THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT 15/95

Annette Brink Applicant

and

Andre Kitshoff NO Respondent

Heard on: 9 November 1995

Judgment delivered on: May 1996

JUDGMENT

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[1] **CHASKALSON P:** This is another case in which difficulties have arisen in regard to the application of the provisions of section 102(1) of the Constitution.

[2] Section 102(1) which deals with the referral of constitutional issues to this Court by a provincial or local division of the Supreme Court, and sections 103(3) and (4) which deal with referrals of constitutional issues raised in other courts, are necessary to address problems of jurisdiction. A provincial or local division of the Supreme Court has jurisdiction under section 101 of the Constitution to determine certain constitutional issues.

In the absence of a consent to jurisdiction in terms of section 101(6) it has no jurisdiction to give a decision on the constitutionality of an Act of Parliament, to rule on disputes of a constitutional nature between the national government and any other organ of government, or to deal with disputes between organs of state of different provinces.

[3] No provision is made for proceedings to be initiated in the Constitutional Court, but section 100(2) empowers the Constitutional Court to make provision in its rules "for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction." Such provision has been made by rule 17 which permits direct access in "exceptional circumstances only, which will ordinarily exist only where the matter is of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government."

[4] The procedures, which are prescribed by sections 102(1), (2), and (3) and sections 103(2), (3) and (4) of the Constitution, contemplate that constitutional issues within the exclusive jurisdiction of the Constitutional Court will be raised formally in proceedings before the Supreme Court or other courts, and will only be referred to the Constitutional Court for its decision in circumstances where it would be appropriate to do so. It is in the first instance the responsibility of the Supreme Court to decide whether or not the circumstances are appropriate.

[5] Thus, if the validity of any legislation is challenged in the Magistrates Court or other court which has no jurisdiction to deal with such challenge, the presiding officer must either act

in terms of section 103(2) and deal with the matter on the assumption that the legislation is valid, or if he or she is "of the opinion that it is in the interest of justice to do so",[1] postpone the proceedings in terms of section 103(3) to enable the party who has raised the matter to apply to the Supreme Court for relief in terms of section 103(4). The Supreme Court has the power in terms of section 103(4) to deal with the issue itself if it is within its jurisdiction or to refer it to the Constitutional Court if it is beyond its jurisdiction. To exercise the power to refer the issue to the Constitutional Court, the provincial or local division concerned must be of the opinion that a decision on the validity of the law will be material to the adjudication of the matter, that there is a reasonable prospect that the relevant law will be held to be invalid, and that it is in the interest of justice that the issue be decided. If a decision is taken to refer the issue to the Constitutional Court the provincial or local division concerned must make a finding on any evidence that may be relevant to the constitutional issue. This will be necessary only if oral evidence has to be heard and although that is not specifically stated, the provision clearly contemplates that in such event the evidence will be heard by the provincial or local division concerned.

[6] Sections 102(1), (2), and (3) prescribe the procedure to be followed in dealing with constitutional issues raised in proceedings before a provincial or local division. They provide:

> (1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be

[1] As to a magistrate's duties in this regard, see *Nel v Le Roux* CCT 30/95: judgment delivered on 4 April 1996.

> heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.
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> (2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.
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> (3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction.

The Constitution contemplates that constitutional disputes will ordinarily be dealt with by the provincial or local division before the Constitutional Court is engaged; and this is so even if the only issue in the case is a constitutional issue within the exclusive jurisdiction of the Constitutional Court. This follows from the language of section 102(1) and (2) which necessarily implies that section 102(1) is applicable to cases in which the only issue is the one to be referred to the Constitutional Court, and section 102(17) which makes provision for appeals to the Constitutional Court against a decision of the Supreme Court refusing a referral where "the only issue raised is a constitutional issue within the exclusive jurisdiction of the Constitutional Court".

[7] The Constitution requires the Supreme Court to deal with constitutional issues raised in proceedings brought before it in terms of sections 102(1) or 103(4), if such issues are within its jurisdiction. Where the constitutional issues raised in proceedings before it, are within the jurisdiction of the provincial or local division, they will ordinarily be considered in conjunction with the other issues in the case, and any appeal will be dealt

with in accordance with the provisions of sections 102(4), (5), (6) and (7); such appeals will also be subject to the rules of the Supreme Court and the Constitutional Court.

[8] Where, however, a constitutional issue within the exclusive jurisdiction of the Constitutional Court is raised in a matter, the provincial or local division is empowered by section 102(1) to refer such issue to the Constitutional Court for its decision. It is not, however, obliged to do so. It is required by the section to have regard to two further matters upon which the exercising of the power is dependent. First, whether the issue is one which may be decisive for the case; and secondly, whether it would be in the interest of justice to refer the issue to the Constitutional Court. The referral should only be made if both these requirements have been satisfied.

