IN THE CONSTITUTIONAL COURT

Case No CCT 40/03

In the matter between

JULEIGA DANIELS	Applicant
and	
ROBIN GRIEVE CAMPBELL N.O.	First Respondent
MELISSA FOURIE N.O.	Second Respondent
SORAYA DANIELS	Third Respondent
ADELAH JAKOET	Fourth Respondent
SHAHIEDA MANUEL	Fifth Respondent
MOGAMAT SHARIEF MANUEL	Sixth Respondent
SARAH DANIELS	Seventh Respondent
MINISTER OF JUSTICE	Eighth Respondent
REGISTRAR OF DEEDS	Ninth Respondent
MASTER OF THE HIGH COURT	Tenth Respondent

APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This case concerns the interpretation and constitutionality of the Intestate Succession Act 81 of 1987 ("the IS Act") and the Maintenance of Surviving Spouses Act 27 of 1990 (""the MSS Act"). Both of these Acts confer rights on "spouses"[1] who are predeceased by their husbands or wives. The word "spouse" is defined by neither Act.

2 The applicant is a Muslim widow whose monogamous marriage was not "registered" by a second ceremony before a marriage officer. The applicant's husband died intestate on 27 November 1994.

3 In the Cape Provincial Division, the applicant sought orders declaring that she is the "spouse" of her deceased husband for the purposes of the IS Act and his "survivor" for the purposes of the MSS Act.[2] In the alternative she sought orders declaring that the failure of the two Acts to confer on surviving spouses of de facto monogamous Muslim marriages the benefits which the Acts confer on surviving spouses of civil marriages is unconstitutional and invalid.[3] The applicant submits in this regard that,

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1 The MSS Act confers benefits on "survivors" but defines "survivor" in s 1 as "the surviving spouse in a marriage dissolved by death."

2 Notice of motion vol 3 p 151 prayer 1 and 3.

3 Notice of motion vol 3 p 151 prayer 2 and p 152 prayer 4. The alternative prayers for relief also included ancillary prayers providing for a "reading in" of wording designed to

unless the Acts are interpreted to extend the status of a "spouse" and a "survivor" to her, they are unconstitutional and invalid because they discriminate unfairly on grounds of religion, culture and marital status against surviving spouses of Muslim marriages.

4 Her Ladyship Justice van Heerden held that the IS Act and the MSS Act were not capable of being interpreted so as to treat the applicant as a "spouse" and a "survivor". However she accepted the applicant's submissions as to the resultant unconstitutionality of the two Acts and accordingly issued an order in the following terms:

> "1. The omission from section 1(4) of the Intestate Succession Act 81 of 1987 of the following definition is declared to be unconstitutional and invalid: " 'spouse' shall include a husband or wife married in accordance with Muslim rites in a de facto monogamous union".
>
> 2. Section 1(4) of the Intestate Succession Act 81 of 1987 is to be read as though it included the following paragraph after paragraph (f):
>
> > "(g) 'spouse' shall include a husband or wife married in accordance with Muslim rites in a de facto monogamous union."
>
> 3. The orders in paragraphs 1 and 2 above shall have no effect on the validity of any acts performed in respect of the administration of an intestate estate that has been finally wound up by the date of this order.

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cure the constitutional defect in the Acts and an order limiting the retrospectivity of the order of unconstitutionality in respect of the ISA Act.

4. The omission from the definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words "and includes the surviving husband or wife of a de facto monogamous union solemnised in accordance with Muslim rites" at the end of the existing definition, is declared to be unconstitutional and invalid.

5. The definition of "survivor" in section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words "dissolved by death":

> "and includes the surviving husband or wife of a de facto monogamous union solemnised in accordance with Muslim rites.""[4]

5 The Applicant now applies for confirmation of this order of Her Ladyship Justice van Heerden. In the alternative, and solely to cater for the eventuality that this Court may hold that the relevant provisions of the IS Act and the MSS Act are consistent with the Constitution because the terms "spouse" and "survivor" used by the respective Acts are capable of including a person in the position of the Applicant, the Applicant applies conditionally for leave to appeal against the failure of Her Ladyship Justice van Heerden to grant the Applicant the declaratory orders that she sought as to her status as a "spouse" and a "survivor" in terms of the respective Acts.[5] We emphasize, however, that the Applicant brought her application in order to obtain the benefits which are extended to spouses under the Intestate Succession Act and the Maintenance of Surviving Spouses Act. If she is

[4] Order, vol 6 pp 419-420.

able to obtain relief which entitles her to these benefits, she has no interest in whether such relief is formulated in the terms contemplated in prayers 1 and 3 of the Notice of Motion (the simple declaratory relief) or in those contemplated in prayers 2 and 4 of the Notice of Motion (the orders of invalidity and ancillary relief).[6]

6 We have structured these heads of argument as follows:

6.1 First we make submissions in support of the Applicant's application for condonation of her failure to comply with the time limits set out in the Rules of this Court in relation to the application to the Cape Provincial Division for a certificate in terms of Rule 18 and the application to this Court for confirmation of the order of Her Ladyship Ms Justice van Heerden.

6.2 We then set out the relevant facts in the main application.

6.3 We briefly address certain general principles of constitutional law which are relevant to the main application.

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5 Application for Confirmation Notice of Motion vol 1 pp 2 to 4 para 1.

6 Founding Affidavit in Application for Confirmation vol 1 pp 11-12 para 9.

6.4 We examine the provisions of the MSS Act and the IS Act which are the focus of the main application and show that, on the interpretation of these provisions adopted by the High Court, they are inconsistent with section 9(3) of the Constitution and were inconsistent with section 8(2) of the Interim Constitution.

6.5 We consider the question of what would amount to appropriate relief if this Court accepts the interpretation of the MSS Act and IS Act adopted by the High Court.

6.6 Finally we address the Applicant's conditional appeal and consider whether the relevant provisions of the two Acts are capable of being read down under section 39(2) of the Constitution so as to be given a meaning consistent with the Constitution.

THE CONDONATION APPLICATION

1 The confirmation of the constitutional invalidity of the orders granted in the applicant's favour in the court *a quo* is regulated by sections 167(5) and 172(2)(d) of the Constitution, section 8(1)(b) of the Constitutional Court Complementary Act, No. 13 of 1995 and rule 15 of the Constitutional Court rules (*"the rules"*).

