concerns, have successfully been moved to pass legislation that outlaws the alienation or encumbrance of a matrimonial

home by one spouse without the consent of the other. Where that happens the court is empowered to set aside the transaction. In Canada (Nova Scotia), s 8 of the Matrimonial Property Act, provides as follows:

“Disposition of matrimonial home

- (1) Neither spouse shall dispose of or encumber any interest in a matrimonial home unless;
 - (a) the other spouse consents by signing the instrument of disposition or encumbrance, which consent shall not be unreasonably withheld;
 - (b) the other spouse has released all rights to the matrimonial home by a separation agreement or marriage contract;
 - (c) the proposed disposition or encumbrance is authorized by court order or an order has been made releasing the property as a matrimonial home; or
 - (d) the property is not designated as a matrimonial home and an instrument designating another property as a matrimonial home of the spouses is registered and not cancelled.

Disposition contrary to subsection (1)

- (2) Where a spouse disposes of or encumbers an matrimonial home contrary to subsection (1), the transaction may be set aside by the other spouse upon an application to the court unless the person holding the interest or encumbrance acquired it for valuable consideration, in good faith and without notice that the property was a matrimonial home.” (my emphasis)

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There is in my view no doubt that legislation along these lines would be desirable in our law, as it would go a long way in safeguarding the family’s rights to shelter. It would also protect the integrity of a matrimonial home and promote the economic empowerment of women. It is precisely because such legislation is absent in our law, that the appeal *in casu* must fail.

[29] It should be noted though that as far back as 2005, MAKARAU J (as she then was) dealt with a similar dispute in *Muswere v Makanza* HH 16/2005. She more forcefully stated the need for law reform in this respect thus:

‘... while accepting the current position at law, I am of the firm view that the principles of family law that this Court is enjoined to apply to restrict the rights of a wife to the realm of personal rights against her husband are anachronistic and have outlived their *raison d’etre*.’

It is in my view, therefore, a matter of regret that no concerted effort has to date been made by activists in the field of gender and women’s rights to lobby the legislature to effect the desired changes in our law. As evidenced by the many disputes of this nature that have been brought before our courts, a need for such change has clearly been demonstrated.

[30] **Disposition**

In the light of the foregoing, the appeal fails on all grounds.

It is accordingly ordered as follows:

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“The appeal be and is hereby dismissed with costs.”

HLATSHWAYO JA: I agree

ZIYAMBI AJA: I agree

Tendai Biti Law, appellant’s legal practitioners

Dhlakama. B Attorney’s, second respondent’s legal practitioners