[9] The importance of the second issue has been stressed in a number of decisions where it has been pointed out that it is not in the interest of justice to refer an issue which is based upon a contention that has no reasonable prospect of being upheld by the Constitutional Court. It has also been pointed out that it is not ordinarily in the interest of justice for cases to be heard piecemeal, and that as a general rule if it is possible to decide a case without deciding a constitutional issue this should be done.[2]

[10] The importance of the first issue is referred to by Didcott J in *Luitingh v Minister of*

[2] *S v Mhlungu & Others* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59; *S v Vermaas* 1995 (3) SA 292 (CC); 1995 (7) BCLR 851 (CC) at para 13; *Ynuico Ltd. v Minister of Trade and Industry and Others* 1995 (11) BCLR 1453 (T) at 1465B-E; *Bernstein and Others v Von Wielligh and Others* (CCT 23/95: judgment delivered on 27 March 1996), at para 2.

Defence,[3] where he held that the requirement that it "may be decisive" was satisfied "once the ruling given there may have a crucial bearing on the eventual outcome of the case as a whole, or on any significant aspect of the way in which its remaining parts ought to be handled." This would include an issue which, if decided in favour of the party who has raised it, would put an end to or materially curtail the litigation. It would also include an issue such as the constitutionality of the provisions of section 217(1)(b)(ii) of the Criminal Procedure Act, 1977, dealing with the onus of proof in relation to the admissibility of a confession in a criminal trial, which arose in *S v Zuma*[4] and *S v Mhlungu*.[5] In *Zuma*'s case, which had been wrongly referred for other reasons, the decision of the entire case in fact depended on where the onus lay. In *Mhlungu*'s case a ruling would determine the way in which the voir dire was to be conducted, and was also necessary in fairness to the accused to enable them to decide whether or not to give evidence.

[11] Evidence that may be necessary for the determination of a constitutional issue should be placed before the Supreme Court at the time of the application for referral. Frequently, this can be done on affidavit. There may, however, be exceptional cases in which it is necessary for oral evidence to be led in respect of the constitutional issue, and the proviso to section 102(1) requires that in such cases the provincial or local division concerned shall hear the evidence and make findings thereon before referring the issue to the Constitutional Court. This requirement is clearly directed towards avoiding the delays and

[3](CCT 29/95): Judgment delivered on 4 April 1996, paras 9 and 10.

[4]1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA).

[5]1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

inconvenience that would be caused if such evidence had to be dealt with by a court of eleven judges. Rule 34 of the Rules of the Constitutional Court provides that a party may also make use of material that does not specifically appear on the record, provided that the facts are common cause or otherwise incontrovertible, or are of an official, scientific, technical, or statistical nature capable of easy verification. Frequently it will not be necessary for evidence to be placed before the Court for the purposes of the decision on the constitutional issue; but there will be occasions on which such evidence will be necessary, particularly when it is sought to justify a limitation of a right entrenched under Chapter Three of the Constitution.

[12] A litigant who wishes to rely on evidence that is not covered by rule 34, has a duty to ensure that such evidence is placed on record before asking for an issue to be referred to the Constitutional Court, and the referring judge should also be satisfied that any evidence necessary for the proper determination of the issue is on record before making the referral. It should be borne in mind in this regard, that an important part of any decision is the order to be made in terms of sections 98(5) or (6) of the Constitution. If either party wishes to rely on evidence beyond the scope of rule 34 to support its submissions concerning the terms of the order, the affidavits containing such evidence should be placed before the court at the referral phase and should not be tendered after the referral has been made.

[13] Although the language of sections 102(1), (2) and (3) differs from the language of sections 103(2), (3),and (4), they have in common the fact that the Supreme Court has the responsibility of controlling referrals to the Constitutional Court. This is an important

function which is necessary both to ensure that the hearing of cases is not disrupted by frivolous or unnecessary applications to refer issues to the Constitutional Court, and to ensure that if the determination of a constitutional issue may be decisive, it should only be referred after all the evidence necessary for such a decision has been placed on record.

[14] Where, as in the present case, a ruling as to the decisiveness of the constitutional issue depends in part on a point of law within the jurisdiction of the provincial or local division, the law point should be considered and decided by the provincial or local division concerned, and a referral should not be made unless that decision leads to the conclusion that the constitutional issue may indeed be decisive. These procedures ensure that litigation proceeds in an orderly fashion, that constitutional issues are only referred to the Constitutional Court when they are ripe for hearing, and that the Constitutional Court has the benefit of the reasons of the provincial or local division for the referral when it is called upon to deal with the matter. Applications for referral are not mere formalities and ought not to be treated as such by the parties seeking a referral, or by the courts to whom an application for a postponement under section 103(3) or a referral under section 103(4) or section 102(1) is made.