2 In terms of rule 15(4), the application for confirmation had to be lodged with the Registrar of the Constitutional Court within a period of 21 days of the grant of the order *a quo* on 24 June 2003, and should therefore have been lodged by no later than 23 July 2003.

3 For the reasons advanced in paragraph 5 above and in anticipation of the possibility that this Court may decline to confirm the orders of constitutional invalidity, it was considered prudent to delay institution of the application for confirmation until the Applicant was in a position simultaneously to apply for conditional application for leave to appeal against the court *a quo*'s refusal to grant the principal relief sought in prayers 1 and 3 of the Notice of Motion.

4 Rule 18(2) is couched in peremptory language and requires that a litigant wishing to appeal against an order, applies for a certificate within 15 days of the grant of the order.

5 Despite the language employed in rule 18(2), the failure to apply for a certificate will not necessarily be dispositive of an application for leave to appeal to the Constitutional Court.[7]

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[7] *Beinash & Another v Ernst & Young & Others* 1999 (2) SA 116 (CC) at paras 24 – 26; *Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another intervening)* 2001 (3) SA 893 CC at para 6; *Xinwa & Others v Volkswagen SA (Pty) Ltd* 2003 (6) BCLR 575 (CC) at paras 13 – 17. See also: *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others* 1998 (4) SA 1157 (CC) at para 22.

6 In the present instance, the application for the rule 18 certificate was brought nine days out of time. The application is silent on the issue of condonation. This is due to the fact that the applicant's attorneys of record had overlooked the prescribed time period of 15 days.[8]

7 The issue of whether the High Court can condone non-compliance with a Constitutional Court rule was considered in the case of *Minister of Home Affairs & Others v Dawood & Another, Minister of Home Affairs & Others v Shalabi & Another, Minister of Home Affairs & Others v Thomas & Another***.**[9] The court in the *Minister of Home Affairs* case concluded that it had the power to condone non-compliance with rule 18(2). The court *a quo* reached a similar conclusion in its judgment on the application for the certificate, albeit for different reasons.[10]

7.1 Binns-Ward AJ, provisionally condoned the applicant's non-compliance with rule 18(2) and issued the requisite certificate in terms of rule 18(6).

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8 Judgment of Binns-Ward AJ in the Application for a Certificate vol 2 p 127 para 9.

9 2000 (1) SA 1074 (C) at 1080D – 1082F.

10 Record vol 2 p 128 para 10 – p 131 para 15.

7.2 By virtue of the fact that judgment in the certification proceedings was handed down on 1 September 2003, the hybrid application for confirmation and conditional leave to appeal to the Constitutional Court could not be lodged timeously by 23 July 2003. The reasons for instituting one composite application encompassing both the confirmatory application and the application for conditional leave to appeal are explained in the applicant's founding papers. In essence, this approach was adopted for reasons of expediency and costs considerations.[11]

7.3 It is respectfully submitted that the applicant has shown good cause[12] for her failure to comply with rules 15(4) and 18(2) of the Constitutional Court Rules and that condonation should be granted therefore, in view of the following:

7.3.1 The delay is of short duration and has been fully explained;

7.3.2 There is no prejudice to the respondents;

7.3.3 The matter is one of substance requiring the ventilation of an important constitutional principle;

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[11] Founding Affidavit in Application for Confirmation vol 1 p 14 paras 15 to 18.

[12] See by analogy the commentary on High Court Rule 27 in Erasmus, Superior Court Practice 1994 (revision19) at B1 – 171 to B1 – 172.

7.3.4 The prospects of success on the merits are good.[13]

7.3.5 In respect of the application for confirmation, if the Applicant's application for condonation is refused, this Court would still have to decide the relevant issues in terms of a referral in terms of Rule 15(5).

8 In the light of the aforegoing the Applicant prays that her failure to comply with rule 15(4) be condoned and, to the extent necessary, her failure to comply with rule 18(2) similarly be condoned.

THE FACTS

7 The Applicant is an adult female domestic worker. In 1969 she married Mogamat Amien Wilson (*"Wilson"*) who submitted an application dated 7 July 1969 to the City of Cape Town to rent a council dwelling. The Applicant and Wilson subsequently divorced. [14]

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[13] *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC) at 6; *Fraser v Naude & Others* 1999 (1) SA 1 (CC) at para 7; *Nehawu v University of Cape Town & Others* 2003 (2) BCLR 154 (CC) at para 25.

[14] Founding Affidavit Vol 3 p 159 para 17, Annexure "C" p 174, First & Second Respondent's Answering affidavit Vol 5 p 345 para 11.

8 In October 1976 the City of Cape Town allocated the immovable property situated at 2A Athon Walk, Lucerne Place, Hanover Park, Western Cape (*"the property"*) to the Applicant. The City of Cape Town had been informed that the Applicant and Wilson had since divorced.[15] The Applicant took occupation of the property on 15 October 1976 and has occupied the property continuously since this date. She was not married at the time of taking occupation thereof.[16]

9 The Applicant married the late Mogamat Amien Daniels (*"the deceased"*) by Muslim rites on 2 March 1977. At all material times this marriage was a *de facto* monogamous marriage. However it was not solemnised by a marriage officer appointed in terms of the Marriage Act, No 25 of 1961.[17]

10 The Applicant informed the City of Cape Town of her marriage to the deceased and the City of Cape Town, in accordance with its housing policy which precluded a married woman (but not a married man) from holding a lease,[18] transferred the tenancy of the property to the deceased on 17 July

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15 Founding Affidavit Vol 3 p160 para 18, Annexure "D" Vol 3 p 175.

16 Founding Affidavit Vol 3 p160 para 18, p 161 para 21, First & Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

17 Founding Affidavit Vol 3 p 156 para 4, First & Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

18 Founding Affidavit Vol 3 p 160 para 19, Annexure "F" Vol 3 p 178 para 4(a).

1978. The tenancy transfer form reflected the reason for the transfer as "transfer of tenancy to new husband".[19]

11 On 21 May 1990 the deceased concluded a written installment sale agreement in terms whereof he purchased the property from the City of Cape Town.[20] The deceased died on 27 November 1994 without leaving a will.[21] The property is the main asset in his deceased estate.[22]

12 The Applicant and the deceased did not have any children together.[23] The deceased, however, had four children of his own[24]

12.1 Mogamat Cassiem Daniels who was born on 23 May 1966 and who died on 12 June 1999;

12.2 The Fifth Respondent;

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19 Founding Affidavit Vol 3 p 160 para 19, Transfer form, Annexure "E" vol 3 p 176.