[15] In the present case the issue referred to this Court concerns the constitutionality of section 44 of the Insurance Act, 1944. It is an issue within the exclusive jurisdiction of the Constitutional Court and the requirement that there be a reasonable prospect of success was clearly satisfied. The consideration that presents a difficulty in the present case is whether the issue is one which may be decisive for the case. As appears from the

judgment of O'Regan J, the answer to that question depends upon whether the date on which the deeming provision takes effect is the date of the concursus creditorum or some earlier date. This is relevant because the deceased died before the Constitution was in force and if the vesting of the creditors' rights to the proceeds of the insurance policy took effect on or before that date it would not be subject to attack even if section 44 was invalidated by the Constitution when it came into force.[6] A ruling as to the constitutionality of section 44 could, however, be decisive for the case if the relevant date is the date of the concursus creditorum. A finding as to the relevant date was therefore necessary for the purpose of deciding whether or not the issue was a proper one for referral in terms of section 102(1). This Court has no jurisdiction to make such a finding, which was relevant not only for the purposes of the referral but also for the making of an order in terms of section 98(5) or (6) of the Constitution. The Transvaal Provincial Division should have been asked to make a finding on this issue. This was not done and as a result the referral has not been made in accordance with the requirements of section 102(1).[7]

[16] In the present case an application was made on the 23rd March 1995 to the Transvaal Provincial Division, before which the case was pending, for the issue of the constitutionality of section 44 of the Insurance Act to be referred to this Court, and that application was granted on the 28th March. The parties failed at the time to appreciate the importance of the date of the vesting of creditors' rights under section 44 of the Insurance

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[6] *Du Plessis v De Klerk* CCT 8/95: judgment delivered in May 1996. Whether there may be exceptional circumstances in which an order in terms of section 98(6) could render invalid anything done prior to 27 April 1994, a question expressly left open in *De Klerk*'s case (at para 20 per Kentridge AJ) needs no further consideration here. It is clear that the circumstances of the present case do not warrant such an order.

[7] *Luitingh v Minister of Defence* (CCT/29/95: judgment delivered on 4 April 1996)

Act, and it was for this reason that the provincial division was not asked to determine such date. This was before the judgments in *S v Mhlungu, S v Vermaas,* and *Du Plessis v De Klerk* had been given. Practitioners and Courts were not yet familiar with the provisions of the new Constitution or with the procedures to be followed in the referral of constitutional issues to this Court. It had also not yet been made clear by this Court that the Constitution will not ordinarily[8] be construed as interfering with vested rights, and as the judgments in *S v Mhlungu* and *Du Plessis v De Klerk* show, there was considerable confusion at the time of the application for referral in this case in regard to the applicability of the Constitution to issues that had arisen prior to the date on which it came into force.

[17] Although they have some features in common there are material differences between the present case and *Luitingh*'s case. *Luitingh*'s case was referred to this Court more than a month after judgment had been given in *Zuma*'s case and at a time when it had already been made clear that rule 17 "is not intended to be used to legitimate an incompetent reference."[9] One of the issues in *Luitingh*'s case was whether the Plaintiff's claim had been extinguished before the Constitution came into force; if it had been the constitutional issue would have been irrelevant. Despite the uncertainty that existed in regard to the "retrospectivity" of the Constitution, it had never been suggested, nor could it reasonably have been suggested, that one of the consequences of the coming into force of the Constitution was to revive extinguished debts. Finally, there was no pressing need to deal

[8]See the caveat in para 20 of the judgment of Kentridge AJ in *Du Plessis v De Klerk* supra.

[9] *Zuma*'s case (supra) at para. 11.

with the constitutional issue raised in *Luitingh*'s case, as the same issue had been argued in another case before this court, and in which the issue would be resolved.

[18] The parties in the present case desire that a decision be given on the constitutional issue. The issue as to the constitutionality of section 44 of the Insurance Act is one of importance on which we have heard full argument by parties with an interest in the outcome, and in respect of which we are in a position to give judgment. Although we do not have jurisdiction to determine the time of the vesting of creditors' rights under section 44 of the Insurance Act I am satisfied that there is a reasonable prospect that on the facts of the present case, the relevant date may be held to be the date of the concursus creditorum, which means that there is a reasonable prospect that the constitutional issue will prove to be decisive for the case. Having regard to this, to the uncertainty that existed at the time of the referral in regard both to the procedures to be followed and the reach of the Constitution, and to the fact that the public interest and the ends of justice and good government will be served by the delivery of a judgment on the constitutional issue by this Court, I consider that the matter is one in which we can exercise our power to grant direct access to the parties.[10] It should, however, be clearly understood that uncertainty as to the procedures to be followed or the reach of the Constitution can no longer be regarded as excuses for incorrect referrals, and that this Court has a discretion, even where exceptional circumstances have been established, to refuse to grant permission for a matter to be brought directly to it. It will not hesitate to exercise that discretion when it considers it appropriate to do so.