20 Founding Affidavit Vol 3 p 161 para 22, Annexure "H", Vol 3 p 181 – 197, First and Second Respondent's Replying Affidavit Vol 5 p 345 paras 12.1 and 12.2, p 346 para 12.3.

21 Founding Affidavit Vol 3 p 156 para 3, First and Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

22 Founding Affidavit Vol 3 p 156 para 3, First and Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

23 Founding Affidavit Vol 3 p 156 para 4, First and Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

24 Founding Affidavit Vol 3 p 157 para 6, p 158 paras 9 – 11, p 172, First and Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

12.3 The Sixth Respondent; and

12.4 The Seventh Respondent.

13 The late Mogamat Cassiem Daniels was survived by four minor children:[25]

13.1 Mogamat Amien Daniels, born on 12 November 1997;

13.2 Ismail Daniels born on 5 September 1992;

13.3 Gretchen van Rensburg born on 16 September 1985; and

13.4 Aaeesha Jakoet born on 18 October 1987.

Mogamat Amien Daniels and Ismail Daniels are represented in these proceedings by the Third Respondent who is their mother and guardian.[26] Gretchen van Rensburg and Aaeesha Jakoet are represented in these proceedings by the Fourth Respondent who is their mother and guardian.[27]

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25 Founding affidavit vol 3 p 157 paras 7 – 7.2.

26 Founding affidavit vol 3 pp 157-8 paras 8 – 8.2.

27 Founding affidavit Vol 3 p 157 – 158 para 8, First and Second Respondent's Replying Affidavit Vol 5 p 345 para 11.

THE FUNDAMENTAL RIGHT TO EQUALITY AND 39(2) OF THE CONSTITUTION

14 The fundamental right to equality is protected by section 9 of the Constitution and was protected by section 8 of the Interim Constitution. Because the deceased died during the period of operation of the Interim Constitution, this case is governed by section 8 of that Constitution rather than section 9 of the present Constitution. However, in view of the similarity of the two provisions, nothing turns on this distinction.

15 In *Harksen v Lane*[28] this Court set out the stages of enquiry in a case involving the fundamental right to equality:

> ". . . it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:
>
> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is

[28] *Harksen v Lane* 1998 (1) SA 300 (CC) at para 53.

discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 8(2)

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)."

16 This Court has now confirmed this approach to the stages of equality analysis on several occasions.[29]

17 Section 35(3) of the Interim Constitution stated:

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

Section 39(2) of the Constitution now states the following:

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[29] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 17; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 32; *East Zulu Motors (Pty) Ltd v Empangeni / Ngwelezane Transitional Local Council and Others* 1998 (2) SA 61 (CC) at para 22; *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at para 27.

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Because the present matter came to Court after the commencement of the Final Constitution, it was governed by section 39(2) of the Constitution rather than section 35 of the Interim Constitution.[30] Again, however, in view of the similarity of the two provisions, nothing turns on this distinction.

18 In the *Hyundai* case, this Court described the duty imposed on courts by section 39(2) in the following terms:

> "This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole.
>
> The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values that the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the

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30 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 37.

> provisions of the legislation, so far as is possible, in conformity with the Constitution."[31]

Building on the *Hyundai* judgment, the Supreme Court of Appeal has enunciated the following principles relating to section 39(2) and statutory interpretation in the *Govender* case:

> "[10] With the enactment first of the interim Constitution and later of the Constitution of the Republic of South Africa Act 108 of 1996 and the vast changes it brought about to the juristic landscape, came a need for a method of interpreting legislation in a manner new to South African lawyers. I can do no better than to repeat and at the same time support the new approach as set out by Langa DP in his judgment in the Constitutional Court in Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) in paras [21] and [22] …
>
> [11] This method of interpreting statutory provisions under the Constitution requires a court to negotiate the shoals between the Scylla of the old-style literalism and the Charybdis of judicial law-making. This requires magistrates and Judges
>
> (a) to examine the objects and purport of the Act or the section under consideration;
>
> (b) to examine the ambit and meaning of the rights protected by the Constitution;
>
> (c) to ascertain whether it is reasonably possible to interpret the Act or section under consideration in such a manner that it conforms with the Constitution, ie by protecting the rights therein protected;
>
> (d) if such interpretation is possible, to give effect to it, and

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[31] *The Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* 2001 (1) SA 545 (CC) at paras 21-2.

(e) if it is not possible, to initiate steps leading to a declaration of constitutional invalidity."[32]

19 It is clear that one of the effects of section 39(2) (and section 35(3) of the Interim Constitution before it) is that previously binding pre-constitutional interpretations of statutes may now have to be revisited. Thus, for example, in considering the post-constitutional meaning to be ascribed to the phrase "just excuse" in section 205 of the Criminal Procedure Act, this Court has stated that

> "A considerable body of case law has already developed on the meaning of 'just excuse'. It is not in the first place our task, but that of other courts, including the Supreme Court, to construe what this means, but in doing so they must bear in mind the duty imposed on them by s35(3) of the Constitution to 'have due regard to the spirit, purport and objects' of chapt 3 '(i)n the interpretation of any law and the application and development of the common law ...'. What we do hold herein is that ss 189 and 205 of the Criminal Procedure Act can and must be construed in the way suggested above so that their application does not unjustifiably infringe or threaten to infringe any of the examinee's chapter 3 rights...
>
> …
>
> Judgments concerning the proper application and construction of s205 which were delivered before the Constitution came into operation will not necessarily correctly reflect the post-constitutional position, because s35(3) of the Constitution requires that this section now be construed by all courts (including the magistrates' courts) having 'due regard to the spirit, purport and objects of chapter 3.'"[33]

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32 *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) at paras 10 to 11.

33 *Nel v Le Roux NO* 1996 (3) SA 562 (CC) at paras 8 and 18 – 574A - B. See also *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another* 2002 (4) SA 613 (CC) at paras 26 and 34-9 and *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 606 B-C.

THE STATUTES AT ISSUE IN THE PRESENT CASE

The Intestate Succession Act

20 Section 1 of the IS Act states the following:

> "**1 Intestate succession**
>
> (1) If after the commencement of this Act a person (hereinafter referred to as the 'deceased') dies intestate, either wholly or in part, and-
>
> (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
>
> (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
>
> (c) is survived by a spouse as well as a descendant-
>
> (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
>
> (ii) such descendant shall inherit the residue (if any) of the intestate estate;
>
> (d) ..."

The ISA Act does not define "spouse".

.

21 By recognizing a right of a surviving spouse to inherit intestate from a deceased spouse the IS Act and its predecessor the Succession Act 13 of 1934 departed from the common law. The common law rules of intestate succession deprived surviving spouses of any inheritance.[34]

22 In this regard the IS Act appears to have been designed to provide economically for surviving spouses both,

22.1 as a means of promoting the institution of marriage, and

22.2 as a means of protecting widows, who constitute a socially vulnerable group.

The Maintenance of Surviving Spouses Act

23 Section 2(1) of the MSS Act states the following:

> "2 Claim for maintenance against estate of deceased spouse
>
> (1) If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefor from his own means and earnings."

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[34] See Corbett, Hofmeyr and Kahn, *The Law of Succession in South Africa* (2nd ed) at 562 to 566.

In terms of section 1 of the MSS Act, "survivor" is defined as "the surviving spouse in a marriage dissolved by death."

24 The MSS Act was enacted in 1990 to remedy the failure of the common law to give surviving spouses a claim for support against the estate of their deceased spouses.[35] In this regard it appears to have been designed to promote the same purposes as those which are promoted by the ISA Act. [36]

THE STATUTES AS INTERPRETED BY THE HIGH COURT ARE UNCONSTITUTIONAL

25 In the Court below, Van Heerden J held that the two Acts were not capable of an interpretation which would vest the Applicant with the status of a "spouse" and a "survivor" and found that the word "spouse" in the two Acts

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35 See *Glazer v Glazer NO* 1963 (4) SA 694 (A) on the absence of any such claim at common law.

36 See Judgment vol 6 pp 493 - 494. See also the Report of the South African Law Commission on the Introduction of a Legitimate Portion or the Granting of a Right to Maintenance to the Surviving Spouse (Project 22, August 1987) at paras 6.2 and 6.4 pp 25-7 where the Law Commission stated:

> "It is submitted in paragraph 5.2 that the moral right of one spouse to share in the other spouse's estate should not serve as the basis for the surviving spouse's claim to maintenance. The aim is to prevent a person from being left destitute. The basis of a claim to maintenance of a surviving spouse is therefore a need for support. …
>
> A testator could leave a nominal amount to the surviving spouse thus defeating a claim for maintenance, and the surviving spouse would still be left destitute. In the Commission's view, legislation should provide for the maintenance of the surviving spouse, regardless of whether the estate of the deceased spouse devolves testate, intestate or partially intestate, as long as the claim to maintenance is based on a need for maintenance."

had to be confined to "a party to a marriage currently recognized as valid in South African law".[37]

26 On the basis of this interpretation of the two Acts, the Learned Judge went on to conclude that the Acts were inconsistent with the Constitution and invalid because they violated the fundamental right to equality.[38] The latter conclusion is, it is submitted, unavoidable if the Learned Judge's interpretation of the two Acts is correct and we respectfully adopt all of her reasoning in respect of the unconstitutionality of the two Acts on her interpretation. For the purposes of these heads of argument, we merely provide a brief summary of this reasoning.

27 On the interpretation adopted by the Learned Judge, the Acts differentiate between *de facto* monogamous marriages entered into in accordance with the procedures of religions (like Islam) which permit polygamous marriages and de facto monogamous marriages entered into in accordance with the procedures of

27.1 religions which do not permit polygamous marriages, or

27.2 the procedures performed by a civil marriage officer.

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37 Judgment vol 6 pp 461-5 at 462 in particular.

38 Judgment vol 6 pp 465 - 496.

28 Applying the test set out in *Harksen v Lane N.O. and others*[39] to the Acts, the interpretation of the Learned Judge has the following result:

28.1 On this interpretation, the Acts differentiate between different types of spouses on the listed grounds of religion, culture and marital status. This differentiation accordingly amounts to discrimination (*Harksen* test, paragraph (b)(i)).

28.2 As the discrimination is on three listed grounds it is presumed to be unfair discrimination (*Harksen* test paragraph (b)(ii)).

28.3 Quite apart from the presumption of unfairness, the discrimination is obviously unfair: when regard is had to the legal origin of the discrimination,[40] its impact on the applicant and other widows in her position (*Harksen* test paragraph (b)(ii)).

28.3.1 The impact on the applicant is that the Muslim character of her marriage to the deceased renders that marriage undeserving of the status which the law accords to Christian, Jewish, and civil marriages for the purposes of

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39 1998 (1) SA 300 (CC).

40 See paragraphs 38 to 39 below.

intestate succession and that her status as a socially vulnerable Muslim widow renders her undeserving of the economic protection which the law accords to socially vulnerable widows of Christian, Jewish and secular civil marriages.

28.3.2 Because of the Muslim character of her marriage she stands to be thrown out of her own home. By a particularly cruel irony of history, this home is one which, but for her marriage to the deceased, would have remained her property and would never have entered the estate of the deceased. Her Muslim marriage was sufficient to make her the victim of the sexist tenancy policies of the Cape Town Municipality but, on the High Court's interpretation, would be insufficient to afford her the protection of the IS Act and the MSS Act.

28.3.3 Nor can it be argued (as was obliquely suggested by the respondents on the papers)[41] that the discrimination of the two Acts is fair discrimination because it leaves legal obligations in Muslim families to be regulated by Muslim personal law.

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[41] Answering affidavit p 193 para 5 to p 195 para 7.

28.3.4 On the High Court interpretation, the Act does not leave legal obligations in Muslim families to be regulated by Muslim personal law. The Applicant has no means of giving effect to her inheritance rights at Muslim personal law.

28.3.5 Rather, it foists on Muslim families a set of legally enforceable relationships which are inconsistent both with Muslim personal law[42] and with the apparent legislative objective of both Acts which, as has been set out above, is to provide economically for surviving spouses as a means of promoting the institution of marriage and protecting widows who are a socially vulnerable group.[43]

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42 It is common cause that irrespective of whether muslim spouses are treated as spouses for the purposes of the ISA Act, the regime of the act is inconsistent with Muslim personal law. (See Answering Affidavit p 194 para 6 to p 195 para 7, p 201 para 18.1 and p 203 paras 21.5 to 21.6).