[10]See: section 100(2) of the Constitution and rule 17. See also *S v Zuma* (supra), para 11.

A CHASKALSON
PRESIDENT, CONSTITUTIONAL COURT

Mahomed DP, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J concur in the judgment of Chaskalson P

[19] **O'REGAN J**: The question referred to the court in this matter was whether section 44 of the Insurance Act, 27 of 1943 ('the Act'), is in conflict with the provisions of chapter 3 of the Constitution of the Republic of South Africa Act, 200 of 1993 ('the Constitution'), in so far as it discriminates against married women by depriving them, in certain circumstances, of all or some of the benefits of life insurance policies ceded to them or made in their favour by their husbands.

[20] Section 44 of the Act provides as follows:

> (1) If the estate of a man who has ceded or effected a life policy in terms of section *forty-two* or *forty-three* has been sequestrated as insolvent, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall be deemed to belong to that estate: Provided that, if the transaction in question was entered into in good faith and was completed not less than two years before the sequestration --
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> (a) by means or in pursuance of a duly registered antenuptial contract, the preceding provisions of this subsection shall not apply in connection with the policy, money or other asset in question;
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> (b) otherwise than by means or in pursuance of a duly registered antenuptial contract, only so much of the total value of all such policies, money and other assets as exceeds thirty thousand rand shall be deemed to belong to the said estate.
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> (2) If the estate of a man who has ceded or effected a life policy as aforesaid, has not been sequestrated, the policy or any money which has been paid or has become due thereunder or any other asset into which any such money was converted shall, as against any creditor of that man, be deemed to be the property of the said man --
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> (a) in so far as its value, together with the value of all other life policies ceded or effected as aforesaid and all moneys which have been paid or have become due under any such policy and the value of all other assets into which any such money was converted, exceeds the sum of thirty thousand rand, if a period of two years or longer has elapsed since the date upon which the said man ceded or effected the policy; or
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> (b) entirely, if a period of less than two years has elapsed between the date upon which the policy was ceded or effected, as aforesaid, and the date upon which the creditor

> concerned causes the property in question to be attached in execution of a judgment or order of a court of law.

[21] Section 44(3) of the Act is concerned with spouses married in community of property and protects life insurance policies owned by a wife from attachment in certain circumstances. It has no bearing on the facts of the case before us and this judgment is therefore concerned solely with subsections (1) and (2) of section 44.

[22] One effect of these provisions is that, where a life insurance policy has been ceded to a woman, or effected in her favour, by her husband more than two years before the sequestration of her husband's estate, she will receive a maximum of R30 000 from the policy. If it was ceded or taken out less than two years from the date of sequestration, she will receive no benefit from the policy at all. Similarly, once two years has elapsed since the policy was ceded to a wife, or effected in her favour, the policy or any money due thereunder, to the extent that it exceeds R30 000, will be deemed, as against the creditors of the husband, to form part of the husband's estate. Such proceeds may therefore be attached by judgment creditors of the husband in execution of a judgment against him. If less than two years has elapsed since the date of the cession or taking out of the policy and the date of attachment by a creditor of her husband, all the proceeds of the policy will be deemed to be part of the husband's estate. The Act contains no similar limitation upon the effect of a life insurance policy ceded or effected in favour of a husband by a wife.

[23] Counsel for Mr A Kitshoff NO, the respondent, pointed out that sections 44(1) and (2), and their predecessors, section 26(2) of the Insolvency Act, 32 of 1916, and section 28 of the Insurance Act, 37 of 1923, were enacted at a time when donations between

spouses during a marriage were prohibited. One of the effects of sections 44 (1) and (2) and their predecessors was therefore to provide some relief to married women in the context of the prevailing law governing matrimonial property. During the 1980s, however, the Legislature enacted legislation which altered substantially the proprietary consequences of marriage (the Matrimonial Property Act, 88 of 1984, and the Marriage and Matrimonial Property Law Amendment Act, 3 of 1988). Section 22 of the 1984 Act abolished the common law provision which had forbidden donations between spouses. Sections 44 (1) and (2) therefore no longer have the beneficial effect referred to by counsel. As a consequence of that change in the law, the effect of the provision, which had formerly been to provide some benefit to married women, was altered so that it, in effect, was prejudicial to them.

[24] The facts in the case referred to this court are as follows: a life insurance policy valued at approximately R2 million in respect of Mr P Brink was taken out during 1989. The policy reflected Mr Brink as the owner of the policy and in 1990 he ceded, or purported to cede, it to his wife, Mrs A Brink, who is the applicant before this court. On 9 April 1994 Mr Brink died. Mr A Kitshoff, the Respondent before this court, was appointed as executor of the estate and on 23 May 1994, in terms of section 34(1) of the Administration of Estates Act, 66 of 1965, ('the Estates Act'), he sent a notice to creditors informing them that the estate was insolvent. In terms of section 44 of the Act, the executor demanded that the assurer (Liberty Life Association of Africa) pay into the estate all but R30 000 of the proceeds of the life insurance policy. When the assurer refused to do so, the executor launched an application in the Transvaal Provincial

Division of the Supreme Court for an order compelling the assurer to pay over the proceeds. Mrs Brink, the assurer and the Master of the Supreme Court were cited as respondents in that application.

[25] Mrs Brink made a counter application seeking an order that the life insurance policy be rectified to reflect her, and not her husband, as the original owner of the policy. She also raised the question of the constitutionality of section 44 of the Act. On 28 March 1995 the parties applied to the Supreme Court for a consent order referring the question of the constitutionality of section 44 to this court in terms of section 102(1) of the Constitution. That order was granted.

[26] In this case, the insurance policy was taken out and ceded and the applicant's husband died before the Constitution came into force. The question of whether this Constitution can have application to events that occurred before it came into operation on the 27 April 1994 has been decided in *Du Plessis and others v De Klerk and others* CCT8/95, an unreported judgment of this court delivered in May 1996. In that case, Kentridge AJ, speaking for the court, held that the Constitution would not ordinarily be construed as interfering with rights which had vested before it came into force (at para 20).

[27] Although that judgment had not been handed down when this case was argued, Mr Bertelsmann, for the applicant, developed his argument on the assumption that the Constitution would only apply to the present case if the executor's claim to the

proceeds of the policy arose after the Constitution came into force. According to his argument, on a proper reading of section 44(1), an estate only becomes entitled to the proceeds of the policy once the estate has been sequestrated. He pointed out that the deceased estate had never been formally sequestrated. However, Mr Bertelsmann argued, relying upon *Miller NO v Smit* 1986 (1) SA 320 (C) at 326, that the estate would become entitled to the proceeds of the policy once a *concursus creditorum* had been initiated in terms of section 44(2), read with section 34 of the Estates Act. This could be brought about by the provisions of section 34 of the Estates Act without a formal sequestration order. In terms of this section, where an executor discovers that an estate is insolvent, he or she may send a notice to all creditors reporting on the insolvency of the estate. If a majority of the creditors do not require the executor to surrender the estate for sequestration in terms of the Insolvency Act, 24 of 1936, the executor may, within a period specified in the notice, which may not be less than fourteen days after sending it, proceed with an informal insolvency procedure governed by the provisions of section 34 of the Estates Act. At that stage, a *concursus creditorum* is deemed to have been initiated. In the present case, a section 34 notice was sent out on 23 May 1994 and Mr Bertelsmann argued in reliance on section 34 that a *concursus creditorum* came into existence fourteen days later and that it was only then that the estate could have acquired a right to the proceeds of the policy.

[28] The jurisdiction of this court is limited to the interpretation, protection and enforcement of the provisions of the Constitution (in terms of section 98(2) of the Constitution) and any other matter over which it is expressly given jurisdiction. Neither the question of

when an estate becomes entitled to the proceeds of a life insurance policy in terms of section 44, nor the question of when a *concursus creditorum* will be initiated, are constitutional questions. This court accordingly does not have jurisdiction over such matters.

[29] The first question to be considered is whether, in the circumstances, the reference of the constitutional issue to this Court is proper. That issue is discussed fully in the judgment of Chaskalson P with which I am in complete agreement. In short, section 102(1) of the Constitution provides three prerequisites for a valid referral: the issue referred must fall within the exclusive jurisdiction of the Constitutional Court, it must be shown that the issue 'may be decisive of the case' and the judge of the provincial or local division must consider it in the interest of justice for the issue to be referred. In *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) (at para 59) Kentridge AJ held that it was implicit within the third requirement that there be reasonable prospects of success in regard to the issue referred. (See also *Ferreira v Levin NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 at para 7.)

[30] On the construction of section 102(1) adopted by Chaskalson P, it is necessary for Mr Bertelsmann to show that the Constitution may have a decisive bearing on the outcome of the case. Whether it will or not in this case depends on whether Mr Bertelsmann's construction of section 44 of the Act and section 34 of the Estates Act is correct or not. This is a matter which falls outside our jurisdiction and within the jurisdiction of the Supreme Court and is a question which should have been answered before this referral

was made. Accordingly, the referral in this case is improper. However, for the reasons given by Chaskalson P (at paragraphs 16 - 18), I consider that this is an appropriate case in which to grant direct access in terms of section 100(2) of the Constitution read with rule 17.