43 This shortcoming of the Acts is recognized by the South African Law Commission. Thus the Law Commission reaches the following conclusion at p 106 para 3.357 of its Report on Islamic Marriages and Related Matters (Project 59, June 2003):

> "The Commission considered representations calling for a comprehensive overview of the Islamic law of succession. In the Commission's view, the issues that were raised in respect of succession are complex and manifold - to the extent that they cannot be dealt with satisfactorily within the scope of the current investigation. However, provision was made to amend the Intestate Succession Act 81 of 1987 by broadening the definition of a "spouse" to cover the spouse/s of a Muslim marriage (see the Schedule to the proposed draft Bill). A corresponding amendment was made to the Maintenance of Surviving Spouses Act 27 of 1990. This would alleviate the hardships endured by Muslim spouses who in the past have not enjoyed such recognition. Of course this does not prevent any Muslim person from ensuring, by making a will, that his or her estate will devolve in terms of Islamic law." (The proposed amendments are contained in the Schedule to the Draft Muslim Marriages Bill, Annexure A to the Report, pp 132-3).

28.4 There is no basis upon which this unfair discrimination can be justified under section 33 of the Interim Constitution (*Harksen* test paragraph (c)). The respondents did not allege any such basis and the Minister of Justice (the Eighth Respondent) who is charged with the administration of the Acts, did not oppose the relief sought by the Applicant.[44]

28.5 On the High Court's interpretation of "spouse" in the MSS Act and the IS Act, both of these Acts are accordingly unconstitutional and invalid.

THE APPROPRIATE ORDERS OF INVALIDITY AND ANCILLARY RELIEF

29 In the event that this Court follows the interpretation of the High Court, the two Acts will accordingly have to be declared unconstitutional. The remedial jurisdiction of this Court in this regard is determined by the provisions of the Final Constitution which is the Constitution in force at the time of the hearing.[45]

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44 Answering affidavit of Minister Maduna Vol 3 p 232 – 3, Letter from State Attorney Vol 4 p 417.

45 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 113, *First National Bank of Southern Africa Ltd t/a Wesbank v Commissioner South African Revenue Service and Another* 2001 (3) SA 310 (C) at 315C-G.

30 Section 172(1) of the Final Constitution states:

> "(1) When deciding a constitutional matter within its power, a court-
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> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, ..."

Section 38 deals specifically with fundamental rights cases in which it vests the Courts with remedial jurisdiction to grant "appropriate relief".

31 This Court has repeatedly emphasized the width and flexibility of the court's powers under sections 38 and 172(1)(b).

31.1 Langa DP said in *Walker* that appropriate relief "should be relief which is tailored to the needs of a particular case".[46]

31.2 This Court commented as follows in *Fose v Minister of Safety and Security*[47] on the identical predecessor of section 38:

> "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion

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46 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para 95.

47 1997 (3) SA 786 (CC).

> new remedies to secure the protection and enforcement of these all-important rights."
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> "Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the right and entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions where the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."[48]

31.3 This Court held in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* and others that its observations in *Fose v Minister of Safety and Security* quoted above, were equally applicable to the exercise of its power to grant appropriate relief under section 38 of the Final Constitution. It added that its "obligation to provide appropriate relief" must be read together with section 172(1)(b) "which requires the court to make an order which is just and equitable". It is accordingly clear that the court not only has the power but also the duty to make such an order.[49]

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48 *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) at paras 19 and 69.

49 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC) at 37C-38B para 65.

32 In the present case appropriate relief demands not merely a declaration that the challenged provisions are unconstitutional, but also the ancillary relief of reading into the challenged provisions wording that will cure the constitutional defect and provide the applicant with meaningful relief. This type of relief has been recognised as appropriate and competent relief by this Court on several occasions.[50] In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. Ackermann J explained the Court's reasoning:

> "[68] ... A Legislature could, for example, extend certain benefits to life-partners generally and exclude same-sex life partners by way of express exception. In such case there would be no objection to declaring the exception invalid, where a Court was satisfied that such severance was, on application of whatever the appropriate test might be, constitutionally justified in relation to the Legislature. It would be absurd to deny the reading-in remedy, where it was equally constitutionally justified in relation to the Legislature, simply because of its form.
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> ...
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> [81] In my view the observations made in *Fose* which were quoted above are of particular application in the present case. In order for the norms and values lying at the heart of our Constitution to be made concrete, it is particularly important for the Court in this case to afford an effective remedy, which will also be seen to be effective, to the eighth to 13th applicants, and people similarly placed within the context of s 25(5). If, in order to do this properly,

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50 See for example *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000(2) SA 1 (CC), *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC), *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) and *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) BCLR 463 (CC).

> new tools have to be forged and innovative remedies shaped, this must be done.
>
> [82] An appropriate remedy in the present case must vindicate the rights of permanent same-sex life partners to establish a family unit that, while retaining the characteristic features derived from its same-sex nature, receives the same protection and enjoys the same concern from the law and from society generally as do marriages recognised by law. But it must vindicate at more than an abstract level. It must operate to eradicate these stereotypes. Our constitutional commitment to non-discrimination and equal protection demands this. There is a wider public dimension. The bell tolls for everyone, because
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> > '(t)he social cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer the discrimination, but also to the very fabric of our society'.
>
> The most effective way of achieving this in the present case is by a suitable reading-in order, if this is reasonably possible.
>
> ...
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> [86] Against the background of what has been said above I am satisfied that the constitutional defect in s 25(5) can be cured with sufficient precision by reading in after the word 'spouse' the following words: 'or partner, in a permanent same-sex life partnership' and that it should indeed be cured in this manner. Permanent in this context means an established intention of the parties to cohabit with one another permanently."[51]

33 The present case is, in this respect, on all fours with *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. It follows that the alternative ancillary relief sought by the applicant in prayers 2.2 and 4.2 of the Notice of Motion[52] would be appropriate relief

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[51] 2000 (2) SA 1 (CC) at paras 68, 81, 82 and 86.

[52] Notice of Motion p 2 prayer 2.2 and p 3 prayer 4.2.

for this Court to grant if it adopts the interpretation of the High Court and accordingly finds the Acts to be unconstitutional.