[31] Sections 44 (1) and (2) of the Act are challenged on the ground that they constitute a breach of section 8 of the Constitution. Section 8 provides that:

> (1) Every person shall have the right to equality before the law and to equal protection of the law.
> (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability,
> religion, conscience, belief, culture or language.
> (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
> (b) ...
> (4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

[32] All the parties who appeared before us conceded that sections 44(1) and (2) constituted a breach of section 8 of the Constitution. The applicant and the Centre for Applied Legal Studies, which was admitted as *amicus curiae*, presented detailed and helpful argument as to the manner in which section 8 should be interpreted. This is the first case in which the court has been directly concerned with section 8, and in particular section 8(2), of the Constitution and some consideration of the approach to that section is appropriate.

[33] Equality has a very special place in the South African Constitution. The preamble

states that

> ... there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races ....

Furthermore, section 33(1) of the Constitution states that rights entrenched in chapter 3 may be limited to the extent only that it is 'justifiable in an open and democratic society based on freedom and equality'. It is not surprising that equality is a recurrent theme in the Constitution. As this court has said in other judgments, the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched. (*S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paragraphs 218, 262, 322*; Shabalala and others v Attorney-General, Transvaal and another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593, at paragraph 26.*)*

[34] Section 35(1) of the Constitution requires us to have regard to international law to interpret the rights it entrenches. The concepts of 'equality before the law' and 'discrimination' are widely used in international instruments. Article 7 of the Universal Declaration of Human Rights 1948 provides that:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 26 of the International Covenant on Civil and Political Rights 1966 provides that:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In addition, there are other international conventions dealing with specific aspects of discrimination such as the International Convention on the Elimination of all Forms of Racial Discrimination 1966, the Convention on the Elimination of all Forms of Discrimination against Women 1980, the Convention against Discrimination in Education 1960 and the International Labour Organisation (ILO) Discrimination (Employment and Occupation) Convention 1958.

[35] As well as the international instruments, many countries have constitutional provisions protecting equality and prohibiting discrimination. One of the oldest of such provisions is the Fourteenth Amendment of the Constitution of the United States of America, which provides that no state shall 'deny to any person within its jurisdiction the equal protection of the laws'. Although this provision contains no specific reference to discrimination, it is widely perceived to be a precursor to equality provisions in many modern constitutions. Similarly, the extensive jurisprudence developed by the United States Supreme Court has informed much of the jurisprudence on equality of other courts. A central principle of the United States jurisprudence has been to impose different levels of scrutiny on different categories of legislative classification. The most stringent level of scrutiny is reserved for classifications based on race or nationality, or those that invade fundamental rights. Such classifications are almost inevitably considered to be a breach of the Fourteenth Amendment. An intermediate level of scrutiny is applied to classifications concerning gender or socio-economic rights. The third level of scrutiny requires merely that a classification be shown to have a rational relationship to the legislative purpose. (See Laurence H Tribe

American Constitutional Law 2nd ed chapter 16; Geoffrey R Stone, Louis M Seidman, Cass R Sunstein, Mark V Tushnet *Constitutional Law* 2nd ed chapter 5.)

[36] The Indian Constitution, too, protects equality and seeks to outlaw discrimination. Article 14 and 15(1) provide that:

> 14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
>
> 15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
> (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any social and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

[37] In interpreting article 14, the Indian Supreme Court has required that any legislative classification or distinction be shown first to be founded on 'intelligible differentia' which have a rational relation to the object sought to be achieved by the impugned legislation. Article 15 is understood as an instance of the right to equality protected by article 14. (Basu *Shorter Constitution of India* 10th ed at 63; Seervai *The Constitution of India* 3rd ed, volume 1 at Chapter 9.)

[38] In Canada article 15 of the Charter on Rights and Freedoms provides that:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In *Andrews v Law Society of British Columbia* (1989) 36 CRR 193, the Supreme Court of Canada held that the primary purpose of section 15 was to prevent discrimination on the grounds listed in section 15(2) or on grounds analogous to those listed. (See P W Hogg *Constitutional Law of Canada* 3rd ed 1164 - 65.)

[39] This cursory consideration of the international conventions and the foreign jurisprudence makes it clear that the prohibition of discrimination is an important goal of both national governments and the international community. However, it also illustrates that the various conventions and national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.

[40] As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of

apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.

[41] Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting section 8, the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and may continue to cause, considerable harm. For this reason, section 8(2) lists a wide, and not exhaustive, list of prohibited grounds of discrimination.

[42] Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and

to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4).