34 The alternative ancillary prayer 2.3 was inserted to preserve the interests of finality in respect of the winding up of deceased estates.[53]

THE CONDITIONAL APPEAL: SECTION 39(2) AND THE INTERPRETATION OF THE ACTS

35 If, as has been set out above, the interpretation of the High Court is one which renders the two Acts unconstitutional, any reasonable interpretation of the Acts which avoids this consequence must be preferred over the interpretation adopted by the High Court. This flows axiomatically from section 39(2) of the Constitution.[54] If "spouse" in the two Acts is interpreted to include the husband or wife of a de facto monogamous Muslim marriage, the problem of unconstitutionality can be avoided. The question accordingly arises whether such an interpretation is a reasonable interpretation of the sort contemplated by section 39(2).

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53 *Brink v Kitshoff N.O.* 1996 (4) SA 197 (CC) at paras 56 to 58.

54 In addition to the authorities cited above, see also *National Union of Metalworkers of South Africa and Others v Bader BOP (Pty) Ltd and Another* 2003 (3) SA 513 (CC) at para 37, *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2003 (4) SA 1 (CC) at para 35, *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) at para 24.

On their Ordinary Meaning, the Acts Vest Rights in the Applicant

36 Both the IS Act and the MSS Act confer rights on a "spouse". The ordinary meaning of "spouse" is "married person; a wife, a husband."[55] This meaning is reasonably capable of covering persons in the position of the applicant. It is common cause that the Applicant and the deceased were husband and wife in a monogamous Muslim marriage. In the alternative to the principal claim for confirmation of the order of the High Court, it is accordingly submitted that on the ordinary literal interpretation of "spouse" the Applicant is entitled to be treated as a "spouse" for the purposes of the Acts. It is significant in this regard that the Cape Town municipal authorities had no problem in recognizing the Applicant as a "married person" and the deceased as her "husband" when it came to their tenancy policy.[56] If the ordinary limits of the word "spouse" fix the limits of a reasonable interpretation of the word in the two Acts, there can, accordingly, be little doubt that it would be reasonable to interpret the Acts to confer the status of a "spouse" on the Applicant and other similarly situated Muslim widows.[57]

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55 The New Shorter Oxford English Dictionary (Clarendon Press, 1993).

56 Tenancy Transfer Form Annexure "E" vol 3 p 176.

57 In this regard, the reliance of Van Heerden J (Judgment vol 6 pp 462-5) on the decisions of this Court on the meaning of "spouse" *vis a vis* same sex life partners (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) and *Satchwell v President of the Republic of South Africa and another* 2002 (6) SA 1 (CC)) as a basis for rejecting the Applicant's argument to be treated as a "spouse" was accordingly

The High Court Interpretation of the Acts and the Legacy of Cultural Chauvinism

37 The High Court held that "spouse" in the IS Act and MSS Act must be interpreted not in accordance with its ordinary meaning, but in accordance with a narrower meaning which was, in the past, adopted by South African courts, so that it refers only to a husband or wife in a marriage currently recognized as valid in South African law.

38 This interpretation begs the question why Muslim marriages have historically not been recognized as valid in South African law. The answer to this question lies in the cultural chauvinism expressed in *Seedat's Executor v The Master (Natal)*[58], where the Appellate Division refused to recognize a Muslim widow as a "surviving spouse" for the purposes of Natal Act 35 of 1905 which exempted "surviving spouses" from estate duty. The Appellate Division justified its decision on the grounds that the potentially polygamous nature of Muslim marriages was "repugnant to the moral principles of [South African] people". Innes CJ stated the following:

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misplaced. At the simple level of language "spouse" is ordinarily capable of including a Muslim husband or wife. The literal interpretation argument in favour of treating same sex life partners as "spouses" is of much lesser force. (See for example *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL)).

58 1917 AD 302.

> "Polygamy vitally affects the nature of the most important relationship into which human beings can enter. It is reprobated by the majority of civilized peoples, on grounds of morality and religion, and the Courts of a country which forbids it are not justified in recognizing a polygamous union as a valid marriage. By a polygamous union I mean one the nature of which is consistent with the husband marrying another wife during its continuance. Whether he exercises his privilege or not is beside the question. The fact that the man and woman contract on the basis that he shall be at liberty to do so differentiates their relationship from that to which we give the name of marriage, and stamps their union as polygamous. Now polygamy is repugnant to the policy and the legal institutions both of Holland and of England. And I know of no case in which the Courts of either country have given effect to a foreign polygamous marriage or recognized the resulting status of either of the parties to it."[59]

39 *Seedat* was but one of a series of judgments refusing to recognize Muslim marriages as "marriages" for the purposes of South African law because of their potentially polygamous character.[60] The cultural chauvinism of these judgments is best illustrated by the founding case in this line, *Bronn v Fritz Bronn's Executors.*[61] In *Bronn* the Cape Supreme Court refused to recognize the applicant as a legitimate child because of the potentially polygamous nature of his parents' Muslim marriage. In reaching their decision members of the court stated the following:

> "Now marriage is a condition Divine in its institution, originating with our first parents; therefore older than the Jewish Dispensation, and

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59 Seedat's Executor v The Master (Natal*)* 1917 AD 302 at 307-8.

60 See also *Ebrahim v Mahomed Essop* 1905 TS 59 and *Esop v Union Government* 1913 CPD 133. In *R v Mboko* 1910 TS 445 at 449 and *Nalana v Rex* 1907 TS 407 courts adopted a similar approach to customary unions.

61 (1860) 3 Searle 313.

> it is only by the development of Christianity that the sacred and mysterious union has been clearly revealed to mankind, and has enjoined a strict observance of its requirements, and one of the first of these requirements is, amongst all Christian nation, that polygamy is unlawful, and that marriage is only good when contracted with a man who is not already married to another woman."[62]
>
> "... I trust that in a short time ... the sacred institution of marriage will be brought by some well devised law within the reach of the people of this Colony who have not yet embraced the greater blessings which they would obtain by Christian marriage, by which I mean of course marriage to one wife, which, among the heathen ought to be sanctioned and encouraged by law. It is, even amongst them, an institution of a divine character - a glimmer of the light once shining in Paradise, which is still vouchsafed to them."[63]
>
> "Equally so with the Mohammedans. If what they call marriage is not what we call marriage, in its essential requirements, but what the jurisprudence even of Christian Rome under the Emperors, up to the time of Leo the Philosopher, would call a recognized concubinage — we cannot, because of the ambiguity of the expression, make that marriage which is a wholly different relation."[64]

The High Court Interpretation is Inconsistent with South African Law's Changing Approach to Muslim Marriages

40 The cultural chauvinism of the line of cases refusing to recognise Muslim marriages for the purposes of common law and statutory rights is incompatible with the *boni mores* of contemporary South Africa. Thus in

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62 *Bronn's* case supra at 318.

63 *Bronn's* case supra 320-1.

64 *Bronn's* case supra at 333.

Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening) Mahomed CJ stated the following:[65]

> "[20] The crucial question which therefore needs to be applied is whether or not the legal right which the appellant had to support from the deceased during the subsistence of the marriage is a right which, in the circumstances disclosed by the present case, deserves recognition and protection by the law for the purposes of the dependant's action. In my view, it does, if regard is had to the fact that at the hearing before us it was common cause that the Islamic marriage between the appellant and the deceased was a de facto monogamous marriage; that it was contracted according to the tenets of a major religion; and that it involved 'a very public ceremony, special formalities and onerous obligations for both parents in terms of the relevant rules of Islamic law applicable'. The insistence that the duty of support which such a serious *de facto* monogamous marriage imposes on the husband is not worthy of protection can only be justified on the basis that the only duty of support which the law will protect in such circumstances is a duty flowing from a marriage solemnised and recognised by one faith or philosophy to the exclusion of others. This is an untenable basis for the determination of the *boni mores* of society. It is inconsistent with the new ethos of tolerance, pluralism and religious freedom which had consolidated itself in the community even before the formal adoption of the interim Constitution on 22 December 1993. ...
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> [21] This new ethos is substantially different from the ethos which informed the determination of the *boni mores* of the community when the cases which decided that 'potentially polygamous' marriages which did not accord with the assumptions of the culturally and politically dominant establishment of the time did not deserve the protection of the law for the purposes of the dependant's action. This is evident from the form and the language in which those assumptions were sometimes articulated during those times. ...
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> [23] I have no doubt that the *boni mores* of the community at the time when the cause of action arose in the present proceedings would not support a conclusion which denies a duty of support arising from a *de facto* monogamous marriage solemnly entered into in accordance with the Muslim faith any recognition in the common law for the purposes of the dependant's action; but which

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[65] 1999 (4) SA 1319 (SCA) at paras 20, 21 and 23.

> affords to the same duty of support arising from a similarly solemnised marriage in accordance with the Christian faith full recognition in the same common law for the same purpose; ... The inequality, arbitrariness, intolerance and inequity inherent in such a conclusion would be inconsistent with the new ethos which prevailed on 25 July 1993 when the cause of action in the present matter commenced. The boni mores of the community would at that time support the approach which gave to the duty of support following on a de facto monogamous marriage in terms of the Islamic faith the same protection of the common law for the purposes of the dependant's action, as would be accorded to a monogamous marriage solemnised in terms of the Christian faith."[66]

41 The *Amod* judgment reflects a broader shift in legal conceptions of the institutions of family and marriage. Thus in *Du Toit*, this Court stated the following:

> "[19] The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change."[67]

42 The changes to the *boni mores* of South African society in respect of the institutions of family and marriage generally and Muslim marriages in

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66 See also *Ryland v Edros* 1997 (2) SA 690 (C) at 707E-H.

67 *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) at para 19. See also *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 31, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at paras 46 to 47, *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at paras 23 to 25, *Du Plessis v Road Accident Fund* (Unreported judgment of the Supreme Court of Appeal in Case No 443/2002, 19 September 2002), *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL).

particular are also reflected in legislation. Taxation and insolvency statutes have long recognized Muslim marriages and other religious marriages for the purposes of imposing obligations or disabilities on spouses to such marriages.[68] There is now, however, a wide range of recently enacted or amended statutes which expressly recognize Muslim marriages and other religious marriages for the purposes of the rights which they vest in spouses. The following is a list of such Acts of Parliament. The list does not purport to be exhaustive.

42.1 Civil Proceedings Evidence Act 25 of 1965 (s 10A recognizes religious marriages for the purposes of the compellability of spouses as witnesses in civil proceedings);

42.2 Criminal Procedure Act 51 of 1977 (s 195(2) recognizes religious marriages for the purposes of the compellability of spouses as witnesses in criminal proceedings);

42.3 Pension Funds Act 24 of 1956 (s 1: definition of "dependant", para (b)(ii));

42.4 Special Pensions Act 69 of 1996 (s 1: definition of "dependant", para (b)(ii));

42.5 Government Employees Pension Law 1996 (s 1: definition of "dependant" and schedule 1 item 1.17, definition of "spouse");

42.6 Demobilisation Act 99 of 1996 (s 1: definition of "dependant");

42.7 Value Added Tax Act 89 of 1991 (Notes 6 and 7 to item 406.00 of Schedule 1 recognize religious marriages for the purposes of tax exemptions in respect of goods imported into SA);

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[68] See for example the definition of "married" in s 1 of the Income Tax Act 58 of 1962 and the definition of "spouse" in s 21(13) of the Insolvency Act 24 of 1936 which deals with the effect of sequestration on the property of a spouse.

42.8 Transfer Duty Act 40 of 1949 (s 9(1)(f) read with the definition of "spouse" in s 1 exempts from transfer duty property inherited by the surviving spouse in a religious marriage);

42.9 Estate Duty Act 45 of 1955 (s 4(q) read with the definition of "spouse" in s 1 exempts from estate duty property accruing to the surviving spouse in a religious marriage);

43 The case law and statutes discussed above indicate that there is no longer any legal imperative to confine the ordinary meaning of "spouse" in the IS and MSS Acts so as to interpret "spouse" as excluding Muslim husbands and wives. In terms of section 39(2) of the Constitution, "spouse" in the IS and MSS Acts therefore would have to be interpreted broadly to include persons in the position of the Applicant, even if such an interpretation represented an unprecedented departure from pre-constitutional authority.