[43] Sections 44 (1) and (2) of the Act treat married women and married men differently. This difference in treatment disadvantages married women and not married men. The discrimination in sections 44(1) and (2) is therefore based on two grounds: sex and marital status. Section 8(2) does not require that the discrimination be based on one ground only; it specifically states that it may be based on ' one or more' grounds. Nor is it a difficulty for the applicant that section 8(2) mentions only one of the grounds, sex. The list provided in section 8(2) is not exhaustive. The subsection states expressly that the list provided should not be used to derogate from the generality of the prohibition on discrimination. It is not necessary to consider whether the other ground of discrimination, marital status, would be a ground which would constitute unfair discrimination for the purposes of section 8. It is sufficient that the disadvantageous treatment is substantially based on one of the listed prohibited grounds, namely, sex.

[44] Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in 'which there is equality between men and women' as well as equality between 'people of all races'.

The Constitution proposes the establishment of a Commission on Gender Equality which shall 'promote gender equality'. It is clear, therefore, that legal rules which discriminate against women, as do sections 44(1) and (2), are in breach of section 8(2), unless it can be shown that they fall within the terms of section 8(3). It was not argued, nor could it have been, that sections 44(1) and (2) could be saved on that ground. Once it is established that a legal rule or provision is in breach of section 8, the question remains as to whether that particular rule or provision may be justified in terms of section 33.

[45] Section 33 provides that:

> (1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation --
>
> (a) shall be permissible only to the extent that it is --
>
> (i) reasonable; and
>
> (ii) justifiable in an open and democratic society based on freedom and equality; and
>
> (b) shall not negate the essential content of the right in question,
>
> and provided further that any limitation to --
>
> (aa) a right entrenched in section 10, 11, 12, 14(1), 21, 25 or 30(1)(d) or (e) or (2); or
>
> (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity,
>
> shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.

[46] For sections 44 (1) and (2) to be held to be permissible limitations in terms of section 33, it must be shown that they are reasonable and justifiable in an open and democratic society based on freedom and equality, and that they do not negate the essential content of section 8. It is now well established that section 33 involves a proportionality exercise, in which the purpose and effects of the infringing provisions are weighed against the nature and extent of the infringement caused. It is to that exercise that I now turn.

[47] Sections 44 (1) and (2) appear to have been enacted with two purposes in mind: the first was to provide married women with a benefit which would otherwise have been denied to them because of the effect of the common law rule prohibiting donations between spouses. As discussed above, this beneficial purpose is no longer achieved because the common law rule was abolished in the mid-1980s. The provisions are now therefore disadvantageous to married women. The second apparent purpose of the section is to protect the interests of creditors of insolvent estates. This purpose is still achieved by the provisions. There is no question that protecting creditors is a valuable and important public purpose. There can be no dispute either that the close relationship between spouses may sometimes lead to collusion or fraud.

[48] However, I am not persuaded that the distinction drawn between married men and married women, which is the nub of the constitutional complaint in this case, can be said to be reasonable or justifiable. No cogent reasons were advanced by the respondent as to why sections 44 (1) and (2) apply only to transactions in which husbands effect policies in favour of, or cede them to, their wives, and not to similar transactions by wives in favour of their husbands. There seems to be no reason why fraud or collusion does not occur when husbands, rather than wives, are the beneficiaries of insurance policies. Avoiding fraud or collusion does not suggest a reason as to why a distinction should be drawn between married men and married women.

[49] Nor could the respondent demonstrate that there were not other legislative provisions which could reasonably serve the purpose of protecting the interests of creditors in a manner less invasive of constitutional rights. The Insolvency Act, 24 of 1936, contains a series of provisions in terms of which transactions which took place prior to the insolvency may be impeached if it is shown, for example, that they were collusive, or resulted in undue preference being given to certain creditors (see sections 26, 29, 30 and 31 of the Insolvency Act). The Insolvency Act also contains specific provisions for the property of the spouse of an insolvent to vest in the Master and thereafter in the trustee (section 21). If these provisions are not considered sufficient, there seems to be no reason either why Parliament could not enact a provision similar to sections 44 (1) and (2) which does not discriminate against married women. Indeed, it appears from information placed before us by the Financial Services Board that draft legislation has been prepared which contains a provision similar to sections 44 (1) and (2), but which does not discriminate against married women.

[50] In the circumstances, it is clear that sections 44(1) and (2) result in a breach of section 8. The respondent has failed to show that there is any reasonable basis for the constitutional breach caused. The purposes sought to be achieved by the provisions do not require a distinction to be drawn between married women and married men. The discrimination occasioned by the provisions cannot be said to be reasonable or justifiable in the light of the purposes of the legislation. In my view, therefore, the respondent has failed to provide sufficient justification for the infringement caused by sections 44(1) and (2). In the circumstances, it is not necessary to consider whether

they constitute a negation of the essential content of the right to equality. From the above, it is clear that sections 44(1) and (2) are therefore inconsistent with the Constitution and this court must therefore hold them invalid.