44 In any event, such an interpretation would not represent an unprecedented departure from pre-constitutional authority. It has long been recognized that the words "marriage", "husband" and "wife" do not have a single fixed restricted meaning when appearing in statutes. For more than fifty years English[69] and Zimbabwean[70] courts have held that it is possible to "recognize" women married by Islamic rites as "wives" for the purpose of interpreting the word "wife" in a particular statute without "recognizing" a

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69 See for example *Baindail v Baindail* [1946] 1 All ER 342 at 346, *Sinha Peerage* case [1946] 1 All ER 348 (PC), *Chaudry v Chaudry* [1975] 3 All ER 687 (Fam D) at 690, *Din v National Assistance Board* [1967] 1 All ER 750 (QB) at 753, *Re Sehota (deceased) Surjit Kaur v Gian Kaur and another* [1978] 3 All ER 385 (Ch).

70 See for example *Estate Mehta v Acting Master, High Court* 1958 (4) SA 252 (FSC), *re Estate Koshen* 1960 (2) SA 174 (SR), *Kader v Kader* 1972 (3) SA 203 (RAD).

Muslim marriage as a legal marriage for all purposes. In *Din v National Assistance Board*[71] Salmon LJ set out the approach of a court in such matters:

> "When a question arises, of recognising a foreign marriage or of construing the word 'wife' in a statute, everything in my view depends on the purpose for which the marriage is to be recognized and the objects of the statute. I ask myself first of all: is there any good reason why the appellant's wife and children should not be recognized as his wife and children for the purpose of the National Assistance Act, 1948? I can find no such reason, and every reason in common-sense and justice why they should be so recognized."

45 The logic of *Din v National Assistance Board* applies compellingly to the present case. There is no good reason why the Applicant and Muslim widows in her position should not be recognized as "spouses" and "survivors" *for the purposes of the IS and MSS Acts*,[72] and every reason in common-sense and justice why they should be so recognized. Recognition in this limited respect would not be tantamount to the unqualified recognition of Muslim marriages as valid marriages in South African Law. Rather, it would give effect to an apparent object of the Acts, namely to provide economically for surviving spouses as a means of protecting widows who

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71 [1967] 1 All ER 750 (QB) at 753.

72 In this respect, the approach advanced by the Applicant to the interpretative recognition of her status as a "spouse" for the purposes of the IS Act and the MSS Act is the statutory equivalent of the approach adopted by the *Amod* and *Rylands* courts to the common law "recognition" of Muslim Marriages for the purposes of founding delictual claims for loss of support and contractual claims to maintenance. In all cases, the recognition of the marriage would be clearly linked to the particular context in which recognition is sought and would not require the generalized recognition of Muslim marriages as valid marriages for all purposes at South African law. The tension postulated by Van Heerden J at vol 6 p 462 of her judgment between the Applicant's interpretive argument and the *Amod* and *Rylands* judgments is accordingly non-existent.

are a socially vulnerable group. It would also render the Acts consistent with the Constitution and in the process vindicate powerful concerns of common sense and justice which are offended by the notion of using a shifting standard of “marriage” to deprive the Applicant and similarly situated Muslim widows of property and rights which ought rightfully to be theirs.

46 In the alternative to her principal prayer for confirmation of the orders of the High Court, the Applicant accordingly submits that on principles of statutory interpretation under the Constitution, the IS Act and MSS Act should be reinterpreted to extend the status of a “spouse” and a “survivor” to the Applicant and that she is entitled to the relief which she sought in prayers 1 and 3 of the Notice of Motion.

CONCLUSION

47 For the reasons set out above, the applicant asks for the orders of Her Ladyship Justice van Heerden to be confirmed, alternatively for the Applicant’s conditional appeal against these orders to be upheld and for the orders to be set aside and replaced by an order in the terms set out in prayers 1 and 3 of the notice of motion.

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MATTHEW CHASKALSON

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RENATA WILLIAMS

Chambers
Johannesburg and Cape Town
9 October 2003

LIST OF AUTHORITIES

1. Beinash & Another v Ernst & Young & Others 1999 (2) SA 116 (CC)

2. Mohamed & Another v President of the Republic of South Africa & Others (Society for the Abolition of the Death Penalty in South Africa & Another intervening) 2001 (3) SA 893 CC

3. Xinwa & Others v Volkswagen SA (Pty) Ltd 2003 (6) BCLR 575 (CC) Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party & Others 1998 (4) SA 1157 (CC)

4. Minister of Home Affairs & Others v Dawood & Another, Minister of Home Affairs & Others v Shalabi & Another, Minister of Home Affairs & Others v Thomas & Another**.** 2000 (1) SA 1074 (C)

5. Mistry v Interim Medical and Dental Council of South Africa & Others 1998 (4) SA 1127 (CC)

6. Fraser v Naude & Others 1999 (1) SA 1 (CC)

7. Nehawu v University of Cape Town & Others 2003 (2) BCLR 154 (CC)

8. Harksen v Lane 1998 (1) SA 300 (CC)

9. National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)

10. National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others 2000 (2) SA 1 (CC)

11. East Zulu Motors (Pty) Ltd v Empangeni / Ngwelezane Transitional Local Council and Others 1998 (2) SA 61 (CC)
12. Hoffman v South African Airways 2001 (1) SA 1 (CC)

13. Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)

14. The Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others 2001 (1) SA 545 (CC).

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16. Nel v Le Roux NO 1996 (3) SA 562 (CC)

17. Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC)

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20. Fedsure Life Assurance Ltd and Others v Greater Johannesburg Metropolitan Council and Others 1999 (1) SA 374 (CC)

21. First National Bank of Southern Africa Ltd t/a Wesbank v Commissioner South African Revenue Service and Another 2001 (3) SA 310 (C)

22. Pretoria City Council v Walker 1998 (2) SA 363 (CC)

23. Fose v Minister of Safety and Security1997 (3) SA 786 (CC)

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26. J and Another v Director General, Department of Home Affairs and Others 2003 (5) BCLR 463 (CC)

27. Brink v Kitshoff N.O. 1996 (4) SA 197 (CC)

28. National Union of Metalworkers of South Africa and Others v Bader BOP (Pty) Ltd and Another 2003 (3) SA 513 (CC)

29. National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (4) SA 1 (CC)

30. De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening) 2002 (1) SA 429 (CC)

31. Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27 (HL)

32. Seedat's Executor v The Master (Natal) 1917 AD 302

33. Ebrahim v Mahomed Essop 1905 TS 59

34. Esop v Union Government 1913 CPD 133

35. In R v Mboko 1910 TS 445

36. Nalana v Rex 1907 TS 407

37. Bronn v Fritz Bronn's Executors. (1860) 3 Searle 313

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