[51] Section 98(5) of the Constitution requires this court to declare invalid any law found to be inconsistent with the Constitution. The court is granted a discretion to suspend that declaration of invalidity in terms of the proviso to section 98(5) if it considers it to be in the interests of justice and good government. The respondent could point to no compelling reason of good government for the court to exercise its discretion under section 98(5) and suspend the effect of the declaration of invalidity. In the absence of such a reason, there can be no grounds upon which the court would exercise that discretion.

[52] A further discretion is conferred upon this court by section 98(6). That subsection provides as follows:

> Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or provision thereof --
>
> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or
>
> (b) passed after such commencement, shall invalidate everything done or permitted in terms thereof.

[53] Sections 44 (1) and (2) of the Act came into force before the Constitution commenced on the 27 April 1994, and therefore section 98(6)(a) is of application to it. If this court were to declare subsections (1) and (2) of section 44 invalid, the ordinary effect would be not to invalidate any reliance on those provisions since the Constitution came into

force.

[54] In *S v Bhulwana; S v Gwadiso* (1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC)), in considering the discretion conferred on the court in section 98(6)(a), we held that:

> Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants (see *US v Johnson* 457 US 537 (1982); *Teague v Lane* 489 US 288 (1989)). On the other hand, as we state in *S v Zuma* (at para 43), we should be circumspect in exercising our powers under section 98(6)(a) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process. (at para 32)

[55] Although that was a criminal case and this case is not, the considerations relevant to an exercise of discretion in terms of section 98(6)(a) are similar. The court must consider whether there are any reasons to believe that not invalidating all acts done or permitted in terms of sections 44 (1) and (2) would be against the interests of justice or good government.

[56] Since the Constitution came into force, estates may have been wound up and finalised in terms of the Insolvency Act, 24 of 1936, or the Administration of Estates Act, 66 of 1965, in good faith in reliance on sections 44(1) and (2). It is also possible that the proceeds of life insurance policies contemplated by section 44(2), or assets into which such proceeds have been converted, have been attached and realised by judgment creditors in terms of the section. There are cogent reasons of good government against making an order which may render proceedings which, to all intents and purposes, have been concluded, subject to further challenge or investigation. Such a possibility is not far-fetched. At common law an unpaid creditor of a deceased person has an action

against heirs or legatees who have been paid more than they were entitled to out of the proceeds of the estate. (See *De Villiers v Bullbrand Fertilisers* Ltd 1941 TPD 131; *Prinsloo v Woolbrokers Federation Ltd* 1955 (2) SA 298 (N).) The position of unpaid creditors of insolvent companies is different to the position of an unpaid creditor of a deceased estate, although they may have a cause of action based on unjust enrichment. (See *Kommissaris van Binnelandse Inkomste v Willers* 1994 (3) SA 283 (A) at 333 and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).)

[57] On the other hand, if the order of invalidity were to be made applicable only to causes of action that arise after the date of the order, it would deny some married women the protection of the Constitution Generally speaking, the interests of justice require that the protection of the Constitution be effective from the date upon which it came into force.

[58] In the circumstances of the present case, I take the view that the interests of justice and good government can best be met by an order which will, on the one hand, avoid creating the possibility of litigation concerning estates which have been wound up or payments to judgment creditors which have been made, while, on the other hand, not deprive women of the rights conferred upon them by the Constitution. This would be achieved by an order which invalidates the deeming provisions of sections 44(1) and (2) with effect from 27 April 1994, but exempts from that order payments made as a result of the operation of deeming provisions before the date of this order.

[59] The question of costs was not an issue before this court. In making the referral in terms of section 102(1), the Supreme Court expressly reserved the question of costs for later adjudication by that court. The parties before us were equally at fault in relation to the incorrect reference. The decision to deal with the matter by way of our power to grant direct access to litigants is one which benefits both parties and which resolves an issue which may be of importance to their litigation. In the circumstances this is not a case in which it would be appropriate to make any order as to costs.

[60] The following order is accordingly made:

1. It is declared that subsections (1) and (2) of section 44 of the Insurance Act, 27 of 1943, are invalid.

2. In terms of section 98(6) (a) of the Constitution it is ordered that the declaration of invalidity made in paragraph 1 shall invalidate the deeming provisions of sections 44(1) and (2) of the Insurance Act with effect from 27 April 1994, except to the extent that the operation of such deeming provisions has resulted, before the date of this order, in the payment of any money or the delivery of any asset, which, but for such provisions, would not otherwise have formed part of the estate, to any creditor of the man, or any beneficiary of his estate.

3. The matter of *Brink v Kitshoff NO* is remitted to the Transvaal Provincial

Division to be dealt with in terms of this judgment.

C.M.E. O'REGAN
JUDGE OF THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Chaskalson P, Mahomed DP, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J and Sachs J concur in the judgment of O’Regan J.

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